

# The Class II Gaming Debate: The Johnson Act vs. The Indian Gaming Regulatory Act

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## INTRODUCTION

**T**HIS ARTICLE SEEKS TO ACCOMPLISH THREE OBJECTIVES. First, the issues relative to Class II gaming are analyzed to demonstrate the importance of, and incentive for, Class II gaming. Second, a historical background of relevant statutes, regulations, and case law is provided to facilitate understanding of the basic issues involved in Class II gaming. Finally, this article explores the future of Class II gaming, in light of current trends.

## EXECUTIVE SUMMARY

Pursuant to the Indian Gaming Regulatory Act (IGRA), Class II gaming consists of bingo and related games, including pull-tabs, lotto, punch boards, tip jars, instant bingo, and non-

banked card games.<sup>1</sup> The IGRA permits Class II games to utilize “electronic, computer or other technologic aids.”<sup>2</sup> Class II gaming is regulated by the tribe and the National Indian Gaming Commission (NIGC). As a general matter, the state where the tribal casino is located has no jurisdiction over Class II gaming.<sup>3</sup> In contrast, a state does have authority to regulate Class III gaming (typically referred to as “casino-style gambling”) pursuant to a contract negotiated with the tribe (called a Tribal-State Compact).<sup>4</sup>

There are several reasons why tribes in certain states have considerable incentive to operate Class II gaming devices in their casinos. One very obvious reason is that the revenue generated by Class II gaming is not typically included in revenue sharing with the state, while Class III gaming revenue is included in any revenue sharing agreement pursuant to a Class III Tribal-State Compact. Likewise, the states are similarly motivated to challenge the classification of these games and contend that the games are, in fact, Class III games and therefore can only be operated pursuant to a Tribal-State Compact.

As a result of these conflicting positions, there have been several reported case decisions over the past few years ruling on whether certain gaming devices were Class II or Class III gaming devices. The NIGC also issues game classification opinions where the NIGC evalu-

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<sup>1</sup> See 25 U.S.C. § 2703.

<sup>2</sup> *Id.*

<sup>3</sup> See *id.* at §§ 2703(7), 2710(b)(1).

<sup>4</sup> See *id.* at § 2710(d)(3), (6).

ates the game elements and then determines whether the game is an “electronic or technologic aid” to the play of a Class II game.

There is no “bright line test” as to what constitutes a Class II gaming device, and what constitutes a Class III gaming device. With technology rapidly evolving, the distinction between the two is becoming more and more blurred. Each new Class II gaming device developed and manufactured for sale to the tribal casinos must be evaluated on a case-by-case basis.

The NIGC (in its 2003 advisory opinions) and the courts have adopted a “plain language” approach to defining Class II games. Under this approach, if the base game being played as part of the machine falls within the Class II category (*i.e.*, bingo or pull-tabs), then there is a better chance that “slot machine” type enhancements such as video screens and other electronic displays will be viewed as permissible electronic or technologic aids to playing the game. The critical analysis then lies in convincing the NIGC or the court that the base game does fall within the Class II category. The NIGC regulations provide some guidance as to what constitutes bingo, and games related to bingo such as pull-tabs.

Generally, before a tribal casino will agree to utilize a new gaming device touted as Class II, the casino will require a legal opinion from the manufacturer/seller/distributor opining that the device falls within the Class II category. To obtain further assurances, the tribe also may seek an advisory opinion from the NIGC (or require the vendor to do so). The NIGC classification opinions are advisory only in nature, and not binding upon a court of law.

Representing a gaming device to be Class II, that is later determined to be Class III either by a court of law or the NIGC, can have adverse consequences for both the tribal casino and the manufacturer/seller/distributor. This is particularly true if the state where the tribal casino is located does not permit any Class III gaming devices pursuant to a Tribal-State Compact (such as Florida or Oklahoma). Operating Class III gaming devices without a compact equates to being engaged in illegal gaming.

Sometimes the tribal casino is willing to press its sovereignty status and may seek to proceed

with a machine that may be questionable as to its classification. In this instance, actions may be taken by the NIGC or other officials to require the tribal casino to “cease and desist” in operating the games. If the cease and desist efforts are successful, the tribal casino will likely have to remove the offending games and also could be faced with monetary sanctions or shutdown of the entire casino by the NIGC for non-compliance.

Generally, however, Class II gaming is booming. It provides a very large opportunity for both Native American gaming as well as the slot machine manufacturers who are participating in this part of the gaming industry.<sup>5</sup> Accordingly, more and more people are starting to give Class II gaming a second look.<sup>6</sup> For some, Class II gaming is starting to make a lot more sense.<sup>7</sup>

## STATUTORY AND REGULATORY OVERVIEW

### *The Johnson Act*

The Johnson Act, as amended in 1962, makes criminal, both outside and inside “Indian Country,” the possession, use, sale, or transportation of any “gambling device.”<sup>8</sup> The Johnson Act defines a “gambling device” as any slot machine . . . and other machine or mechanical device (including but not limited to roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.<sup>9</sup>

<sup>5</sup> See Marian Green, *Class II gaming poised for growth, but some legal questions remain*, INTERNATIONAL GAMING AND WAGERING BUSINESS, March 2004 (quoting Marc Falcone, gaming analyst with Deutsche Bank).

<sup>6</sup> See *id.* (quoting Charlie Lombardo, senior vice president of gaming operations for the Seminole Indians’ tribal casinos in Florida).

<sup>7</sup> See *id.*

<sup>8</sup> 15 U.S.C. § 1175(a).

<sup>9</sup> *Id.* at § 1171(a)(1), (2).

Some courts have construed the Johnson Act broadly, concluding that the statute's "gambling device" language was enacted to "anticipate the ingeniousness of gambling machine designers" in "separating the public from its money on a large scale."<sup>10</sup> Therefore, the Johnson Act may be interpreted as covering a wide variety of machines.

### *The IGRA*

As a result of the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*,<sup>11</sup> which "authorized gaming on federally recognized Indian lands," Congress enacted the Indian Gaming Regulatory Act, also known as IGRA.<sup>12</sup> The IGRA "provides a comprehensive regulatory framework for gaming activities on Indian country which seeks to balance the interests of tribal governments, the states, and the federal government."<sup>13</sup>

IGRA divides Native American gaming into three mutually exclusive categories: Class I, II, and III.<sup>14</sup> The three classes differ as to the extent of federal, tribal, and state oversight.<sup>15</sup>

**Class I.** Class I gaming includes traditional Native American "social games played in connection with 'tribal ceremonies or celebrations.'"<sup>16</sup> Tribes possess "exclusive jurisdiction" to regulate Class I gaming.<sup>17</sup>

**Class II.** Class II gaming includes "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith) . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. . . ." <sup>18</sup> The IGRA excludes from the definition of Class II gaming "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."<sup>19</sup> Class II gaming may be conducted in Indian country without a Tribal-State Compact.<sup>20</sup>

Class II games are regulated by both the NIGC and the tribes.<sup>21</sup> Congress made no reference in IGRA to the relationship between the Johnson Act's strictures and IGRA's authorization of the use of technologic aids to Class II

gaming. Nor has Congress amended the Johnson Act to clarify this relationship.

**Class III.** Class III is a "residual" category. Under IGRA, all gaming activity other than Class I and II gaming is Class III gaming.<sup>22</sup> Examples of Class III gaming include any banking card games, including baccarat, chemin de fer, or blackjack (21), and electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.<sup>23</sup>

IGRA provides that the Johnson Act's prohibitions "shall not apply to any gaming conducted under a Tribal-State Compact" that is entered into between "any Indian tribe having jurisdiction over the Indian lands upon which a Class III gaming activity is being conducted" in "a state in which gambling devices are legal."<sup>24</sup>

Class III gaming authorized by a Tribal-State Compact is regulated by the given compact. However, Class III gaming not duly authorized by a compact may be subject to federal criminal prosecution under the Johnson Act. Thus, regulation of Class III gaming is shared by the tribes, the states, the NIGC, and the Department of Justice.

**Specific Definitions.** The IGRA defines Class II gaming in relevant part to include:

- I. the game of chance commonly known as bingo (whether or not electronic, com-

<sup>10</sup> *Lion Mfg. Corp. v. Kennedy*, 330 F.2d 833, 836-37 (D.C. Cir. 1964).

<sup>11</sup> 480 U.S. 202 (1987).

<sup>12</sup> *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 717 (10th Cir. 2000).

<sup>13</sup> *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997).

<sup>14</sup> See 25 U.S.C. § 2703.

<sup>15</sup> See *United States Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991).

<sup>16</sup> 25 U.S.C. § 2703(6).

<sup>17</sup> *Keetoowah*, 927 F.2d at 1177 (quoting 25 U.S.C. § 2710(a)(1)).

<sup>18</sup> 25 U.S.C. § 2703(7)(A).

<sup>19</sup> *Id.* at § 2703(7)(B)(ii).

<sup>20</sup> See *id.* at §§ 2703(7), 2710(b)(1).

<sup>21</sup> See 25 U.S.C. § 2710(b).

<sup>22</sup> See *id.* at § 2703(8).

<sup>23</sup> See *id.* at § 2703(7)(B)(i)-(ii).

<sup>24</sup> *Id.* at § 2710(d)(3), (6).

puter, 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.<sup>25</sup>

Games that are not within the definition of Class II games are Class III.<sup>26</sup>

The NIGC regulations (which were amended in 2002) similarly define Class II gaming to include:

a. Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:

1. Play for prizes with cards bearing numbers or other designations;
2. Cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
3. Win the game by being the first person to cover a designated pattern on such card;

b. If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo.<sup>27</sup>

In addition to meeting the requirements for bingo, a game can be Class II so long as it includes an electronic aid and is not an electronic or electromechanical facsimile.<sup>28</sup> The NIGC regulations define an electronic, computer or other technologic aid as:

a. Electronic, computer or other technologic aid means any machine or device that:

1. Assists a player or the playing of a game;
2. Is not an electronic or electromechanical facsimile; and
3. Is operated in accordance with applicable Federal communications law.

b. 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.

c. Examples of electronic, computer or other technologic aids include pull-tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.<sup>29</sup>

The NIGC regulations define electronic or electromechanical facsimile as:

Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or

<sup>25</sup> 25 U.S.C. § 2703(7)(A).

<sup>26</sup> *See id.* at § 2703(8).

<sup>27</sup> 25 C.F.R. § 502.3.

<sup>28</sup> *See* 25 C.F.R. § 502.7(a).

<sup>29</sup> 25 C.F.R. § 502.7.

against each other rather than with or against a machine.<sup>30</sup>

In sum, if a game contains the fundamental characteristics of a Class II game and is played using an electronic or other technologic device, the determining factor in its classification is whether the electronic device is an “aid” to the play of a game, in which case the game is Class II, or whether the electronic device is a “facsimile” of a game, in which case the game is Class III. Arguably, classification could also depend on whether the game is being played in real time.

Briefly, what’s most important in classifying an electronic gaming machine is whether or not that game is played in real time. “Real time” means that numbers or cards are drawn as the game progresses with players competing against each other, not the house. Games operating in this manner fall under Class II. If the game is already played inside a machine or computer before the player even puts down his or her wager, we’re talking Class III.<sup>31</sup>

As noted above, a game’s classification matters in that, under IGRA, Class III games may be played only pursuant to a Tribal-State Compact.<sup>32</sup>

#### *NIGC Amendments*

On July 17, 2002, the NIGC issued a rule amending three key terms of the IGRA with respect to Class II gaming; specifically, “electronic, computer or other technologic aid,” “electronic or electromechanical facsimile,” and “game similar to bingo.” The NIGC issued these amendments to “bring stability and predictability to the important task of game classification.”<sup>33</sup>

Because of the varying levels of tribal, state, and federal involvement in the three classes of gaming, the proper classification of games is essential. As a legal matter, Congress defined the parameters for game classification when it enacted IGRA.<sup>34</sup> As a practical matter, however, several key terms were not specifically defined, and thus subject to more than one interpretation.<sup>35</sup>

A recurring question as to the proper scope of Class II gaming involves the use of electronics and other technology in conjunction with bingo and other Class II games.<sup>36</sup> In IGRA, Congress recognized the right of tribes to use “electronic, computer or other technologic aids” in connection with Class II gaming.<sup>37</sup> Congress provided, however, that “electronic or electromechanical facsimiles of any game of chance or slot machines of any kind” constitute Class III gaming.<sup>38</sup> Since Class III gaming requires an approved Tribal-State Compact to be lawful, definitions articulating the proper distinctions between the two classes are vital to sound execution of the law.<sup>39</sup>

Under a plain language definition of these terms, the distinction between an “electronic aid” to a Class II game and a Class III “electromechanical facsimile” of a game of chance is relatively ascertainable.<sup>40</sup> However, the NIGC did not apply a plain meaning approach in its early construction of IGRA or in its regulatory definitions, and even if it had, the terms can nonetheless be read to overlap.<sup>41</sup> The distinction between Class II “electronic aids” and Class III “electromechanical facsimiles” is further complicated by the extent to which Class II gaming is affected by the Johnson Act.<sup>42</sup>

The traditional broad construction of the Johnson Act encompasses numerous devices manufactured to assist in the play of Class II games that the NIGC now believes Congress presumed to constitute acceptable technologic aids.<sup>43</sup> In a frequently quoted passage from the

<sup>30</sup> 25 C.F.R. § 502.8.

<sup>31</sup> Tom Wanamaker, *Let the Games Begin: Solving gaming problems in Oklahoma?*, INDIAN COUNTRY TODAY, March 3, 2004.

<sup>32</sup> See 25 U.S.C. § 2710(d)(1)(C).

<sup>33</sup> See Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002).

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002).

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

legislative history, a Senate Report accompanying 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."<sup>44</sup> In other words, the ingenuity of gaming designers, which was intended to be constrained by the Johnson Act, is arguably intended to be given freer rein by IGRA in the context of Class II gaming.<sup>45</sup>

The inconsistencies in purpose between IGRA and the Johnson Act are readily apparent.<sup>46</sup> The federal courts, including no less than three United States circuit courts of appeal prior to the 2002 NIGC amendments, have been virtually unanimous in concluding that the NIGC's definitions were not useful in distinguishing between technologic aids and facsimiles.<sup>47</sup> Rather than apply the NIGC's rules, the courts instead conducted a plain meaning analysis juxtaposed against the language of the statute and the Senate Report.<sup>48</sup>

While most of the courts simply ignored the NIGC's definitions, one court intentionally criticized the NIGC's rule as unhelpful.<sup>49</sup> In sum, these courts implicitly rejected the NIGC's definition of "electromechanical facsimile," which incorporates the Johnson Act, and instead used a plain meaning approach to interpret this key term.<sup>50</sup>

In addition to the lack of deference noted above, two United States circuit courts reached decisions that can be construed to be at odds with the NIGC's definition of facsimile.<sup>51</sup>

As a result of the NIGC amendments of 2002, bingo and games "similar to bingo" (including non-banked house games) are now allowed to be played in virtually any form, so long as the player is not playing against the house.<sup>52</sup> Some observers contend that the NIGC amendments have essentially authorized tribes to have unlimited numbers of bingo slot machines and have described the tribal gaming operations as "bingosinos."<sup>53</sup> Notwithstanding the "loosening" of the definitions, the classification of Class II gaming devices remains unclear and subject to considerable scrutiny from state officials, state and federal regulators, as well as opponents of tribal gaming.

## APPLICABLE CASE LAW

### *Court Cases*

Since 2000, there have been five circuit court decisions where gaming devices were evaluated and determined to be Class II. These cases led, in part, to the NIGC's amendment of the Class II definitions in 2002, and the adoption of a more plain meaning approach. These cases are summarized below.

***United States v. 103 Electronic Gambling Devices*, 223 F. 3d 1091 (9th Cir. 2000).** In this case, the United States brought an *in rem* civil forfeiture action against certain electronic gaming machines manufactured by Multimedia located at a California tribal casino. The United States claimed that the MegaMania machines were illegal "gambling devices" under the Johnson Act. The tribe asserted that the machines were bingo games permitted as Class II by the IGRA. The Ninth Circuit Court of Appeals affirmed the lower court decision and held that the gaming devices were "technologic aids" used in connection with a bingo game and therefore were permissible Class II gaming

<sup>44</sup> See S. Rep. No. 100-446, at 9 (1988).

<sup>45</sup> See Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002).

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *id.*

<sup>49</sup> See *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994) (holding that the scope of gaming determination at issue in the case could be made by looking to the statute alone and without examining the Commission's regulatory definitions); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) (resorting to the dictionary definition of facsimile as "an exact and detailed copy of something," rather than using the regulatory definition); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000) ("Boiled down to their essence, the regulations tell us little more than that a Class II aid is something that is not a Class III facsimile.").

<sup>50</sup> See Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002).

<sup>51</sup> See *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).

<sup>52</sup> See I. Nelson Rose, *Is It Bingo or a Slot Machine*, CASINO CITY TIMES, January 13, 2003.

<sup>53</sup> See *id.*

devices under IGRA and not prohibited by the Johnson Act. The court concluded that the game played utilizing the gaming device was bingo, a Class II game. Therefore, the device was simply an aid to the play of a Class II game.

*United States v. 162 MegaMania Gambling Devices*, 231 F. 3d 713 (10th Cir. 2000). The same MegaMania games at issue in the Ninth Circuit case were likewise under scrutiny in this Tenth Circuit decision, decided just two months later, and with similar results. The Tenth Circuit's reasoning concerning the use of the machines in the Oklahoma tribal gaming operations mirrored that of the Ninth Circuit. The decision again hinged on the fact that the analysis is whether the underlying game fits within the definition of a Class II game. If so, then the use of an electronic aid with the game will not convert it into a Class III game.

*Diamond Game Enterprises v. Reno*, 230 F. 3d 365 (D.C. Cir. 2000). At issue here was a gaming device known as the Lucky Tab II, an electromechanical device that dispensed paper pull-tabs and then displayed their contents on a video monitor. The lower court ruled that the device was a Class III gaming device requiring a Tribal-State Compact for its legal operation. The tribal gaming operation at issue was located in Oklahoma where there were no Tribal-State Compacts in place permitting Class III gaming devices of any nature. On appeal, the D.C. Circuit Court reversed and held that the underlying game involved pull-tabs, a Class II game, and that the machines simply facilitated the playing of paper pull-tabs. Thus, the court found the machines to be Class II electronic aids and not Class III facsimiles.

*United States v. Santee Sioux Tribe of Nebraska*, 324 F. 3d 607 (8th Cir. 2003). The Eighth Circuit affirmed the lower court's ruling, which followed the same reasoning in the *Diamond Game* case, described above. At issue in the *Santee Sioux* case were the same Lucky Tab II machines as in the *Diamond Game* decision. As a result, the court held that the devices could be operated legally in the tribal casino without a compact from the state of Nebraska.

In late 2003, the Department of Justice (DOJ) filed a Petition for Writ of Certiorari with the Supreme Court. On March 1, 2004, the Supreme Court denied the Petition. The dispute underscored long-running tensions over the types of machines that tribes can offer at their casinos. Moreover, the classification of gaming devices has been a continuing source of friction between the DOJ and the NIGC. There have been several situations where the NIGC concluded that a device was a Class II game, but the DOJ disagreed. Indeed, in the *Santee Sioux* case the NIGC had determined that the Lucky Tab II games were Class II games. The DOJ nevertheless chose to take enforcement actions against the Tribe.

In its petition, the DOJ contended that the Eighth Circuit's decision in the *Santee Sioux* case, holding that the IGRA does not provide tribes with any exemption from the Johnson Act when they use gambling devices in the absence of a Tribal-State Compact, conflicts with the Tenth Circuit's holding in the *Seneca-Cayuga* case (see below). The DOJ claimed that the Eighth Circuit was wrong in finding that the Lucky Tab II was not a gambling device within the meaning of the Johnson Act. The DOJ argued that the Johnson Act is intended to define "gambling device" in the most expansive terms possible, "precisely to prevent ingenious manufacturers from slipping their devices through some linguistic loophole."

Nevertheless, the Supreme Court denied the Petition for Writ of Certiorari without comment, deflating the argument that there is any real conflict between the Eighth and Tenth Circuits. Accordingly, the Santee Sioux Tribe of Nebraska may breathe a sigh of relief and continue to use an electronic machine similar to pull-tabs.<sup>54</sup>

*Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F. 3d 1019 (10th Cir. 2003). This case again involved tribal gaming operations in Oklahoma. The gaming device at issue here was the "Magical Irish Instant Bingo Dispenser System," manu-

<sup>54</sup> See David Melmer, *Santee Sioux win*, INDIAN COUNTRY TODAY, March 5, 2004.

factured by Diamond Game Enterprises. The lower court granted the tribes' request for a declaratory judgment that the gaming device was not an illegal "gambling device" under the Johnson Act and that it was a permissible technologic aid to Class II gaming under IGRA. The Tenth Circuit affirmed and cited with approval the other cases discussed above in so holding.

In late 2003, the DOJ filed a Petition for Writ of Certiorari with the Supreme Court concerning this case as well. On March 1, 2004, the Supreme Court denied this petition also. In its petition, the DOJ contended that the Tenth Circuit has "eviscerated the Johnson Act as a tool for policing casino-style gaming in Indian country." The DOJ argued that the continued application of the Johnson Act is "essential to fulfilling Congress' purpose in enacting IGRA to ensure the existence of a regulatory regime for lucrative casino-style gaming that is sufficient to protect against corruption."

In responding to the DOJ's petition, the tribes argued that "the particularities of how to define a Johnson Act gambling device is not an issue worthy of review." The tribes argued that such an analysis is fact-intensive and not proper for Supreme Court review. Apparently the Supreme Court agreed.

A number of states had filed a brief of amici curiae, in support of the DOJ's position. The amici contended that, by allowing slot machines as Class II gaming devices, the Tenth Circuit had undermined Congress's intent that a Tribal-State Compact govern slot machines. The amici further argued that the petition should be granted to resolve a circuit court conflict regarding the relevance of the Johnson Act in determining Class II gaming status. However, with the denial of the Petitions for Certiorari, it appears the circuit court conflict issue may be dead for the time being.

### *NIGC Classification Process and Opinions*

**NIGC Process.** As noted above, the IGRA and the NIGC regulations are less than clear as to the process for the classification of games. The NIGC proposed regulations establishing a formal process for the classification of games on November 10, 1999.<sup>55</sup> These proposed rules were withdrawn on July 12, 2002.

The proposed rules required that the NIGC decide that a game is Class II before such game is authorized for play in a Class II gaming operation. The proposed rules made it clear that the tribal casinos were not permitted to offer any games without a classification decision that the game is a Class II game unless the game is offered pursuant to a Class III compact. The NIGC proposed that tribes would be subject to enforcement action by the NIGC if they offered games as Class II without a classification decision.<sup>56</sup>

There are three methods currently available for addressing the classification of games. The first method entails formal notice and comment rulemaking. While this method "produces certainty and finality, the process is slow, cumbersome, and insufficiently nimble to be practical for use on a routine basis."<sup>57</sup>

The second method is through the use of advisory opinions prepared by the NIGC's Office of General Counsel upon request by an interested party. The Office of General Counsel has issued more than 30 such opinions. Such opinions, however, are "merely advisory in nature and not the result of a formal administrative process."<sup>58</sup> As such, these opinions are not entitled to the level of deference that must be accorded to final decisions of the NIGC, though certain courts had granted them limited deference in certain circumstances.<sup>59</sup>

Under the NIGC's current process for issuing a game classification opinion for any electronic game, the NIGC must evaluate the elements of the game and determine whether the game is an "electronic aid" to the play of a Class II game, or an "electronic or electromechanical facsimile" of a game of chance or a slot machine. In 2003, the NIGC issued only two opinions (Mystery Bingo and Reel Time Bingo opinions).

<sup>55</sup> See Classification of Games, 64 Fed. Reg. 61234 (proposed November 10, 1999) (to be codified at 25 C.F.R. pt. 504).

<sup>56</sup> See *id.*

<sup>57</sup> See Classification of Games, 67 Fed. Reg. 46134 (withdrawn July 12, 2002).

<sup>58</sup> *Id.*

<sup>59</sup> See *id.* (citing 162 *MegaMania Gambling Devices* and *Diamond Game Enterprises v. Reno* decisions).

A formal administrative enforcement action is the third method for addressing classification of games. This could entail an enforcement action by the NIGC or an action pursued by the Justice Department. Again, while such an action produces reliable results through a court decision, the process itself is time-consuming, resource-intensive, and quite lengthy.<sup>60</sup>

None of the three methods is ideal. However, absent a clear classification procedural process, the NIGC has no other option but to follow the status quo—"which has been unsatisfactory to all concerned."<sup>61</sup>

**Tribal Casinos are Responsible for Operating Legal Games.** Based upon the withdrawal of the proposed NIGC regulations, the classification of games remains an ad hoc process. Pursuant to NIGC Chairman Phil Hogen's letter of May 15, 2003 to the Oklahoma tribes, however, it seems clear—at least with respect to the current NIGC leadership—that the classification of games is a *tribe's* responsibility and the tribe takes the risk of operating a game that does not meet the Class II definitions of the IGRA. In the Oklahoma tribes' situation, the NIGC was of the viewpoint that, notwithstanding various NIGC and other enforcement actions taken to stop illegal Class III gaming activities, the offending games were simply renamed or reconfigured. Such actions, in the NIGC's mind, failed to make the games legal.

Hogen specifically opined:

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. The operating characteristics of a device are the keys to its classification.<sup>62</sup>

NIGC Chair Hogen went on to state that the NIGC decisions and applicable federal case law are "sufficient precedent to classify these machines as Class III devices." Hogen mandated that all of the Class III devices must be "promptly removed from tribal gaming facilities in Oklahoma." Hogen noted that his "intention is to stop this activity by first seeking the assistance and cooperation of the tribal regulators and, second, by bringing enforcement actions against those operations that continue to operate these machines. We all want a level playing field for tribal gaming facilities in Oklahoma, but the playing field must be a lawful one."<sup>63</sup>

At least with respect to the tribal gaming facilities in Oklahoma, the NIGC is of the viewpoint that the tribal gaming commission and tribal leadership are responsible for determining that the gaming activities are legal. They cannot simply sit back and continue to operate the games on the mere assertion that they are Class II until the NIGC determines otherwise. Tribal gaming operations taking such an approach, risk the issuance of a notice of temporary closure and issuance of a fine, without any further warning or notice from the NIGC.

As noted above, the NIGC definitions have not been viewed by the courts as particularly useful in distinguishing between technologic aids and facsimiles, the latter being viewed as a Class III game. As a result, two NIGC advisory opinions, issued in the Fall of 2003, concluded that two bingo games were Class II games under IGRA and therefore could be played in tribal casinos without the necessity of a Tribal-State Compact. These NIGC opinions, and others, are summarized below.

### Opinions.

#### *Reel Time Bingo [September 23, 2003]*

In April, 2002, the NIGC issued an advisory opinion concluding that Multimedia's Mega-

<sup>60</sup> See *id.*

<sup>61</sup> *Id.*

<sup>62</sup> NIGC Chairman Phil Hogen's letter of May 15, 2003, to the Oklahoma tribes.

<sup>63</sup> *Id.*

Nanza game was a Class III game. Multimedia promptly sued the NIGC over its decision, which ultimately resulted in a settlement. The settlement provided that Multimedia would substitute its Reel Time Bingo game for the MegaNanza machines. Upon examination of the Reel Time Bingo game's characteristics, the NIGC concluded in late September that Reel Time Bingo met each of the three specific criteria for bingo under the IGRA. Therefore, Reel Time Bingo was deemed to be bingo under the IGRA.

In evaluating these elements, the NIGC noted that the electronic card is readily visible and is integral to the play of the game. These facts were viewed as "critical" to the NIGC's opinion that the Reel Time Bingo met the first statutory criterion that the game be played for prizes with cards bearing numbers or other designations.

The second statutory requirement is that the holder of the card covers when objects are drawn. The NIGC found that the Reel Time Bingo met this requirement because the numbers are released sequentially and players all have the same opportunity to cover (or daub) immediately upon release of each series of drawn balls.

The final requirement is that the game must be won by the first person covering a previously designated arrangement of numbers or designations on such cards. Reel Time Bingo met this criterion by having the first person that covers one of several pre-designated patterns win the prize associated with that pattern. The fact that the game had interim or bonus prizes did not negate this finding.

The NIGC further found that the electronic characteristics of Reel Time Bingo fell within the category of an electronic aid. The NIGC determined that the Electronic Player Station on which the game may be played broadened participation in the game through the linking of players within the same tribal casino or other tribal casinos. The Electronic Player Station also was found to allow multiple players to play with or against each other, which is one of the exceptions to the definition of electronic facsimile for bingo games. The NIGC found that the Reel Time Bingo machines broadened participation and also required the players to play

against other participants rather than just against the machine.

As a result of the Reel Time Bingo game, the NIGC also issued NIGC Bulletin No. 03-3 providing "Guidance on Classifying Games with Pre-Drawn Numbers." This bulletin specifically addresses one of the statutory requirements of a Class II bingo game: that the "holder of the card covers such numbers or designations when objects . . . are drawn or electronically determined."<sup>64</sup> The bulletin also addresses whether games similar to bingo must meet this requirement.

The NIGC concludes in its bulletin that the statutory requirement for bingo is met only when numbers or designations are drawn after a player begins play of the game. The NIGC further concludes that, in order to constitute a game similar to bingo, numbers must likewise be drawn after play of the game begins.

#### *Mystery Bingo [September 26, 2003]*

Mystery Bingo is a linked bingo system using technological aids, developed by Sierra Design Group. The game is played electronically on a networked system of components. Participation at the player level is accomplished through player terminals that can be physically configured in a wide range of appearances. The Bingo Game Controller is a computer that coordinates and connects participants in the game. The Bingo Game Manager is a computer that electronically determines numbers for use in the game. The Mystery Bingo game is generally played among players on a central system whereby the players compete for prizes and a progressive jackpot.

As with the Reel Time Bingo game, the NIGC also determined that Mystery Bingo met the three statutory criteria for bingo. Although the "cards" for Mystery Bingo exist only on a computer graphic at the individual player stations, the NIGC determined that electronic cards are permissible technologic aids (citing the amended NIGC definitions).

The NIGC found as crucial to its Class II determination, the fact that Mystery Bingo con-

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<sup>64</sup> 25 U.S.C. § 2703(7)(A).

tains an aspect of the race or contest important to the game of bingo. The game provides for at least two electronic determinations of numbers (ball draws) before a player can win the primary bingo game. The game also requires all players to daub.

### DEVELOPMENT OF TECHNICAL STANDARDS

At present, the NIGC is working on developing comprehensive technical standards for Class II gaming devices. These technical standards will serve as an attempt on the NIGC's part to clarify this very muddy area of gaming law.

Early in 2004, the NIGC commenced the process of forming a Joint Federal-Tribal Class II Game Classification Advisory Committee (Committee). This Committee includes a number of tribal representatives.<sup>65</sup> The NIGC intends to retain an independent technical advisor to assist the Committee on technical issues.

The Committee is charged with preparing an initial draft of proposed technical standards. The initial draft will be disseminated to all interested parties to review and comment upon, including other tribes not represented on the Committee, gaming device manufacturers, others in the gaming industry, as well as expected opponents. The NIGC will hold briefing sessions around the country for interested parties to express their concerns/comments about the proposed rules. Following receipt and evaluation of the various oral and written comments, the NIGC and the Committee will prepare the actual proposed rule.

The proposed rule will then be issued for public comment, under the usual administrative rule-making process. The NIGC would like to have the Final Rule published in the *Federal Register* in June 2005.

### CONCLUSION

Class II gaming issues are important for a variety of reasons. Tribes have a vested business

interest in being able to classify gaming in such a way as to maintain their sovereignty and avoid state interference. States contend that they have an interest in maintaining some sort of order in the world of gaming devices, as well as a monetary interest in revenue sharing. Others involved in the gaming industry simply want some certainty and predictability as to what devices are viewed as legal. All parties' interests are sure to be affected, one way or another, in the near future. The technical standards that the NIGC is currently working on, in conjunction with the ramifications of the Supreme Court's abstention on this issue, ensure changes are coming in Class II gaming law.

In particular, the Supreme Court's denial of the DOJ's Petitions for Writ of Certiorari in the *Santee Sioux* case and *Seneca-Cayuga* case probably brings an end to the alleged circuit court conflict. The Supreme Court's denial of the petitions also will likely impact the direction taken in preparing the NIGC technical standards. Finally, some analysts believe the Court's decision will provide a bargaining chip for the tribes as they lobby states to offer traditional slot machines in the coming years.<sup>66</sup> In short, by refusing to weigh in on the Class II gaming debate, the Supreme Court has in effect done just that.

The tribes and gaming companies have apparently won the battle, but it remains to be seen which side ultimately will win the war of game classification on Indian lands.

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<sup>65</sup> The following is a list of selected Committee members: 1) Norm Des Rosiers, Commissioner, Gaming Commission, Viejas Band of Kumeyaay; 2) Mark Garrow, Inspectors Manager, Gaming Commission, St. Regis Mohawk Tribe; 3) Joseph Carlini, Executive Director, Gaming Commission, Agua Caliente Band of Cahuilla; 4) Melvin Daniels, General Manager, Muckleshoot Indian Bingo; 5) Kenneth Ermatinger, Executive Director, Gaming Commission, Sault St. Marie Tribe of Chippewa; 6) Charles Lombardo, Sr. Vice President of Gaming Operations, Seminole Tribe of Florida; and 7) Jamie Hummingbird, Director, Cherokee Nation Gaming Commission. This list was obtained from an NIGC press release dated March 8, 2004.

<sup>66</sup> See Liz Benston, *Look of bingo machines changing*, LAS VEGAS SUN, March 11, 2004.