

CLASS II GAMING REDUX

When NIGC Chairman Hogen made the announcement earlier this month the NIGC is “putting aside” two of the four new regulations proposed in October 2007, it was notable that the pullback came without any of the federal court litigation which has so often defined the relationship between the NIGC and the Indian gaming industry. The term “putting aside” implies the two regulations, Electronic or Electromechanical Facsimile Definition and Class II Classification Standards, are readily at hand for re-issue but from all accounts, this will have to be clarified from the next Chairman of the NIGC. Firmly rooted in Native American tribal sovereignty, the partnerships between the tribal governments and machine manufacturers, attorneys, and lobbyists which constitute the gaming industry have never been more firmly bound than the present. So what is the status of Class II gaming now? Since the remaining two proposed regulations, those on Technical Standards and Class II Minimum Internal Control Standards still contain issues some tribes and manufactures find very objectionable, the probability of litigation on these two remaining regulations is high. But, because the remaining two regulations had much more input from the gaming industry, the sense of urgency from the gaming industry has been notably dampened. A small group of attorneys and lobbyists geared up for a fight 25 months ago when the NIGC published in the Federal Register proposed Classification Standards for Class II gaming. This was followed by the NIGC publishing of Technical Standards on August 11, 2006. The force was still small when on September 19, 2006, the NIGC called for a public hearing in Washington, D.C. where a few Tribal leaders, tribal gaming regulators, and gaming manufacturers all forcefully stated to the NIGC how and why those regulations were terrible for the native governments and the gaming vendors. The presentations were so similar but from so many different points of view that it was obvious to any rational observer that this federal agency proposal was dead on arrival. Yet, when the NIGC withdrew the entire proposed regulatory package in February, 2007, it was only a temporary stand down as meetings of federal officials immediately occurred and the well known conferences between key NIGC staff and the gaming manufactures and attorneys began. A few

keenly interested tribal regulators and tribal leaders attended these meetings, although their numbers could always be counted on two hands, and often only on one. Back on the rez, where the actual gaming activity was being played, the market economy was at work, and in those jurisdictions mostly effected by the development of Class II gaming over the past decade, that is, the tribal jurisdictions in the State of Oklahoma, a change was occurring with astonishing speed. Those gaming systems which had been the recipient of positive Class II Advisory opinions from the General Counsel of the NIGC were being moved off the gaming floors not by any action of the NIGC or the U.S. Department of Justice, but by games which maintained a higher daily hold of gaming money. As the more profitable games produced better bottom line profits, even after deduction of Class III gaming compact fees to the State of Oklahoma, the short term contracts between gaming vendors and the tribal casinos found they could not be renewed on the same terms as before and longer term contract's notice of termination clauses were active. The result was, and is today, a significant reduction of NIGC "approved" games on the Oklahoma casino floors (the NIGC General Counsel has no actual legal authority to approve or disapprove a request to determine whether a game is Class II but the Advisory Opinions had become an accepted signal of NIGC thought on the subject). The replacement games were Class III compact games or games represented and promoted as Class II by their manufactures but which never been issued an NIGC Class II Advisory Opinion. The reasons for or against requesting a Class II Advisory Opinion was a matter of internal policy of various gaming manufacturers but eventually, with the discussions leading up to the first round of new Class II regulations which were occurring in late 2005 and early 2006, the general consensus became a wait and see attitude. The waiting was over in May of 2006 and the cycle which has just ended began. Today, to play on a Class II game which has an NIGC Advisory Opinion stating the game is Class II, a player had as much chance of finding such a game in Alabama as Oklahoma.

The arguments for preserving Class II under its present definitions are as strong as ever and the Oklahoma Indian Gaming Association advocated the positions loudly at the 2006 and 2007 OIGA Conference and Trade Show and since then these arguments and more have been

shouted in a multitude of locations. Some of these arguments will be presented in federal court under the remnants of the banner carried by the Class II Working Group or smaller crowds which chose not to attend the many working meetings when the remaining two Class II regulations become final. The legal arguments will also be made in an interesting tactical maneuver which has Class II as its focus and whmoves independently but also at the same time with the upcoming battle on the remaining two proposed regulations. This is the issue of what constitutes a Class II game and to be decided by the Commission and not just the General Counsel of the NIGC, and possibly then, by a federal court (again).

That the Metlakalta Indian Community in Alaska would become the center of the Class II battle was not an option anyone heard about two years ago, but the significance of the matter is highlighted by inclusion of the legal issues involved in Chairman Hogen's disapproval of the Metlakalta Indian Community gaming ordinance amendment in the same NIGC press release of June 5, 2008 announcing, "NIGC Sets Aside Class II Classification, Definition Regulations". Half of the press release concerned the Metlakalta Indian Community gaming issue. This press release is a model of how federal agencies created and funded to have responsibility over activities on Indian country are torn between carrying out the conflicting policies. Much talk is made of the federal trust responsibility of protecting and advancing Native American tribal interests. In the case of Class II gaming, the tribes and the tribal business partners are united on what it means to protect and advance tribal interests. Conflicting with this treaty obligation are the interests of the states and other political jurisdictions along with the interests of their business partners. Many commentators have stated the now famous "bright line" between Class II and Class III which Chairman Hogen repeats as justification for action deemed to be hostile by the tribes, is only a smokescreen for creating rules to cripple Class II gaming. Finding out who will profit from these new rules is a traditional method of tracing the source of the effort. Who carries out the program opposed by the tribes is a great way to see colonial policy still at work in the United States of America.

Contained in the June 5 NIGC press release is a link to view Chairman Hogen's

disapproval letter of the Metlakatla Indian Community gaming ordinance amendment and a link to the letter also appears on the front page of the NIGC website at www.nigc.gov. The press release says:

“Hogen also announced that the issue of what constitutes a Class II game continues to be before the Commission. The Metlakatla Indian Community of Metlakatla, Alaska, recently submitted an amendment to its Tribal Gaming Ordinance authorizing “one-touch” fully electronic bingo as Class II gaming. Hogen said that he had disapproved the amendment, finding that when bingo is played in a manner that permits a player to once push a button and do nothing else, that game no longer constitutes “bingo” or a “game similar to bingo” under IGRA and is a Class III electronic facsimile of a game of chance.

Hogen stated that the Tribe would now have the right to appeal his decision to the full Commission, and, if affirmed, to federal court. Taken together, Hogen explained, the Commission’s focus on technical standards and minimum internal controls, and the possibility of further judicial clarification of games that tribes may use in the absence of Tribal-State compacts, would help achieve long-sought clarity, sooner, rather than later.”

Why would this press release and the link to the disapproval letter be combined with the issue of setting aside two of the regulations? A reading of the disapproval letter shows the NIGC intends to make its case in a process where they believe they will have advantages not present in the promulgation of federal regulation process. Disapproval of a gaming code or amendment to a gaming code is a process which activates the NIGC federal agency appeal process and this can take some many months and any federal court review of this action may tend to give the federal agency, the NIGC in this case, the benefit of the doubt on the decisions of the NIGC. This is a risk for the Metlakatla Indian Community which they certainly have thought long and hard about. The small cadre of attorneys who were left out of the expected intense litigation over the regulations on Classification Standards and Facsimile Definitions because these two proposed regulations have been “set aside” will find some work in monitoring and filing friend of the court briefs should the Metlakatla Indian Community and the NIGC continue the dispute. Close attention will be given from Class II proponents.

The simplicity of the issue has been the strength of the gaming tribes and their vendor partners. Everyone in the Indian gaming business should by now have read at least this key component of the Indian Gaming Regulatory Act, where IGRA defines class II gaming as:

- (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,....”.

25 U.S.C §2703(7)(A).

The federal courts also read this as well and the entire argument for the tribes and the gaming vendors of today may be read in a federal case from eight years ago when a federal court of appeals said:

“The Government’s efforts to capture more completely the Platonic “essence” of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA’s three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.

There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

U.S. v. 103 Electronic Gambling Devices, 223 F.3d 1091, C.A.9 (Cal.), 2000.

The federal courts of eight years ago have seen changes in their judicial membership as federal judges have retired and new judges appointed by the President George W. Bush. There is not a credible source who would argue that his appointments to the federal bench are far more conservative than those of President Clinton. A striking feature of conservative judges in general is a belief in the sovereignty of the states *vis-a-vis* the federal government. Such a view does not encourage presentations of federal issues where states have an interest, including those cases involving the Indian tribes.

The NIGC and the Department of Justice are part of the Executive Branch of the United States Government. The importance of the issue of Class II gaming will be seen through the remainder of 2008 and after the federal election in November. The tribes know how important it is in keeping Class II as it is now used as one of the few negotiating strengths for the tribes in building the Class III compacts. Should the Class III compacts fail for whatever reason, Class II gaming which built Oklahoma gaming from bingo halls to part of a nationwide \$19 billion dollar industry is all there is to fall back to.

The concern now is that we have returned to 2005 in the relations with the NIGC and the U.S. Department of Justice. Recall the uncertainty that existed then, not in what constituted a Class II game, because the NIGC knew enough about what this was because it issued Advisory Opinions on the subject, but rather, uncertainty from DOJ actions under the Johnson Act.

No federal statute is immortal so when the definitions of Class I, II, and III are eliminated from the federal law the ongoing battle over Class II gaming will be just another historical note in Indian affairs, but that day is hopefully far off. Many in gaming in 2008 remember tribal gaming before the Congress moved to restrict our sovereign rights in the form of federal legislation, which became the Indian Gaming Regulatory Act. But IGRA did embolden the faint-hearted who sat on the sidelines

afraid to test the Indian gaming waters. After the passage of IGRA it became possible as never before for financing of tribal gaming facilities as Indian gaming became formalized under federal statute. Gaming manufactures were comfortable to invest the money needed to develop new games for the Indian gaming market. Tribal employees did not have to factor in uncertainty as a consequence of continued litigation, even though the tribes in Florida, California and Oklahoma were winning the legal battles.

We have returned to the legal relationships as they were in 2005, but the NIGC has announced its intention to continue to draw its “bright line” between Class II and Class III. The uncertainty created by this upcoming cycle of relations in federal-Indian relations will have the predictable affect of dampening economic stimuli in Indian country. Surely attorneys can find a claim for damages in here somewhere?

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