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TRIBAL SOVEREIGNTY AND ONLINE GAMING: FANTASY SPORTS OFFER TRIBES WHAT OTHER GAMES DO NOT

Cody Wilson*

“[A]T gambling, the deadly sin is to mistake bad play for bad luck.”¹ Native American tribes should keep those words in mind following the decision issued by the United States Court of Appeals for the Ninth Circuit in *State of California v. Iipay Nation of Santa Ysabel*.² In that case, the Ninth Circuit addressed an issue of first impression, holding that tribal sovereignty does not permit a tribe to offer online bingo to patrons located in a state where betting on bingo is illegal.³ This note exposes the court’s holding, while correct, to be a result of the tribe’s “bad play” rather than bad luck. Bingo is simply the wrong game for what the tribe hoped to accomplish. Indeed, the court’s analysis tacitly affirmed the existence of a statutory loophole that allows all Native American tribes to offer pay-to-play fantasy sports (fantasy sports) to patrons across the United States,⁴ regardless of state law.

For nearly 200 years, the Supreme Court has recognized that Native American tribes, as nations that predate the Constitution and the United States itself, “exercise sovereignty subject to the will of the Federal Government.”⁵ Inherent to tribal sovereignty is immunity from lawsuits. This immunity applies to suits brought by states or by individuals and even extends to claims arising from a tribe’s off-reservation commercial activity.⁶ Yet, tribal sovereign immunity is not absolute. As the Supreme Court has explained, Congress may abrogate tribal sovereignty by un-

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1. IAN FLEMING, *CASINO ROYALE* 49 (1953).

2. 898 F.3d 960 (9th Cir. 2018).

3. *Id.* at 962.

4. Patrons play fantasy sports by managing a fictional sports team that consists of real-life athletes and win by obtaining the highest number of points, which are awarded based on each athlete’s performance in actual sporting events. Jonathan Bass, Comment, *Flushed from the Pocket: Daily Fantasy Sports Businesses Scramble Amidst Growing Legal Concerns*, 69 SMU L. REV. 501, 504 (2016).

5. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 803 (2014).

6. *Id.* at 789–90.

equivocally expressing its purpose to do so.⁷

The Indian Gaming Regulatory Act (IGRA)⁸ and the Unlawful Internet Gambling Enforcement Act (UIGEA)⁹ partially abrogate tribal sovereignty with respect to gaming. The IGRA provides a statutory basis for the regulation of tribal gaming that occurs on “Indian lands.”¹⁰ It does this by either preserving or abrogating tribal sovereignty—and its inherent immunity—with respect to three classes of gaming.¹¹ Tribal sovereignty remains entirely intact with respect to the narrowly defined category of class I gaming.¹² This class is limited to participation in social games that are played for prizes of minimal value and “traditional forms of Indian gaming engaged in . . . as a part of . . . tribal ceremonies or celebrations.”¹³ Tribal sovereignty also remains intact with respect to the other narrowly defined category of class II gaming with one caveat: the gaming must be “located within a State that permits such gaming for any purpose by any person, organization or entity.”¹⁴ Class II gaming is limited to participation in “the game of chance commonly known as bingo” and certain card games.¹⁵ In contrast, tribal sovereignty is significantly abrogated with respect to the broad, residual category of class III gaming by the requirement that the gaming be “conducted in conformance with a Tribal-State compact.”¹⁶ This abrogation of tribal sovereignty is significant because all gaming that is not within class I or class II is considered to be within class III,¹⁷ and states are not obligated to enter into, or even negotiate, tribal-state compacts.¹⁸

The IGRA is silent in regard to the Internet and other networking capabilities that allow games to reach beyond a tribe’s borders, but the UIGEA is not.¹⁹ Specifically, the UIGEA prohibits a tribe, a state, or any other “person engaged in the business of betting or wagering” from knowingly accepting financial payments associated with “unlawful Internet gambling.”²⁰ Unlawful Internet gambling occurs when a “bet or wager” is placed, received, or otherwise transmitted through some part of

7. *Id.* at 790 (citing *C&L Enter., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)).

8. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21 (2012).

9. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–67 (2012).

10. 25 U.S.C. §§ 2702, 2710. IGRA defines “Indian lands” to mean “all lands within the limits of any Indian reservation; and . . . any lands title to which is either held in trust by the United States . . . or held by any Indian tribe or individual . . . over which an Indian tribe exercises governmental power.” *Id.* § 2703(4).

11. *Id.* § 2710.

12. *Id.* § 2710(a)(1).

13. *Id.* § 2703(6).

14. *Id.* § 2710(a)(2), (b)(1)(A).

15. *Id.* § 2703(7)(A).

16. *Id.* § 2710(d)(1)(C).

17. *Id.* § 2703(8).

18. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74–76 (1996).

19. *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 964–65, 964 n.6 (9th Cir. 2018).

20. 31 U.S.C. §§ 5363, 5365(b) (2018).

the Internet where the bet or wager is illegal under federal or state law.²¹ Notably, the UIGEA expressly excludes participation in fantasy sports from its scope provided that the games themselves meet certain criteria.²²

Restrictions on the games that a Native American tribe may offer under the IGRA and isolated reservations prevent a majority of tribes from participating in the \$32 billion tribal gaming industry.²³ Many tribes hold land in states in which the games that a tribe can offer under the IGRA are substantially reduced by the state's refusal to authorize the games in a tribal-state compact.²⁴ Additionally, many tribes hold land in areas where the local population cannot support traditional, brick-and-mortar casinos.²⁵ The Iipay Nation of Santa Ysabel (Iipay Nation) falls into the latter group.²⁶ Following the failure of its brick-and-mortar casino, the tribe pursued a stake in the booming online gaming industry by offering Desert Rose Bingo (DRB) through the Internet to patrons located in California.²⁷

The Iipay Nation attempted to use the IGRA's preservation of tribal sovereignty with respect to class II gaming to shield the tribe from the UIGEA's prohibition against unlawful Internet gambling.²⁸ The tribe operated DRB from servers located on Iipay Nation land that is considered to be Indian land for purposes of the IGRA.²⁹ Like traditional bingo, a patron played DRB by purchasing cards labeled with a grid of numbers and won when numbers drawn matched those on the patron's card in a

21. *Id.* § 5362(10). The UIGEA defines “bet or wager” to mean: the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.

Id. § 5362(1)(A).

22. *Id.* § 5362(1)(E)(ix). A full discussion of these criteria and whether particular types of fantasy sports satisfy them is beyond the scope of this note. For an in-depth discussion of those topics, see generally Brett Wessels, *Batman and Two Very Large Jars of Mayonnaise: The Looming Clash of Daily Fantasy Sports and Tribal Gaming*, 50 CREIGHTON L. REV. 295, 300–13 (2017); Bass, *supra* note 4, at 526–30.

23. Gavin Clarkson et al., *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. ENT. & TECH. L. 1, 6 (2016); *FY13-FY17 Gaming Revenues by Range*, NAT'L INDIAN GAMING COMM'N (July 26, 2018), <https://www.nigc.gov/images/uploads/reports/Chart2017GamingRevenuesbyRange.pdf> [<https://perma.cc/AY4W-U74W>].

24. Some states prohibit all gaming, tribal or otherwise. See, e.g., UTAH CODE ANN. §§ 76-10-1101(2)(a), 76-10-1102 (West 2017); HAW. REV. STAT. ANN. § 712-1223 (West 2013).

25. Clarkson et al., *supra* note 23, at 6.

26. See *Iipay Nation of Santa Ysabel*, S. CAL. TRIBAL CHAIRMEN'S ASS'N, <https://www.sctca.net/iipay-nation-of-santa-ysabel/> [<https://perma.cc/P58E-43EK>] (last visited Mar. 31, 2019).

27. *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 962 (9th Cir. 2018). Global online gaming revenue is expected to exceed \$65 billion by 2021. MICHAELA D. PLATZER, CONG. RESEARCH SERV., R44680, INTERNET GAMBLING: POLICY ISSUES FOR CONGRESS 2 (2016).

28. *Iipay Nation*, 898 F.3d at 964.

29. *Id.* at 962.

predetermined pattern.³⁰ A patron purchased cards by visiting *www.desertrosebingo.com*, funding an account, selecting a bingo card denomination, and clicking “Submit Request!”³¹ This final action on the part of a patron transmitted the information to the servers where computer software “accepted” the information, debited the patron’s account by a corresponding amount, drew the numbers, daubed the cards, and determined each game’s winner.³² Since each element of play within the IGRA’s description of bingo occurred on Indian lands,³³ the Iipay Nation insisted that tribal sovereignty prevented the application of the UIGEA.³⁴ Still, the State of California, the United States, and ultimately the Ninth Circuit disagreed.³⁵

The Iipay Nation launched DRB on November 3, 2014, and within a month the State of California and the United States (collectively, the Government) brought suit in the District Court for the Southern District of California.³⁶ Two claims formed the basis of the lawsuit. First, the Government alleged that the Iipay Nation violated the IGRA by offering DRB through the Internet without authorization in a tribal-state compact.³⁷ Second, the Government alleged that the tribe violated the UIGEA by offering DRB to patrons located in California, where betting on bingo is illegal.³⁸ The court held against the Government regarding the alleged IGRA violation after classifying DRB as a class II game, which does not require state authorization.³⁹ Conversely, the court granted summary judgment in favor of the Government based on the Iipay Nation’s violation of the UIGEA.⁴⁰ The court subsequently entered a permanent injunction prohibiting the tribe’s operation of DRB, and the tribe appealed.⁴¹

On appeal, the Ninth Circuit affirmed the district court’s grant of summary judgment in favor of the Government.⁴² The court acknowledged that the IGRA granted the Iipay Nation exclusive jurisdiction over DRB to the extent that the class II “gaming activity” occurred on Indian

30. *Id.* The Iipay Nation ceased its operation of DRB on December 12, 2014. *Id.* at 963.

31. *Id.* at 962–63.

32. *Id.* at 963.

33. IGRA describes bingo as a game which is played for prizes . . . with cards bearing numbers . . . in which the holder of the card covers such numbers . . . when objects, similarly numbered . . . are drawn or electronically determined, and in which the game is won by the first person covering a previously designated arrangement of numbers

25 U.S.C. § 2703(7)(A)(i) (2012).

34. *Iipay Nation*, 898 F.3d at 964.

35. *Id.* at 962.

36. *Id.* at 963.

37. *Id.* at 963–64.

38. CAL. PENAL CODE § 330 (West 2018); *Iipay Nation*, 898 F.3d at 964.

39. *Iipay Nation*, 898 F.3d at 964.

40. *Id.*

41. *Id.*

42. *Id.* at 962.

lands.⁴³ The court found, however, that the actions on the part of DRB patrons located in California constituted gaming activity that occurred *off* Indian lands in light of the Supreme Court's decision in *Michigan v. Bay Mills Indian Community*.⁴⁴ In that case, the Court noted that the IGRA does not define "gaming activity" but interpreted the phrase to mean "gambling in the poker hall" and not the "off-site licensing or operation of the games."⁴⁵ Applying that definition to DRB, the Ninth Circuit held that a patron's act of submitting a bet while in California exceeded the IGRA's grant of exclusive jurisdiction to the Iipay Nation.⁴⁶ Furthermore, the court recognized that the IGRA did not prevent the application of the UIGEA, even if all DRB gaming activity occurred on Indian lands.⁴⁷ For that to occur, the actions on the part of DRB patrons must be viewed as pre-gaming communication rather than gaming activity, and pre-gaming communication is an action to which the IGRA's preservation of tribal sovereignty does not apply.⁴⁸

In reaching its decision, the Ninth Circuit clarified the relationship between the IGRA and the UIGEA. Both abrogate tribal sovereignty to some extent. The IGRA grants tribes exclusive jurisdiction over class I and class II gaming that occurs on Indian lands, but class III gaming cannot occur on Indian lands unless authorized in a tribal-state compact.⁴⁹ The UIGEA did not alter the IGRA but did "outlaw certain financial transactions associated with gaming on Indian lands facilitated by the internet, a topic on which the IGRA is silent."⁵⁰ Following this reasoning, the Ninth Circuit admitted that DRB could be entirely legal to the extent that the game is offered to patrons located on Indian lands.⁵¹ Nevertheless, the Iipay Nation's decision to accept financial payments over the Internet from patrons located in California subjected the tribe to, and violated, "UIGEA's requirement that bets placed over the internet be legal both where they are initiated and where they are received."⁵²

The Ninth Circuit properly held against the Iipay Nation because the tribe's decision to offer bingo, rather than fantasy sports, to patrons located beyond its borders exposed the tribe to the UIGEA's abrogation of tribal sovereignty. A Native American tribe may offer online gaming to patrons located beyond its borders so long as neither the IGRA nor the UIGEA is violated.⁵³ The Iipay Nation satisfied the IGRA's require-

43. *Id.* at 968.

44. *Id.* at 967.

45. *Id.* (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790–93 (2014)).

46. *Id.*

47. *Id.* at 967–68.

48. *Id.* at 967.

49. 25 U.S.C. § 2710 (2012).

50. *Iipay Nation*, 898 F.3d at 968.

51. *Id.*

52. *Id.*

53. A tribe's online gaming operation must also comply with the Federal Wire Act, but that statute only applies to betting on actual sporting events and thus is not relevant to this note's discussion of bingo or fantasy sports. Federal Wire Act, 18 U.S.C. §§ 1081–84 (2012); see *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State*

ments to the extent gaming activity occurred on Indian lands,⁵⁴ but failed to abide by UIGEA's prohibition against unlawful Internet gambling.⁵⁵ The tribe presumably chose bingo because, under the IGRA, a tribe can conduct class II gaming without authorization in a tribal-state compact.⁵⁶ However, that decision ignored the UIGEA's abrogation of tribal sovereignty with respect to unlawful Internet gambling. Unlike bingo, the UIGEA expressly excludes participation in fantasy sports from its scope.⁵⁷ Furthermore, tribes may offer fantasy sports in a way that avoids the IGRA's abrogation of tribal sovereignty with respect to class III gaming.

Until this case, whether the IGRA permitted a tribe to offer online fantasy sports without state authorization remained unclear. Fantasy sports likely fall within the category of class III gaming, thereby requiring state authorization in a tribal-state compact to the extent that the associated gaming activity occurs on Indian lands.⁵⁸ Yet, no official opinion has been issued as to the proper classification of fantasy sports.⁵⁹ Now, the Ninth Circuit's analysis regarding the scope of the IGRA in the context of online gaming makes the proper classification of fantasy sports irrelevant. The Ninth Circuit reached its holding by explaining that the actions on the part of DRB patrons located in California exceeded the scope of the IGRA because the actions, whether viewed as gaming activity or as pre-gaming communication, occurred off Indian lands.⁶⁰ This analysis tacitly revealed that a tribe may avoid the IGRA's abrogation of tribal sovereignty by offering fantasy sports in such a way that all gaming activity occurs off Indian lands.

All gaming activity associated with fantasy sports can occur off Indian lands because the outcome of such games is dependent solely upon the patrons' decisions regarding fantasy team management and the performance of actual athletes. Gaming activity is "what goes on in a casino—each roll of the dice and spin of the wheel . . . the gambling in the poker hall," not the authorizing, licensing, or operation of games.⁶¹ Therefore, a tribe's offering of online fantasy sports may remain outside the IGRA's abrogation of tribal sovereignty so long as two requirements are met.

Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 1 (Sept. 20, 2011).

54. *Iipay Nation*, 898 F.3d at 968.

55. *Id.* at 968–69.

56. *See* 25 U.S.C. § 2710(b) (2012).

57. 31 U.S.C. § 5362(1)(E)(ix) (2012).

58. Charles W. Galbraith, *What The Growth Of Daily Fantasy Sports Means For Tribes*, LAW360 (July 5, 2016, 3:34 PM), <https://www.kilpatricktownsend.com/-/media/Files/articles/2016/What-The-Growth-Of-Daily-Fantasy-Sports-Means-For-Tribes.ashx> [<https://perma.cc/3ELQ-C6VR>].

59. *Id.*; *see* Press Release, Nat'l Indian Gaming Comm'n, NIGC Comments on Recent Press Release Regarding Daily Fantasy Sports (Oct. 20, 2016), https://www.nigc.gov/images/uploads/newsrelease/NIGC_Press_Release_on_Daily_Fantasy_Sports.pdf.

60. *Iipay Nation*, 898 F.3d at 967–68.

61. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014).

First, the tribe cannot accept bets from patrons located on Indian lands.⁶² Second, the tribe cannot award points to patrons based on an athlete's actual performance in any sporting event that takes place on Indian lands.⁶³ In this way, "the gambling in the poker hall," namely a patron's selection of athletes, a patron's decision to submit a wager, and each athlete's actual performance, would occur off Indian lands.⁶⁴ Only administrative activities such as the accepting of information, debiting of an account, awarding of points, and determination of a winner would take place on Indian lands. In other words, every aspect of fantasy sports that is critical to the outcome of a game, the "gaming activity," would occur off Indian lands, and thus, be outside the scope of the IGRA.⁶⁵

Nevertheless, some states may oppose a tribe's offering of fantasy sports. Possible state opposition can be divided into two groups. One group may oppose a tribe's offering of fantasy sports for the same reason they do not allow the two major players in the industry, DraftKings and FanDuel, to offer fantasy sports to patrons within their borders.⁶⁶ These states either oppose all gambling within their borders or require that those offering the game hold a state license.⁶⁷ The other source of opposition may come from states that claim a tribe cannot offer fantasy sports unless the game is authorized in a tribal-state compact. The tribal-state compact requirement provides states with a source of revenue because states can require that a tribe share a percentage of its gaming revenues with the state as part of the compacting process.⁶⁸

Whatever the reason for state opposition, tribal sovereignty will protect a tribe's operation of online fantasy sports so long as no gaming activity occurs on Indian lands. Tribes are immune from legal action regarding a given activity unless Congress has unequivocally abrogated that immunity.⁶⁹ The IGRA and the UIGEA are the two pieces of congressional legislation relevant to a tribe's offering of fantasy sports. A tribe may avoid the IGRA by ensuring all gaming activity occurs off Indian lands.⁷⁰ A tribe avoids the UIGEA by merely choosing to offer fantasy sports rather than some other game.⁷¹ If Congress is dissatisfied with this result, then it should abrogate tribal sovereignty with respect to fantasy sports through an amendment to either the IGRA or the UIGEA or both. Congress could bring all tribal offerings of fantasy sports within the scope of

62. See *Iipay Nation*, 898 F.3d at 967–68.

63. See *id.*

64. See *Bay Mills*, 572 U.S. at 792; *Iipay Nation*, 898 F.3d at 967–68.

65. See *Iipay Nation*, 898 F.3d at 967–68.

66. See Chris Grove, *What Are The States Where You Can Play Daily Fantasy Sports?*, LEGAL SPORTS REP. (Dec. 1, 2018), <https://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> [https://perma.cc/LD5J-TPCX].

67. See, e.g., HAW. REV. STAT. ANN. § 712-1223 (West 2013); NEV. REV. STAT. ANN. § 463.160 (West 2013).

68. Clarkson et al., *supra* note 23, at 6 n.19 (citing 25 U.S.C. § 2710(d)(3)(C)(iii) (2012)).

69. *Bay Mills*, 572 U.S. at 790.

70. See 25 U.S.C. § 2702(3); *Iipay Nation*, 898 F.3d at 967.

71. See 31 U.S.C. § 5362(1)(E)(ix) (2012).

the IGRA by defining “gaming activity” to mean all activities, administrative or otherwise, associated with gambling.⁷² Also, Congress could subject tribes to state laws regarding fantasy sports by removing the UIGEA’s carve-out for those games. Such an amendment would not itself make fantasy sports illegal because the UIGEA relies on violations of other federal or state laws in its definition of unlawful Internet gambling.⁷³ Therefore, a state would simply be able to choose whether to permit or prohibit fantasy sports within its borders.

In conclusion, the Ninth Circuit properly held that the Iipay Nation violated the UIGEA by offering DRB to patrons located in California, a state that prohibits betting on bingo. However, the court’s holding is a result of the tribe making a “bad play” in choosing to offer bingo, rather than fantasy sports, to patrons located beyond its borders. Had the Iipay Nation chosen to offer online fantasy sports instead, the tribe could have avoided both the IGRA and the UIGEA’s abrogation of tribal sovereignty. Furthermore, the preservation of tribal sovereignty and its inherent immunity, with respect to the \$7.22 billion fantasy sports industry, offers a noteworthy potential source of tribal revenue.⁷⁴ The preservation of tribal sovereignty seemingly allows tribes to offer online fantasy sports to patrons in all fifty states, regardless of state law.⁷⁵ In addition, the ability to offer fantasy sports while avoiding the IGRA’s tribal-state compact requirement allows *all* Native American tribes to offer such games without obtaining state authorization.

72. See *Bay Mills*, 572 U.S. at 792 (interpreting the statute to exclude administrative activities from the definition of “gaming activity”).

73. 31 U.S.C. § 5362(10).

74. Press Release, Fantasy Sports Trade Ass’n, Fantasy Sports Now a \$7 Billion Industry (June 20, 2017), <https://fsta.org/press-release-fantasy-sports-now-a-7-billion-industry/>.

75. Tribal sovereign immunity does not extend to individual tribal members; therefore, a state may prosecute tribal members, and of course its own citizens, for illegal gambling. *Bay Mills*, 572 U.S. at 795–96.