V. Professional Qualifications

My legal practice is primarily in the area of Indian law and Administrative Law, with most of my practice concentrated on Indian gaming law matters involving the development, management and regulation of Indian gaming operations conducted under the authority of IGRA, and applicable state and tribal law. I have extensive experience with IGRA related regulations issued by the NIGC, the federal agency with oversight responsibility for Indian gaming operations. I have advised a wide variety of gaming equipment vendors regarding IGRA related issues. I am past commissioner (and acting Chairman) of the NIGC and an elected member of the International Masters of Gaming Law, considered the preeminent organization for lawyers in the gaming industry.

Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System ("VPNAPS")

Introduction

Santa Ysabel Interactive, a tribal gaming operation owned and operated by the Iipay Nation of Santa Ysabel ("Tribe") intends to offer server-based bingo games to be played on the Tribe's sovereign Indian lands using a Class II gaming system known as the "Virtual Private Network Assisted Play System" ("VPNAPS"). In sum, the VPNAPS allows the Tribe to offer Class II electronic linked bingo machine gaming conducted on Indian lands using a proxy system. The nature of the games to be played using the linked bingo system will be Class II server-based games requiring peer-to-peer competition in a single game of bingo with a common ball draw.

How Play of Bingo Games Will Be Conducted

The games to be conducted using the VPNAPS will use the traditional bingo game format and be played electronically on a networked system of components, an advanced technology platform version of multi-site bingo systems in operation today in Indian gaming facilities (i.e. players compete against one another either within one Indian gaming facility and/or against all players in linked Indian gaming facilities). The collection of "technologic aids" contained within the VPNAPS will allow the gaming system to function as a series of linked "electronic" Class II gaming devices at the Santa Ysabel Interactive facility located on the Tribe's Indian lands without changing the essential game characteristics or statutory criteria required under IGRA for the play of a Class II bingo game. In this respect, while there will be a number of game graphical display themes, each game theme will utilize a common bingo pattern set. The winning of prizes is determined under established rules by matching designated numbers on a digital bingo card with corresponding numbers randomly drawn in a predetermined pattern.

Game play is achieved via "proxy play." In this respect, real time live bingo game action is played only by the "proxy" of an individual who has used a web-browser enabled device to access the Santa Ysabel Interactive gaming facility and its servers (each located on the Tribe's Indian lands) via the VPNAPS; no live bingo game action is ever performed by the user of the web-browser enabled device. Once an individual is approved as an "Account Holder" (i.e. an individual at least twenty-one (21) years of age who has used the VPNAPS to establish an account to become a properly registered account holder with Santa Ysabel Interactive), system

components of the VPNAPS allow the Account Holder to access a "VPN gateway" connecting them to a virtual "proxy engagement station" – to hire a proxy to conduct the bingo game play on their behalf. On behalf of an Account Holder, their proxy participant commences play of the game on the VPNAPS by requesting from the game action server component of the VPNAPS the purchase of one or more digital bingo cards in a common game of bingo with a set denomination (i.e. penny, $.05, $.10, $.25, $.50 or $1.00 game). At all times the games played using the VPNAPS require peer-to-peer competition between at least five (5) proxy participants in the game of bingo which is accomplished through a linked network contained within the VPNAPS. There is a single bingo ball draw for all proxy participants included in each common bingo game. Components of the VPNAPS assist the Account Holder's proxy in playing the game of bingo by providing a visual representation of the digital bingo card, displaying the balls drawn, daubing or covering the corresponding numbers on the digital bingo card when matched with ball numbers as they are drawn, and presenting any prizes won through the play of the bingo game for later display to the Account Holder. Game play results are revealed on a time-delayed basis to the Account Holder, and an Account Holder can select the theme for watching the replay display of the game played by their proxy on their behalf.

A proxy participant's digital bingo card will consist of a traditional 5X5 "bingo" matrix with numbers for each card. The five columns of the digital bingo card face are labeled "B" "I" "N" "G" and "O" from left to right. The center space on the card is marked "Free Space" and is considered automatically filled when contained in a pattern. The range of numbers is restricted by column, with the "B" column containing numbers between one and fifteen inclusive, the "I" column containing sixteen through thirty, the "N" column containing thirty-one through forty-five, the "G" column containing forty-six through sixty, and the "O" column containing sixty-one through seventy-five. All digital bingo cards used by proxy participants for a common game of bingo are unique (i.e. each card contains a uniquely identifying serial number).

Each bingo game uses a pool of 75 bingo balls numbered from 1 to 75 inclusive which are randomly selected without replacement. Once five or more proxy participants have purchased cards for a common game within a set period of time, the bingo game will commence. In the event there are not five or more proxy participants initiating game play for a common game within the maximum allotted period, that bingo game will not be permitted to commence. Failure to attain five or more proxy participants within the allotted period will result in the common game being cancelled and the value of the purchased cards being refunded to the Account Holder's account. Digital bingo cards are first randomly distributed to each proxy participant as requested and then ball numbers are randomly drawn using an electronic random number generator. As they are drawn, the ball numbers are released one at a time in rapid succession in the same sequence and delivered to all proxy participants at the same time (although during the replay display of the game played an Account Holder can set the speed of the actual ball draw to their individual time preference to watch the results of the game unfold). Assisted by

components of the VPNAPS, an Account Holder's proxy participant immediately daubs or covers the corresponding numbers on the digital bingo card when the ball numbers are drawn. This is consistent with applicable tribal regulations that state that: (1) use of technologic aids such as auto-daub features or reader/dauber devices are expressly permitted to assist the proxy agent playing Class II bingo games on the Account Holder's behalf in determining whether a held card has a pre-designated pattern matching the numbers drawn for the Class II bingo game; and (2) there is no requirement for the proxy agent playing the Class II bingo game on the Account Holder's behalf to manually declare a "bingo" upon matching the numbers drawn with the pre-designated game-ending pattern on a card in order to collect the game-ending prize award. The ball draw release continues until a "bingo" has been made (i.e. game-ending pattern is achieved) and the game ends. If a card held by the proxy participant meets the standards for an iBonus prize (i.e. achieves the game-ending pattern within a pre-determined limited set of ball numbers drawn), the proxy participant's card will win both the iBonus prize and game-ending prize. Each bingo game will be played to cover a single prize pattern randomly selected prior to commencement of the game from a set of seven (7) designated patterns that each require a minimum of eight (8) numbers to achieve "bingo" (i.e. an "X" pattern, "7" pattern, "T" pattern, etc.).

In each bingo game, the VPNAPS will have an "iBonus" that is ten thousand times the card cost. For each pattern that is being called, game participants have the opportunity to win the iBonus if they achieve "bingo" for the designated pattern in the prescribed number of balls called. For example, in a twenty-five cent game, the proxy participant could win twenty-five hundred dollars for an X pattern bingo (which requires eight (8) numbers with a free space to cover the pattern in order to achieve "bingo") achieved within the first twelve (12) or less numbers drawn; but in a ten-cent game, the proxy participant could only win one thousand dollars for achieving the same X pattern bingo within the first twelve (12) or less numbers drawn, and so on for each game of different denominations. If the iBonus is not won before one million cards are sold cumulatively for that game denomination, then the iBonus activates a "floodgate" feature that permits the iBonus to be won without regard to the limited set of numbers drawn requirement – in other words, after one million cards are sold cumulatively for that specific game denomination and no iBonus has yet been won for that game denomination, the proxy participant whose card achieves the next game-ending prize pattern for that denomination, even if it takes more than twelve (12) numbers to achieve the pattern, will automatically win both the iBonus prize and game-ending prize for that game denomination.

All bingo games will pay out prizes in a pari-mutual format. For example, for every penny paid in by proxy participants on behalf of their Account Holders for a common penny bingo game, the prize amount for that game will be a certain percentage of the pay-in amount of game cards purchased for that common game. See Appendix A. In addition, upon the initial opening of Santa Ysabel Interactive, four percent (4%) of the pay-in amount for every common bingo game

will be retained for prize pay-out for a "Half Hour Bonus Game," one percent (1%) will be retained for prize pay-out for an in game bonus ("iBonus"), and a certain percentage will be retained by Santa Ysabel Interactive. See Appendix A.

Bonus Game Play

Santa Ysabel Interactive intends to offer a number of bonus game play features as part of the games to be conducted using the VPNAPS.

Half Hour Bonus Game

This is a bonus game play feature that will be included upon the initial opening of Santa Ysabel Interactive. For every five cards purchased in a single game per denomination by a proxy participant on behalf of the Account Holder during the previous half hour, the proxy participant will receive one free bingo card for that denomination's "Half Hour Bonus Game." Collection of the amount to be used for each denomination's Half Hour Bonus Game prize will cease being collected before the game begins to allow proxy participants to submit requests for game play on behalf of their Account Holders. The proxy participant must have played in the previous half hour to be eligible to purchase extra game cards for that denomination's Half Hour Bonus Game.

Account Holders, through their proxy participants, may receive reminders that they have free cards coming up in the denomination's bonus game and are eligible to purchase additional cards. This allows proxy participants to buy cards on behalf of their Account Holders in games not yet played of the same denomination, and to receive more free cards along with those they can purchase to participate in that denomination's Half Hour Bonus Game, subject to the card purchase request being accepted prior to commencement of the Half Hour Bonus Game.

Monthly Bonus Game

This is a bonus game play feature that may be added following the initial opening of Santa Ysabel Interactive. There will be no free cards in play, but the proxy participant must have played on behalf of the Account Holder during the previous month with a minimum number of cards in play. Proxy participants will be able to purchase cards on behalf of their Account Holder for twenty-five cents per card for the Monthly Bonus Game as soon as they are qualified to be eligible, until one minute prior to the start of the Monthly Bonus Game. This game is played for a bonus prize consisting of all of the monthly bonus money collected plus seventy (70%)(i.e. 17.50 cents) of the value of any cards purchased to play the bonus game (with thirty (30%)(i.e. 7.50 cents) of the bonus game card purchase value retained by Santa Ysabel Interactive), and will use a "coverall" for the prize winning pattern.

Quarterly Bonus Game

This is a bonus game play feature that may be added following the initial opening of Santa Ysabel Interactive. There will be no free cards to play, however, if proxy participants have

played on behalf of their Account Holder during the previous quarter with a minimum of five cards in a single game, they will be eligible to participate. Proxy participants will be able to purchase cards on behalf of their Account Holder for twenty-five cents per card for the Quarterly Bonus Game as soon they are qualified to be eligible, until 5 minutes prior to the start of the Quarterly Bonus Game. This game is played for a bonus prize consisting of all of the quarterly bonus money collected plus seventy (70%)(i.e. 17.50 cents) of the value of any cards purchased to play the bonus game (with thirty (30%)(i.e. 7.50 cents) of the bonus game card purchase value retained by Santa Ysabel Interactive), and will use a "coverall" for the prize winning pattern.

Summary

The VPNAPS has been specifically developed, designed and engineered to be (1) in strict compliance with the minimum technical requirements specified in 25 CFR Part 547, and (2) to constitute an electronic linked Class II bingo gaming system that serves as a "technologic aid" to server-based bingo games classified as "class II gaming" under IGRA. The games to be played using the VPNAPS are specifically designed to meet the statutory criteria for a Class II bingo game pursuant to IGRA. To ensure proper performance of the VPNAPS, all hardware, software, and electronic components of the gaming system are specifically tested and approved by an independent compliance lab competent to conduct such testing and approval.

APPENDIX A
PAY-OUT PERCENTAGES FOR BINGO GAMES PLAYED USING VPNAPS

Penny Bingo Game Pay-Out Percentages

65.00% paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out) – *Note: the 65.00% will be decreased to 64.00% if Monthly Bonus Game and Quarterly Bonus Game are played*
04.00% retained for Half Hour Bonus Game
00.5% retained for Monthly Bonus Game – if played
00.5% retained for Quarterly Bonus Game – if played
01.00% paid for iBonus funding for a $100 bonus
30.00% retained by Santa Ysabel Interactive

Five Cent ($.05) Bingo Game Pay-Out Percentages

65.00% paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out) – *Note: the 65.00% will be decreased to 64.00% if Monthly Bonus Game and Quarterly Bonus Game are played*
04.00% retained for Half Hour Bonus Game
00.5% retained for Monthly Bonus Game – if played
00.5% retained for Quarterly Bonus Game – if played
01.00% paid for iBonus funding for a $500 bonus
30.00% retained by Santa Ysabel Interactive

Ten Cent ($.10) Bingo Game Pay-Out Percentages

65.00% paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out) – *Note: the 65.00% will be decreased to 64.00% if Monthly Bonus Game and Quarterly Bonus Game are played*
04.00% retained for Half Hour Bonus Game
00.5% retained for Monthly Bonus Game – if played
00.5% retained for Quarterly Bonus Game – if played
01.00% paid for iBonus funding for a $1,000 bonus
30.00% retained by Santa Ysabel Interactive

Twenty-Five Cent ($.25) Bingo Game Pay-Out Percentages

65.00% paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out) – *Note: the 65.00% will be decreased to 64.00% if Monthly Bonus Game and Quarterly Bonus Game are played*
04.00% retained for Half Hour Bonus Game
00.5% retained for Monthly Bonus Game – if played
00.5% retained for Quarterly Bonus Game – if played
01.00% paid for iBonus funding for a $2,500 bonus
30.00% retained by Santa Ysabel Interactive

Fifty Cent ($.50) Bingo Game Pay-Out Percentages

70.00% paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out) – *Note: the 70.00% will be decreased to 69.00% if Monthly Bonus Game and Quarterly Bonus Game are played*
04.00% retained for Half Hour Bonus Game
00.5% retained for Monthly Bonus Game – if played
00.5% retained for Quarterly Bonus Game – if played
01.00% paid for iBonus funding for a $5,000 bonus
25.00% retained by Santa Ysabel Interactive

One Dollar ($1.00) Bingo Game Pay-Out Percentages

74.00% paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out) – *Note: the 74.00% will be decreased to 73.00% if Monthly Bonus Game and Quarterly Bonus Game are played*
04.00% retained for Half Hour Bonus Game
00.5% retained for Monthly Bonus Game – if played
00.5% retained for Quarterly Bonus Game – if played
01.00% paid for in iBonus funding for a $10,000 bonus
21.00% retained by Santa Ysabel Interactive

Half Hour Bonus Game Pay-Out Percentages

100% of amount collected for free card play and 74.00% of value of extra cards purchased for that denomination's Half Hour Bonus Game paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out) – *Note: the 74.00% will be decreased to 73.00% if Monthly Bonus Game and Quarterly Bonus Game are played*
04.00% retained for next Half Hour Bonus Game
00.5% retained for Monthly Bonus Game – if played

00.5% retained for Quarterly Bonus Game – if played
01.00% paid for in game bonus funding for a bonus consistent with that denomination
21.00% retained by Santa Ysabel Interactive

Monthly Bonus Game Pay-Out Percentages

100% of amount collected for free card play and 70.00% of value of extra cards purchased for that Monthly Bonus Game paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out)
30.00% retained by Santa Ysabel Interactive

Quarterly Bonus Game Pay-Out Percentages

100% of amount collected for free card play and 70.00% of value of extra cards purchased for that Quarterly Bonus Game paid to holders of winning bingo pattern (multiple winners in any common game share equally in winning prize pay-out)
30.00% retained by Santa Ysabel Interactive

APPENDIX B
CLASS II GAMING CLASSIFICATION UNDER IGRA

Class II Gaming Classification

IGRA Definition

IGRA governs gaming on Indian lands. IGRA defines "Class II Gaming" in relevant part to include:

1. The game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –
    a. which is played for prizes, including monetary prizes, with cards bearing numbers or other designations:
    b. in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
    c. 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
2. card games that –
    a. are explicitly authorized by the laws of the State, or
    b. are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

See 25 U.S.C. §2703(7) (A). Games that are not within the definition of Class I or Class II games are Class III games, see 25 U.S.C. §2703(8), including:

1. any banking card games, including baccarat, chemin de fer, or blackjack (21), or
2. electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

NIGC Definition

The NIGC's current regulations define Class II gaming very similar to the statutory definition under IGRA:

1. Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
    a. Play for prizes with cards bearing numbers or other designations;
    b. Cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
    c. Win the game by being the first person to cover a designated pattern on such cards.
2. If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo;
3. Nonbanking card games that:
    a. State law explicitly authorizes, or does not explicitly prohibit, and are played legally anywhere in the state; and
    b. Players play in conformity with state laws and regulations concerning hours, periods of operation, and limitations on wagers and pot sizes;

See 25 C.F.R. §502.3.

The NIGC regulations also define "other games similar to bingo" for purposes of Class II gaming.

> 25 C.F.R. §502.9 Other games similar to bingo.
>
> Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

APPENDIX C
CLASS II GAMING USING TECHNOLOGICAL AIDS

Class II Gaming Using a Technologic Aid

NIGC Definition

Class II games that may utilize "electronic, computer or other technologic aids" as part of players' participation in the game are distinguished under the NIGC regulations as follows:

> 25 C.F.R. §502.7 Electronic, computer or other technologic aid.

1. Electronic, computer or other technologic aid means any machine or device that
   a. assists a player or the playing of a game;
   b. is not an electronic or electromechanical facsimile; and
   c. is operated according to applicable Federal communications law.
2. Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:
   a. broaden the participation levels in a common game;
   b. facilitate communication between and among gaming sites; or
   c. allow a player to play a game with or against other players rather than with or against a machine.
3. 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.

The NIGC regulation which applies to any Class III games using an electronic or electromechanical facsimile of any game of chance is found at:

> 25 C.F.R. §502.8 Electronic or electromechanical facsimile.
>
> 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 against each other rather than with or against a machine.

MegaMania Bingo Cases Analysis

Each of the MegaMania Bingo Cases is specifically analyzed below for their implication to our opinion in connection with the bingo games to be offered using the VPNAPS Gaming System.

a. US v. 103 Electronic Gaming Devices, 223 F3d 1091 (9th Cir. 2000) ("Ninth Circuit MegaMania Bingo Case")

Game characteristics: Many players compete against one another in a single interlinked game via a network of individual computer terminals. At least 12 people must play a minimum of 48 cards in order for the game to commence. A blower located in the Choctaw gaming facility blows approximately 40 balls (out of a pool of 75 balls) into a tube. A human operator keys the 40 selected balls into the computer. After each three number display, a player must pay an additional 25 cents per card to continue that game. This is known as the "ante-up" feature. In each session, there is a straight line game (horizontal, vertical, or diagonal) and a corners game. The corners game can be won before or after the straight line game has ended.

Holding: MegaMania is a Class II technologic aid to the game of bingo.

Key Points of the Case: The Court restates the three statutory criteria for bingo: (i) play for prizes with cards bearing numbers or other designations; (ii) cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and (iii) win the game by being the first person to cover a designated pattern on such cards.

The Court rejects the government's argument that there are criteria in addition to the above mentioned three. It holds that the statutory language relating to "the game commonly known as bingo" does not require one to read in certain other characteristics of traditional bingo games. Specifically, the Court rejects the argument that the following elements render the game a Class III game: (i) the ante-up feature is not traditional; (ii) traditional bingo, unlike cornermania, requires earning to be dependent on other players; and (iii) the manic pace and potential high stakes are different than the normally tranquil and placid game which offers token rewards.

The Court concludes that the three statutory criteria are the sole legal criteria for bingo under IGRA. Critical to the Court making this

determination is that the NIGC, in its rulemaking, rejected the notion to limit bingo to its classic form.

The Court rejects the government notion that the ante-up feature of MegaMania distinguishes it from traditional bingo, quoting the lower court decision which concluded "there is nothing in the statute or the regulations that requires a player to pay one price up front to play the entire game."

The Court also rejects the government position that the continuous win feature (called the interim win feature by MGAM) does not comply with the third IGRA requirement. The Court concludes that a "previously designated arrangement" need not be a straight line. As to the first winner argument, the Court decided that there may be multiple winners because "win" does not mean the same thing as "vanquishing" one's opponent.

The Court observed that in some traditional live bingo games there are interim payouts for achieving certain results. Also, because the statute allows instant bingo (with interim payments during a game of bingo), it did not intend to exclude interim payouts in the game of bingo itself. Also, Congress easily could have said that bingo games end upon only one player winning, but did not include such a limitation in the statute.

Further, the Court rejects the government's argument that the corner game is a house banking game because payouts do not hinge on the success of others. Also, the house, over time, will net 15% of so-called "Cornermania" wagers. The Court holds that the house does not participate in Cornermania the way it participates in blackjack, and that church run bingo games also net a percentage.

In MegaMania, unlike Class III keno, someone other than the house must win. The Court, therefore, rejects the government's argument that MegaMania is a "Class III electronic facsimile" of bingo. The Court cites the section of the Senate Report on IGRA that specifically discusses Tribes being able to link various players at numerous cites as a means of increasing revenue. Also important is that MegaMania is being played outside the terminal – i.e. against other players. This is in sharp contrast to the game considered in Sycuan Band, 54 F.3d at 542-43, where a player can participate whether or not anyone else is playing (wherein the court concluded that an electronic pull-tab game in which one player played against machine was an exact, self-contained, copy of the paper version of game and was thus a Class III electronic facsimile thereof).

The Court rejects the government's argument that Cornermania is in fact a game with one participant, because winning does not depend on the

success or failure of another; reasoning that Cornermania cannot be played alone because it must be played with MegaMania and players are competing against one another (i.e. the first player to achieve results vis-a-vis MegaMania wins).

The Court also rejects the government's argument that MegaMania terminals are illegal under the Johnson Act. The Court reasons that the Johnson Act and IGRA, statutes passed 35 years apart, must be read together to comfortably coexist while giving each the greatest continuing effect. IGRA explicitly states that "Class II gaming...is permitted in Indian Country". Moreover, statutes that are specific and relatively recent (like IGRA), control over those that are general and more distant in time (like the Johnson Act). Also important is IGRA's statutory purpose of promoting tribal economic development, tribal self-sufficiency and strong tribal government.

b. US v. 162 MegaMania Gambling Devices, 231 F3d 713 (10th Cir. 2000) ("Tenth Circuit MegaMania Bingo Case")

Game characteristics: Same as in Ninth Circuit MegaMania Bingo case. Also important to the Court's description of the game is the feature that in each game there is at least one straight line winner and one Cornermania winner.

Holding: MegaMania is a Class II technologic aid to bingo.

Key Points of the Case: The Court emphasizes that the definition of Class II includes other games similar to bingo, and applies the traditional Cannons of Construction to be used when interpreting statutes involving Indians (i.e. such statutes are to be liberally construed in favor of Indians, with any ambiguous provisions interpreted to their benefit).

The Court also notes that Chevron deference is to be granted to the NIGC's regulatory definitions, and while opinion letters issued by the NIGC are not afforded the same level of Chevron deference, such opinion letters are "entitled to respect" (the Court also refers to these opinion letters as informal pronouncements).

The Court emphasizes the distinction between "other technological aids" and "other games similar to bingo" elements of the NIGC's Class II definition, and the "any banking card game" and "electronic or electromechanical facsimiles of any game of chance or slot machine of any kind" elements of the Class III definition.

The Court holds the MegaMania meets the three statutory criteria for bingo – (i) played on an electronic card that looks like a bingo card; (ii) first person to cover a previously designated arrangement; and (iii) wins a prize – and favorably cites the Ninth Circuit MegaMania Bingo Case which reached the same conclusion.

Important to the Court's conclusion is that, in its opinion letter declaring that MegaMania is a Class II game, the NIGC noted that "variations [between MegaMania and the] game commonly known as bingo are minor, do not alter the fundamental characteristics of the game of bingo, and meet the criteria of Class II game of bingo or a game similar to bingo".

Likewise, it was important to the Court's conclusion that the NIGC noted in its opinion letter that "a number of bingo handbooks, manuals, catalogues describe interim win games where a player in a traditional bingo game may win an interim prize by being the first player to cover a predetermined corner pattern of numbers while playing toward a regular predetermined pattern on the bingo card".

The Court holds that the house is not a participant in the game because it does not play a bingo card, and points out that nothing in IGRA prohibits more than one winner; traditional bingo allows for interim win variations, IGRA and the NIGC regulations do not outline what the predetermined configuration for bingo must be; and that the Ninth Circuit was correct in stating that winning does not necessarily mean vanquishing the other players.

The Court rejects the argument that the "ante-up" feature of the game removes it from the Class II category, citing the following comment of the NIGC in adopting its regulations:

> "One commentator questions whether the definition of bingo should require all players participate on an equal basis. The commentator stated that in a traditional bingo game, all cards are purchased for a preset price, notwithstanding limited promotional discounts. The Commission believes such considerations are marketing decisions and are outside of the Act's purview. Therefore, the Commission rejects the suggestion."

The Court also cites a NIGC advisory opinion letter stating that "similar to the paper card, 'speed bingo' or 'chip up bingo' games are played in bingo halls where the player antes up money for each number called". The "game similar to bingo" element of the Class II definition, again, is cited in support of this conclusion.

The Court notes that nothing in IGRA or its regulations prevent "ante up" or "pay as you go" features, refers favorably to the NIGC comment during rulemaking and to its advisory opinion, and again notes that any perceived ambiguity would be resolved in favor of the tribe.

The Court rejects the government's argument that MegaMania is more like a slot machine than bingo. It concludes that MegaMania meets all three statutory criteria for bingo and favorably cites the Ninth Circuit MegaMania Bingo Case conclusion that the game is played "outside of the box".

The Court holds that to be an "aid" to a Class II game, the device must: (i) operate to broaden the participation levels of participants in a common game, and (ii) the "aid" must be distinguishable from the "facsimile" where a single person plays against a machine rather than against other players; and specifically holds that Congress did not intend for the Johnson Act to reach Class II aids.

A footnote by the Court narrows its holding regarding Class II "aids" to only the MegaMania game[2].

[2] Footnote 9 of the Tenth Circuit MegaMania Bingo Case decision states: "The State of Oklahoma, as amicus curiae, argues that the district court's determination that MegaMania is not a gambling device under the Johnson Act creates a dangerous precedent under which 'all electronic slot machines and similar devices could be converted into non-gaming devices by simply networking them with a separate computer or device which provided part or all of the element of chance.' Our decision rests on our determination the MegaMania game is bingo or a game 'similar to bingo' and the MegaMania machines meet the statutory definition of an 'aid to bingo.' Our holding in this case therefore is limited to the MegaMania form of bingo currently at issue." In my view, the MegaMania electronic network bingo game is sufficiently similar to the Offered Games bingo game play using the VPNAPS that this limiting footnote does not remove the Offered Games from the analysis of the case.

MEMORANDUM

Attorney/Client Privileged & Confidential

TO: Joseph Valandra
Managing Member
Great Luck, LLC

DATE: June 26, 2014 **Updated**

FROM: Kevin Quigley
Doug Twait
Tom Foley

SUBJECT: **IGRA opinion regarding proposed tribal gaming operation offering server-based bingo games played using a proprietary Class II gaming system known as the Virtual Private Network Assisted Play System ("VPNAPS").**

You have requested that we evaluate whether a tribal gaming operation is legally permitted under existing applicable federal law and the tribe's inherent sovereign authority to offer server-based bingo games to be played on the tribe's sovereign Indian lands using a Class II gaming system known as the "Virtual Private Network Assisted Play System" ("VPNAPS"). The VPNAPS contains several proprietary technologic aids, including a component that facilitates access to the tribe's gaming facility through a secure virtual private network connection between individuals who are properly registered account holders with the tribal gaming enterprise and their proxy agent located on the Indian lands, which assists proxy play on behalf of the account holders (referred to herein as "VPN Aided Class II Gaming"). In sum, the VPNAPS allows the tribe to offer Class II electronic linked bingo gaming conducted on Indian lands using a proxy system. The nature of the games to be played using the linked bingo system will be Class II server-based games requiring peer-to-peer competition in a single game of bingo with a common ball draw.

Specifically, you have requested us to opine whether: (1) the VPNAPS should be classified as a "technologic aid" to Class II games pursuant to the requirements contained in the Indian Gaming Regulatory Act ("IGRA, 25 U.S.C. §§2701-2721); (2) the federal law commonly known as the "Johnson Act" (15 U.S.C. § 1171(a)), prohibits the use of the VPNAPS in a licensed Indian gaming facility; (3) the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA", 31 U.S.C. §§5361-5367) prohibits the use of the VPNAPS in a licensed Indian gaming facility; and (4) the Federal Wire Act ("Wire Act", 18 U.S.C. §1804) prohibits the use of the VPNAPS in a licensed Indian gaming facility.

I. Summary Opinion

Based upon our professional education and experience with Indian gaming law matters, and our understanding of the play of the server-based bingo games using the VPNAPS as described herein, it is our opinion that: (1) the VPNAPS should be deemed a "technologic aid" to Class II games pursuant to the standards established under IGRA; (2) the Johnson Act does not prohibit the use of the VPNAPS in a licensed Indian gaming facility; (3) UIGEA does not prohibit the use of the VPNAPS in a licensed Indian gaming facility; and (4) the Wire Act does not prohibit the use of the VPNAPS in a licensed Indian gaming facility. Accordingly, while VPN Aided Class II Gaming (i.e. server-based bingo games using the VPNAPS) will be subject to regulation by the Indian tribe operating the tribal gaming operation using the system to conduct gaming on their Indian lands, and oversight by the National Indian Gaming Commission ("NIGC"), such gaming is not unlawful or otherwise subject to enforcement action under federal law, nor would such gaming require a Tribal–State Compact in order to be conducted under IGRA.

Although the legal conclusions to which we have opined herein are, in our view, consistent with applicable law, and the best-reasoned and most logically-applied rules of law, there can be no guarantee as to any conclusions to be made, and possible actions taken in furtherance of those conclusions, by the NIGC, the U.S. Department of Justice ("DOJ"), any courts having jurisdiction over the play of Class II games and the VPNAPS, or other governmental agencies who may claim regulatory authority over Class II games and the VPNAPS.

II. Legal Opinion Accord Statement

This opinion memorandum is being rendered solely to Great Luck, LLC at your request and may only be relied upon by Great Luck, LLC in connection with evaluating server-based bingo games played on a tribe's sovereign Indian lands using the VPNAPS as specifically described herein. This opinion memorandum is governed by and shall be interpreted in accordance with the Legal Opinion Accord of the ABA Section of Business Law (1991). As a consequence, it is subject to a number of qualifications, exceptions, definitions, limitations on coverage and other limitations, as more particularly described in the Accord, and this opinion memorandum should be read in conjunction therewith.

This opinion memorandum is limited to questions of law and legal conclusions. For purposes of this opinion memorandum, we are assuming that the facts as described below in section III are true and correct. In this opinion memorandum we make certain reasonable conclusions as to possible regulatory agency or judicial outcomes. While we believe this opinion memorandum contains informed judgments as to likely future outcomes, there can be no guarantee as to any conclusions to be made, or possible actions taken in furtherance of those conclusions, by any regulatory agencies or courts having jurisdiction over the matters discussed herein.

III. Description of VPN Aided Class II Gaming

VPN Aided Class II Gaming and its use of the VPNAPS as a technological aid to the play of Class II server-based bingo games is described in a document entitled "Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System" dated June 24, 2014, which we have attached hereto as **Exhibit 1** and incorporate by reference herein. The descriptive material provided to us regarding the characteristics and method-of-play for VPN Aided Class II Gaming using the VPNAPS is foundational to our opinion. Our opinion does not apply if the VPN Aided Class II Gaming using the VPNAPS is modified with additional features or if the VPN Aided Class II Gaming using the VPNAPS is operated in a manner materially different from the manner described in this opinion. In addition, we understand that an independent compliance testing lab will certify the VPNAPS's compliance with the technical and other standards of 25 CFR Parts 543 and 547 before the VPNAPS is placed into operation at any Indian gaming facility, a representation upon which we expressly rely in making our opinions herein.

In summary, we understand that VPN Aided Class II Gaming using the VPNAPS will operate as follows.

1. The VPN Aided Class II Gaming will offer only Class II server-based (electronic) bingo games using a game server located within a tribally licensed Indian gaming facility on the host tribe's Indian lands. The bingo games will be classified as "Class II" games under IGRA by the tribal gaming regulatory agency before being offered for play using the VPNAPS. Moreover, the VPNAPS itself will be verified and certified under the tribe's gaming regulations and the technical and other standards of 25 CFR Parts 543 and 547 by a qualified, independent compliance testing lab.

2. The tribal gaming enterprise will conduct its VPN Aided Class II Gaming using the VPNAPS, a licensed, proprietary technology platform – comprised of multiple software processes and hardware components that work together to offer access to Class II server-based bingo games via a secure and restricted access virtual private network ("VPN") connection through any web browser enabled device – that is designed and engineered to maintain legal compliance with all applicable laws and regulations. The collection of "technologic aids" contained within the VPNAPS will allow the gaming system to function as a series of linked "electronic" Class II gaming devices at the tribal gaming facility located on the tribe's Indian lands without changing the essential game characteristics or statutory criteria required under IGRA for the play of a Class II bingo game.

3. The games to be conducted using the VPNAPS will use the traditional bingo game format. Game play, however, is achieved via "proxy play" – thus ensuring that all actual game play is taking place within the sovereign Indian lands of the tribe. In this respect, real time live bingo game action is played only by the "proxy" that represents an individual who has used a web-browser enabled device to access the tribe's gaming facility and its servers (each located

on the tribe's Indian lands) via the VPNAPS; no live bingo game action is ever performed or viewed by the user of the web-browser enabled device.

4. Once an individual is approved as an "Account Holder" (i.e. an individual at least twenty-one (21) years of age who has used the VPNAPS virtual "registration booth" to receive consent to (1) enter the tribe's Indian lands and (2) establish an account with the tribal gaming enterprise), system components of the VPNAPS allow Account Holders to access a "VPN gateway" connecting them to a virtual "proxy engagement station" – to hire a proxy to conduct the bingo game play on their behalf. The Account Holder engages their proxy via a request form that is the legal contract through which the proxy relationship is established.

5. A tribal gaming employee (or their designee) monitoring the proxy functions of the VPNAPS acts as the legally designated agent of the Account Holder, and, assisted by the technologic aid of proxy software elements in the VPNAPS (including an auto-daub feature), conducts proxy play of the bingo games on the Account Holder's behalf. An Account Holder's proxy commences play of the game on the VPNAPS by requesting from the game action server component of the VPNAPS the purchase of one or more digital bingo cards in a common game of bingo with a set denomination (i.e. penny, $.05, $.10, $.25, $.50 or $1.00 game).

6. At all times the games played using the VPNAPS require peer-to-peer competition between at least five (5) proxy participants in the game of bingo which is accomplished through a linked network contained within the VPNAPS. There is a common bingo ball draw for all proxy participants included in each bingo game. Components of the VPNAPS assist the Account Holder's proxy in playing the game of bingo by providing a visual representation of the digital bingo card, displaying the balls drawn, daubing or covering the corresponding numbers on the digital bingo card when matched with ball numbers as they are drawn, and presenting any prizes won through the play of the bingo game for later display to the Account Holder.

7. Game play results are revealed on a time-delayed basis to the Account Holder, and an Account Holder can select the theme for watching the replay display of the game played by their proxy on their behalf.

8. The VPN gateway link used by Account Holders to establish their accounts with the tribal gaming enterprise and to connect with their proxy agents regarding their proxy service relationship will be assigned a "special use" Internet protocol address by the Internet Assigned Numbers Authority and uses a form of communication that utilizes secured and restricted access connections (i.e. via software and a server that authenticates users, encrypts data, and manages sessions with users) over connectivity infrastructure to create point-to-point connections segregated and isolated from the publicly accessible Internet network (also known as the World Wide Web), such as to constitute a closed, proprietary communication network.

9. This level of isolation is accomplished by using various technologies that not only establish the "tunnel" for the information passed between the Account Holders and their proxy agents and the tribal gaming enterprise, but also how the information is transported. These include: Firewall(s), Internet Protocol Security, Password Authentication, and Advanced Encryption.

10. The secure VPN used with the VPNAPS meets the level of isolation necessary to be deemed a "closed, proprietary communication network," as demonstrated by (1) its use of an encrypted HTTPS secure connection to the tribal gaming operation using a proprietary communications protocol, and (2) the fact that no component of the VPNAPS used in connection with the VPN Aided Class II Gaming will function without a physical and logical connection to the network.

11. Other than the VPN communication link between the Account Holders and their proxy agents and the tribal gaming enterprise, all other components of the VPNAPS are physically located on the tribe's Indian lands, including the computer hardware and software associated with the operation of the VPN Aided Class II Gaming, the accounts of the Account Holders, the administrative personnel and records, and the servers and other technological components that assist the proxy participants to play the bingo games on behalf of the Account Holders.

12. The initial registration process for accessing the tribal gaming enterprise and its VPN Aided Class II Gaming gathers basic identification information. As the individual is allowed entry into the secure VPN network connection of the VPNAPS, additional information will be required for consumer protection: (a) further identification information; (b) age (21-years or older) and location verifications; (c) affirmations of privacy policy and other legal and regulatory requirements, along with other disclosures and affirmations; (d) payment and settlement information and authorizations; and (e) engagement of their proxy, the legally designated agent of an Account Holder, to take specific actions on their behalf.

13. In order to engage a proxy to participate in bingo games on their behalf, an individual must first become a registered account holder and fund an account with the tribal gaming enterprise. An Account Holder can fund their account by several different means, including direct cash deposits, mailed checks or money orders, wire transfers, ACH transfers, or debits from Visa or MasterCard debits or credit cards made using features of the VPNAPS.

14. Once their account is established, Account Holders can then submit a request form to instruct their proxy to purchase (in U.S. currency) bingo cards to be played on their behalf in order to be eligible to win several different forms of cash prizes. If, and only if, the request form is accepted by the tribal gaming enterprise, a proxy participant will be allowed to proceed to purchase bingo cards on the Account Holder's behalf. Bingo cards for bingo games will be sold in denominations of Penny, $0.05, $0.10, $0.25; $0.50; and $1.00. There will be no limit to the number of cards available for purchase for each bingo game.

15. The VPNAPS will comply with the Part 547 technical standards for the use of "technologic aids" in the play of Class II games. The primary collection of components which serve as "technological aids" as part of the play of Class II games using the VPNAPS consist of the following:

(a) The electronic hardware and software components used to make a "video" or "digital" representation of the Class II game on the Class II gaming system.

(b) The hardware and software components used to make the VPN communication link between the tribal gaming enterprise's servers located on the tribe's Indian lands and an Account Holder's web-browser enabled device.

(c) The hardware and software components for the "proxy function" elements of the VPNAPS to allow proxy play of the bingo game by the Account Holder's legally designated agent on behalf of the Account Holder.

16. In summary, this collection of "technological aids" will allow the VPNAPS to function as follows: (a) the electronic hardware and software components will permit a video or digital representation of the Class II game play and results to be displayed in real time to proxy participants, as if the proxy participants are playing an "electronic" Class II gaming device at the tribal gaming facility; (b) the VPN hardware & software components will permit a remote communications channel between each Account Holder and their legally designated proxy located on Indian lands, who will receive instructions from the Account Holder regarding play of bingo games on the VPNAPS; and (c) the "proxy function" element of the VPNAPS, monitored by the tribal gaming employee designated for the Account Holder, will allow the Account Holder's proxy to play the bingo game in real time on behalf of the Account Holder and reveal and report on a time delayed basis to the Account Holder the results of the games previously played on their behalf.

17. We understand that before any VPN Aided Class II Gaming using the VPNAPS will be offered for real money play, the tribe, in its role as the primary regulator of Class II gaming under IGRA, will exercise its sovereign authority by adopting several legislative and regulatory measures that will be applicable to the VPN Aided Class II Gaming, including:

(a) A "tribal transaction or dealings ordinance" which will provide that it is the public policy and substantive law of the tribe that:

(1) Any consumer or commercial transactions or dealings involving the tribe, or its instrumentalities, political subdivisions, agencies and wholly-owned tribally-chartered companies, including any tribal gaming enterprise conducting Class II gaming (as defined by IGRA), with any persons wherever located shall be conclusively

deemed to be (i) entered into, formed and made on the tribe's Indian lands, (ii) solely governed by, and to be construed, interpreted and enforced in accordance with, the substantive laws of the tribe, without regard to its conflict of laws rules, and (iii) subject to the adjudicatory jurisdiction of the tribe; and

(2) The situs and place of performance of any consumer or commercial transactions or dealings, or any written or oral contract or agreement, including agreements made by course of dealings or by any patron's wager placement or game participation with any tribal gaming enterprise conducting Class II gaming, reflecting transactions or dealings described in paragraph (1) above shall be conclusively deemed to be on the tribe's Indian lands, to be (i) solely governed by, and to be construed, interpreted and enforced in accordance with, the substantive laws of the tribe, without regard to its conflict of laws rules, and (ii) subject to the adjudicatory jurisdiction of the tribe.

(b) A tribal gaming regulatory agency regulation which (1) requires that any VPN Aided Class II Gaming operated by the tribal gaming enterprise shall be conducted using servers and computer equipment situated within the tribe's Indian lands, and (2) specifically declares that such VPN Aided Class II Gaming shall be deemed to take place where the tribal gaming enterprise servers are located on the Indian lands, regardless of a player's physical location.

(c) A tribal gaming regulatory agency regulation which governs the operation of VPN Aided Class II Gaming and provides, among other things, that:

(1) "Account Holder" under the regulation means an individual at least twenty-one (21) years of age who has used the VPNAPS to establish an account to become a properly registered account holder with the tribal gaming enterprise.

(2) "Account" under the regulation means an electronic ledger operated and maintained by the tribal gaming enterprise wherein information relative to VPN Aided Class II Gaming is recorded on behalf of an Account Holder.

(3) An individual must register as an Account Holder using the VPNAPS via its "Patron Registration Site" in order to access the VPN Aided Class II Gaming either remotely or in person.

(4) "Patron Registration Site" under the regulation means the patron-facing interface of the VPNAPS, which, by virtue of the design of the VPNAPS, individuals must first access when using the VPNAPS.

(5) An individual's access to VPN Aided Class II Gaming via the VPNAPS shall be denied or disabled when the individual is physically located in a state or foreign jurisdiction from which access to the Patron Registration Site or VPN Aided Class II Gaming has been restricted or limited, either as required by the tribal gaming regulatory agency or determined by the tribal gaming enterprise.

(6) Before registering as an Account Holder, the individual must affirm that by establishing an account with the tribal gaming enterprise the individual consents to the exclusive regulatory and adjudicatory jurisdiction of the tribe, acknowledges that the individual is authorizing proxy play of Class II bingo games on their behalf and that the VPN Aided Class II Gaming is conducted on the tribe's sovereign Indian lands, and agrees that any disputes between the individual and the tribal gaming enterprise concerning VPN Aided Class II Gaming shall be resolved exclusively pursuant to procedures established by the tribal gaming enterprise consistent with regulations of the tribal gaming regulatory agency.

(7) Account Holders are permitted to fund deposits into their Accounts, among other means, via (i) cash deposits made directly with the tribal gaming enterprise, (ii) personal checks, cashier's checks, wire transfer and money order deposits made directly or mailed to the tribal gaming operation; (iii) debits from an Account Holder's Visa or MasterCard debit card or credit card; and (iv) transfers through the automated clearinghouse or from another mechanism designed to facilitate electronic commerce transactions, or other means approved by the tribal gaming enterprise.

(8) A tribal gaming enterprise employee (or their designee) monitoring the proxy functions of the VPNAPS shall act as the legally designated agent of the Account Holder and, assisted by the technologic aid of proxy software elements contained in the VPNAPS, shall conduct proxy play of Class II bingo games on the Account Holder's behalf.

(9) There is no requirement for the proxy agent playing Class II bingo games on the Account Holder's behalf to manually declare a "bingo" upon matching the numbers drawn with the pre-designated game winning pattern on a purchased bingo card in order to collect the game prize; use of technologic aids such as an auto-daub feature is expressly permitted to assist the proxy agent playing Class II bingo games on the Account Holder's behalf in determining whether a card held has a pre-designated pattern matching the numbers drawn for the Class II bingo game.

(10) "VPN" under the regulation means a virtual private network which (a) has been assigned a "special use" Internet protocol address in the range from 10.0.0.0-10.255.255.255, 172.16.0.0-172.31.255.255, and 192.168.0.0-192.168.255.255 by the Internet Assigned Numbers Authority, and (b) uses a form of communication that utilizes secured and restricted access connections (i.e. via software and a server that authenticates users, encrypts data, and manages sessions with users) over connectivity infrastructure to create point-to-point connections segregated and isolated from the publicly accessible Internet network (also known as the World Wide Web), such as to constitute a closed, proprietary communication network.

(11) "VPN Aided Class II Gaming" under the regulation means server-based electronic bingo games offered by the Gaming Enterprise to be played on the Tribe's sovereign Indian lands using a Class II Gaming System, known as the VPNAPS, containing several proprietary technologic aids, including a component that facilitates access through a secure virtual private network connection between Account Holders and their proxy agents located on the Tribe's Indian lands which assists proxy play on behalf of the Account Holder.

(12) "VPNAPS" under the regulation means the Class II Gaming System known as the "Virtual Private Network Assisted Play System", a licensed, proprietary technology platform comprised of multiple software processes and hardware components that work together to offer Class II server-based electronic bingo games via a secure and restricted access VPN connection accessed through any web browser enabled device; including the collective hardware, software, VPN, proprietary hardware and software specifically designed or modified for, and intended for use by the tribal gaming enterprise, to conduct VPN Aided Class II Gaming within the boundaries of the tribe's Indian lands.

(13) "Class II Gaming System" under the regulation means a "Class II gaming system" as defined in 25 CFR §547.2; including any components that facilitate access to the system or communication between Account Holders, their proxy agents and the tribal gaming enterprise.

(14) Before the VPNAPS is placed into operation, the VPNAPS is required to be tested and verified by an independent compliance lab in accordance with such standards as are accepted by the tribal gaming enterprise.

(d) A tribal gaming regulatory agency regulation which establishes procedures and requirements for approval of Class II gaming systems and provides, among other things, that:

(1) "Account Holder" under the regulation means an individual at least twenty-one (21) years of age who has used a Class II Gaming System to establish an account to become a properly registered account holder with the tribal gaming enterprise.

(2) "Class II Gaming System" under the regulation means a "Class II gaming system" as defined in 25 CFR §547.2; including any components that facilitate access to the system or communication between Account Holders, their proxy agents and the tribal gaming enterprise.

(3) The tribal gaming enterprise is permitted to conduct Class II gaming activities, including bingo games, using Technologic Aids.

(4) "Technologic Aid" under the regulation means electronic, computer, or other technologic equipment used in connection with a game of bingo that: (a) assists Account Holders or the playing of a game; (b) is not an Electronic or Electromechanical Facsimile; and (c) is operated in accordance with applicable federal communications law; including, but is not limited to, electronic, computer, or other technologic equipment used in connection with a bingo game that: (i) broadens participation in the game; (ii) facilitates communication between and among gaming sites or Account Holders, their proxy agents and the tribal gaming enterprise; or (iii) requires Account Holders to play a game with or against other Account Holders rather than with or against a machine.

(5) Examples of Technologic Aids include, but are not limited to, auto-daub readers or other card cover assist features, proxy play software programs, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations and electronic cards.

(6) "Electronic or Electromechanical Facsimile" under the regulation 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 a Class II game such as bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

(7) The "classification determination" process and criteria therefor established under the regulation for Class II bingo games using gaming systems shall be followed by the tribal gaming regulatory agency.

(8) A game played using the Class II Gaming System will be determined to be bingo if the game is played consistent with the standards for bingo required by the regulation, and the fundamental aspects or characteristics of the game are preserved, unaltered by the game's electronic format.

(9) The tribal gaming regulatory agency has determined that bingo is at its core essentially a peer-to-peer number and card pattern matching game, and that the following are the fundamental aspects or characteristics of bingo to be played consistent with the standards required by the regulation:

(a) The game is played for prizes, including monetary prizes:

(i) with cards bearing numbers;
(ii) in which card holders match (i.e., cover) the numbers contained on their cards when objects with similar numbers are drawn or electronically determined; and
(iii) the game is won by the first person holding a card containing a match of the previously designated game-ending pattern;

(b) The Class II Gaming System mechanism for drawing or electronically determining the objects to be used for matching pre-designated patterns on a card must meet applicable standards for ensuring randomness as set forth in the NIGC technical standards contained in 25 CFR Part 547 or as established by the tribal gaming regulatory agency;

(c) Actual prize values must be defined before a prize can be awarded, but need not be defined before the start of a game; and

(d) A game must require peer-to-peer competition between at least two (2) participants; however, those participants do not need to be physically located at the same location if the game is played using a Class II Gaming System.

(10) Account Holders may engage agents located on the Indian lands of the tribe to assist with the play of the bingo game on behalf of the Account Holders (also known as "proxy play").

(11) Account Holders may engage their proxy play agents using a Class II Gaming System containing a component that facilitates access through a secure virtual private network connection between Account Holders and their proxy agents located on the tribe's Indian lands which assists with proxy play on behalf of the Account Holder.

(12) Use of technologic aids such as auto-daub features or reader/dauber devices are expressly permitted to assist the proxy agent playing Class II bingo games on the Account Holder's behalf in determining whether a held card has a pre-designated pattern matching the numbers drawn for the Class II bingo game.

(13) There is no requirement for the proxy agent playing the bingo game on the Account Holder's behalf to manually declare a "bingo" upon matching the numbers drawn with the pre-designated game-ending pattern on a card in order to collect the game-ending prize award;

(14) The tribal gaming regulatory agency must issue a written classification determination for the gaming system before any games are offered for play using the gaming system.

(15) An independent compliance testing lab must validate the gaming system's compliance with, among other things, the requirements of 25 CFR Part 547.

18. We understand that in addition to adopting the above legislative and regulatory measures the tribe will, as mentioned above, also exercise its primary regulatory authority over Class II gaming conducted on Indian lands by having its tribal gaming regulatory agency make a written determination, before any VPN Aided Class II Gaming using the VPNAPS will be offered for real money play, that (a) the bingo games played using the VPNAPS are to be classified as "Class II" games under IGRA, and (b) the VPNAPS is a Class II gaming system that meets the standards and requirement of the tribe's gaming regulations and the technical and other standards of 25 CFR Parts 543 and 547.

IV. Opinion & Legal Analysis

Based upon the foregoing facts, it is our professional opinion that a tribal gaming operation is legally permitted under existing applicable federal law and the tribe's inherent sovereign authority to offer VPN Aided Class II Gaming using the VPNAPS for the following reasons:

(1) The VPN Aided Class II Gaming will be offered pursuant to the tribe's inherent sovereign authority;
(2) IGRA expressly permits Class II gaming conducted by a tribe;
(3) IGRA expressly permits Class II gaming using "technologic aids" (i.e. electronic server-based bingo terminals and Class II gaming systems);
(4) The Class II gaming system components comprising the VPNAPS used for the VPN Aided Class II Gaming are technologic aids to Class II gaming permitted under IGRA;
(5) The proxy play component of the VPNAPS used to conduct the VPN Aided Class II Gaming means the gaming is conducted on Indian lands;
(6) There is no requirement under IGRA for Account Holders to be physically present on Indian lands at the time they communicate via a secure VPN connection directly with their proxy agent located on Indian lands regarding their service relationship;
(7) IGRA completely preempts state regulation of Class II gaming conducted by a tribe on Indian lands; and
(8) Indian gaming using technologic aids like the components comprising the VPNAPS used for the VPN Aided Class II Gaming is not generally prohibited by other federal law.

The foregoing legal conclusions reflect our reasoned legal judgment based upon, and supported by, prevailing case law, IGRA's statutory provisions and legislative history, and NIGC regulations, as the following legal analysis explains in more detail.

1. The inherent sovereign authority of tribes to regulate tribal gaming activities

Any analysis of the breadth of a tribe's inherent sovereign authority over its tribal gaming activities must begin with the recognition that Indian tribes are independent sovereign nations pre-existing the United States and its Constitution.

> The history of tribal self-government forms the basis for the exercise of modern powers. Indian tribes consistently have been recognized, first by European nations and later by the United States, as "distinct, independent political communities qualified to exercise powers of self-government, not by any delegation of powers, but rather by reason of their original tribal sovereignty.

See Cohen's Indian Law Handbook, 2012 ed. (Lexis Nexis)(hereinafter referred to as "Cohen's Indian Law Handbook"), § 4.01[1][a], at p. 207, citing Worcester v. Georgia, 31 U.S. 515, 559 (1832) and United States v. Wheeler, 435 U.S. 313, 323-324 (1978); see also McClanahan v. Arizona Tax Commission, 411 U.S. 164, 172-173 (1973)("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States . . . thus far not brought under the laws of the Union or of the State within whose limits they reside"); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985)("[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others' . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union)(quoting from The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867))(emphasis added).

This historically rooted doctrine of tribal sovereignty is the primary legal and political foundation of federal Indian law and Indian gaming. As one leading Indian gaming commentator has stated:

> Native American tribes now have a special status outside as well as within the American federal system . . . In essence, the modern legal doctrine means the United States recognizes tribes as independent sovereign nations, and their location within the boundaries of a state does not subject them to the application of state law, yet they are subject to Congress's asserted plenary power . . . Tribes therefore have a unique semi-sovereign status under federal law, and accordingly may be regulated by Congress.

Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming Law and Policy, Carolina Academic Press (2006) at p. 11 (hereinafter "Indian Gaming Law and Policy").

Pursuant to their inherent sovereign authority, Indian tribes and their members have for centuries engaged in games involving wagering and other gambling-type activities (i.e. games of

chance), conducting these activities according to tribal rules. Id. at pp. 17-19. Traditional tribal gaming activities conducted by tribal communities were considered a part of their social and cultural heritage. Indeed, Congress has expressly recognized the historical connection between tribal sovereignty and tribal gaming activities. See 25 U.S.C. §2703(6)(Class I gaming, which is within the "exclusive jurisdiction" of Indian tribes and not subject to federal limitations under IGRA, includes "traditional forms of Indian gaming").

Moreover, the inherent sovereign authority of tribes to regulate their tribal gaming activities was specifically upheld by the U.S. Supreme Court's seminal decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In Cabazon, the Court held that tribes had the right to operate gambling facilities independent of state regulation, reaffirming that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." Id. at 207. In making the determination that state regulation of tribal gaming activities was preempted by operation of federal law, the Court "proceed[ed] in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." Id. at 216.

Thus, tribal governments' authority over their tribal gaming activities stems from their status as pre-constitutional sovereign nations, not from any grant of gaming regulatory authority to tribes by Congress through IGRA or any other action. See Stephen L. Pevar, The Rights of Indians and Tribes, Oxford University Press, 4th Edition (2012) at p. 276. In response to Cabazon, however, Congress enacted IGRA, using its plenary power over Indian affairs to create a set of limited restrictions on tribes' sovereign rights over their tribal gaming activities. See Indian Gaming Law and Policy at p. 12; also generally Steven Andrew Light and Kathryn R.L. Rand, Indian Gaming and Tribal Sovereignty--The Casino Compromise, University of Kansas Press (2005)(describing in detail how a tribe's right to conduct and regulate tribal gaming activities is an inherent tribal right which has been compromised by IGRA). But even IGRA's "compromise" of tribal sovereignty authority over tribal gaming activities is limited in nature, as reflected by Congress's finding that:

> Indian tribes have the ***exclusive right to regulate gaming activity*** on Indian lands if the gaming activity is not ***specifically*** prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

See 25 U.S.C. 2701(5)(emphasis added).

The limited nature of IGRA's "compromise" of tribal sovereignty authority over tribal gaming activities is expressly stated in the statute's plain text:

> (d) Regulatory authority under tribal law
> Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's

> jurisdiction ***if such regulation is not inconsistent*** with this chapter or any rules or regulations adopted by the Commission.

See 25 U.S.C. §2713(d)(emphasis added).

Consistent with its retention of regulatory authority over tribal gaming activities as provided by IGRA, the tribe will adopt a number of legislative and regulatory measures that will be applicable to the VPN Aided Class II Gaming and take certain regulatory actions in connection therewith, as described above in Section III – none of which are "inconsistent" with IGRA's *unambiguous* provisions or the NIGC's regulations and pronouncements concerning Class II gaming permitted under IGRA, as explained in more detail below in Subsections IV2B-E below.

Accordingly, in view of tribes' historic immunity from state control over tribal gaming activities, the VPN Aided Class II Gaming will be offered pursuant to the tribe's inherent sovereign authority – and is lawful unless otherwise expressly prohibited by applicable federal law (which, as explained below, does not prohibit such gaming by the tribe).

2. The VPN Aided Class II Gaming using the VPNAPS is permitted under IGRA

By enacting IGRA, Congress devised a "comprehensive regulatory structure" to govern gaming on "Indian lands" (as defined by IGRA). See, e.g., Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 543–48 (8th Cir.1996). To determine whether IGRA may be properly interpreted to prohibit the VPN Aided Class II Gaming using the VPNAPS requires an analysis of the act's statutory text, structure and legislative history, and consideration of prevailing case law regarding IGRA.

A. Indian law canons of construction.

The canons of construction for statutes intended for the benefit of American Indians and tribes are unique and reflect the special relationship between Indians/tribes and the federal government.

> The theory and practice of interpretation in federal Indian law differs from that of other fields of law. The Supreme Court has stated: "the standard principles of statutory interpretation do not have their usual force in cases involving Indian law." The basic Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians; and all ambiguities are to be resolved in favor of the Indians.

Cohen's Handbook of Federal Indian Law, §2.02[1], at p. 113 (emphasis added)(citing, Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985), additional citations omitted). The principle of

Indian law jurisprudence that demands any ambiguity be liberally interpreted in favor of the Indians has been expressly applied to federal statutes with the same force applied to interpretation of treaties. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992)([w]hen we are faced with these two possible constructions [of a statute], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: '[S]tatutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit'")(quoting Montana, 471 U.S. at 767-68); see also Williams v. Babbitt, 15 F.3d 657, 660 (9th Cir. 1997).

Nowhere are Indian law canons of construction favoring tribes more appropriate, or more necessary, than in actions between tribes and states. Federal courts have readily recognized their duty to protect tribes against states because "[Indians] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemy." United States v. Kagama, 118 U.S. 375, 384 (1886). The basic principle of the judicial branch having a special duty to protect tribes by liberally interpreting Indian law in favor of Indians against state incursions on Indian sovereignty has been upheld recently by the federal courts in Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999), 124 F.3d 904 (8th Cir. 1997), 853 F. Supp. 1118 (D. Minn. 1994).

It is clear that IGRA was drafted for the benefit of the tribe and its members. See 25 U.S.C. §2702(1) (First purpose of IGRA is to establish statutory framework for Indian gaming "as a means of promoting ***tribal*** economic development, self-sufficiency and strong ***tribal*** governments")(emphasis added). Accordingly, in the event that there are two possible constructions as to the effect of IGRA (i.e. whether the tribe's VPN Aided Class II Gaming is prohibited by IGRA), the statute is to be "construed liberally in favor" of tribal interests and to the tribe's benefit.

These Indian law canons of construction have particular relevance when interpreting IGRA to identify the parameters of Indian regulatory authority thereunder. As the Ninth Circuit noted in Rincon Band of Luiseno Mission Indians of the Rincon Reservation v. Schwazenegger, 602 F.3d 1019 (9th Cir. 2010):

> Mindful of this ignominious legacy [of state governments' antipathy toward tribal interests], Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states. *See* S.Rep. No. 100-446, at 33 (1988)(statement of Sen. John McCain), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3103; 134 Cong. Rec. at S12654 (statement of Sen. Evans). In passing IGRA, Congress assured tribes that the statute would always be construed in their best interests. *See, e.g.,* S. Rep. No. 100-446, at 13-14, *as reprinted in* 1988 U.S.C.C.A.N. at 3083–84.

Id. at p. 1027 (emphasis added); see also S. Rep. No. 446, 100th Cong. 2d Sess., p. 9, reprinted in 1988 U.S. Code Cong. & Admin. News 3071, p. 12 (1988)(hereinafter "S. Rep. No. 100-446 (1988)")("The Committee . . . trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes").

B. IGRA expressly permits Class II gaming conducted by a tribe.

IGRA expressly states that any "class II gaming" on Indian lands "shall ***continue*** to be within the jurisdiction of the Indian tribes," subject to IGRA's provisions. See 25 U.S.C. §2710(a)(2)(emphasis added). Further, IGRA expressly states that in connection with "regulation of class II gaming activity," an Indian tribe may engage in and regulate "class II gaming" on the tribe's Indian lands if "such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity."[1] See 25 U.S.C. §2710(b)(1).

IGRA defines "class II gaming" in relevant part to include:

> (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, . . .

See 25 U.S.C. §2703(7)(A)(emphasis added).[2]

NIGC regulations define "class II gaming" very similar to the statutory definition under IGRA:

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[1] In addition, to conduct and regulate "class II gaming" the tribe must adopt a gaming ordinance and have it approved by the NIGC Chairman, and such gaming must not be "otherwise specifically prohibited" on Indian lands by federal law. See 25 U.S.C. §2710(b)(1)(A) & (B).

[2] Games that are not within the definition of Class I or Class II gaming are Class III games, see 25 U.S.C. §2703(8), including:

> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

See 25 U.S.C. §2703(7)(B).

(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 cards.

(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; . . .

See 25 C.F.R. §502.3.

NIGC regulations also define "other games similar to bingo" for purposes of Class II gaming.

> Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, ***provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.***

See 25 C.F.R. §502.9 (emphasis added).

The NIGC has advised that:

> [I]f a game contains the fundamental characteristics of a class II game and is played using an electronic or other technological 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.

See September 23, 2003 NIGC Advisory Letter re: Reel Time Bingo, p. 5. Thus, when it formerly issued a game classification opinion for any "electronic" bingo or pull-tab based game, the NIGC evaluated the elements of the game and determined whether the game was 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.

For example, the NIGC did so by first looking to see if the game play met the statutory criteria for bingo. In the NIGC's view, the three specific criteria necessary to meet the definition of bingo contained in IGRA are: (1) cards bearing numbers, (2) holder of the card covers when objects are drawn, and (3) game won by first person covering previously designated pattern. See September 23, 2003 NIGC Advisory Letter re: Reel Time Bingo, pp. 5-9; September 26, 2003 NIGC Advisory Letter re: Mystery Bingo, pp. 11-18; April 4, 2005 NIGC Advisory Letter re: Nova Gaming Bingo System, pp. 9-13; also 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3.

Likewise, several circuit court decisions have rejected a number of assertions by the DOJ for a narrow reading of what constitutes a Class II game. See U.S. v. 103 Electronic Gaming Devices, 223 F.3d 1091 (9th Cir. 2000); U.S. v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000)(collectively referred to herein as the "MegaMania Bingo Cases"). A key contention of the DOJ specifically rejected by these circuit court decisions was that the courts must look beyond the statutory criteria for bingo to determine whether a game constitutes "bingo" under IGRA.

We have not been provided any specific description of the game characteristics of the type of the games to be played using the VPNAPS other than to be informed that the bingo games will be classified as "Class II" games under IGRA by the tribal gaming regulatory agency before being offered for play using the VPNAPS. For purposes of this opinion, we rely on this representation and assume any game played using the VPNAPS "contains the fundamental characteristics of a class II game" that uses an "electronic aid" to the play of the game so that the game itself meets the statutory criteria for a Class II game.[3]

C. IGRA expressly permits Class II gaming using "technologic" aids.

Under IGRA, Class II bingo-based games conducted by tribes are not limited to just "traditional" church-hall paper and dauber bingo games. Rather, IGRA expressly permits Class II bingo-based games to utilize "electronic, computer or other technologic aids" as part of the players' participation in the game. See 25 U.S.C. §2703(7)(A); also, U.S. v. 103 Electronic Gaming Devices, 223 F.3d at 1093 ("Under IGRA, however, bingo and electronic aids thereto are generally permissible in Indian country"). Such "technologic aids" are distinguished from "slot machines" (i.e. electronic or electromechanical facsimile of any game of chance) that constitute "class III gaming" under IGRA.

In connection with "bingo" based electronic games, each of the Ninth and Tenth Circuits of the U. S. Court of Appeals' decisions in the MegaMania Bingo Cases are instructive as to the nature of technologic aids for Class II gaming under IGRA. Each decision concerned a game called "MegaMania", an electronic bingo game which links players in different locations who compete against one another in a game of bingo. Both of these Circuit Courts found MegaMania to be a Class II game played with a "technological aid", and are the only reported appellate court level decisions to date to have undertaken a classification analysis for "bingo" based electronic games. At the same time the MegaMania Cases were being decided in 2000, the D.C. Circuit also held that the "Lucky Tab II" electronic pull-tabs game was Class II gaming permitted under IGRA. See Diamond Game Enterprises, Inc. v. Reno, 231 F.3d 365 (D.C. Cir. 2000). In declaring that the electronic pull-tabs machine at issue was a Class II "technologic aid," the court

[3] The NIGC takes the position that "each purported aid to a [Class II] game must be looked at individually to ascertain whether it is actually an aid or a Class III electronic facsimile". See December 17, 2009 NIGC Memorandum to George T. Skibine from Penny J. Coleman re: Classification of Card Games Played with Technologic Aids, at page 7.

rejected the argument that IGRA limited technologic aids to only those devices which operate to broaden player participation in order to qualify as a Class II aid. Id. at 370-371.

In 2002 the NIGC revised its original regulations in connection with the definitions associated with Class II gaming and Class III gaming. These amendments were designed to conform the NIGC regulations to the foregoing modern court decisions which interpreted what "electronic" gaming devices may properly be classified as Class II games. Many commentators and Indian gaming law practitioners believe these amendments helped clarify what constitutes permissible Class II gaming, and have the practical effect of expanding the field of Class II gaming. As explained by the NIGC:

> IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a *wholly* electronic format, ***provided that multiple players are playing with or against each other***.

67 Fed. Reg. 41166, 41171 (June 17, 2002)(second emphasis added).

NIGC regulations now define "technologic aids" as follows:

> 25 C.F.R. §502.7 Electronic, computer or other technologic aid.
>
> (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 according to 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.

In contrast, NIGC regulations define an electronic or electromechanical facsimile of any game of chance (i.e. "class III gaming" subject to IGRA's tribal-state compact requirements, see 25 U.S.C. §2703(7)(B)(ii) & §2710(d)(1(C)) as follows:

> *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 against each other rather than with or against a machine.***

See 25 C.F.R. §502.8 (emphasis added).

Two federal court appellate decisions, involving electronic "pull-tab" devices, have applied the amended version of the NIGC's regulations, and are consistent with the holdings in the MegaMania Bingo Cases; each finding that the electronic pull-tab devices constituted a permissible Class II game played with a technological aid. See United States v. Santee Sioux Tribe, 324 F.3d 607, 613-15 (8th Cir. 2003); Seneca Cayuga Tribe v. NIGC, 327 F.3d 1019, 1025 (10th Cir. 2003). Each of these cases is relevant to determining if IGRA prohibits VPN Aided Class II Gaming using the VPNAPS.

In the wake of the foregoing prevailing case law relating to Class II games with permitted "technologic aids", the NIGC issued several letters advising that "linked bingo systems" (i.e. electronic server-based bingo systems) constitute technologic aids to Class II gaming as permitted under IGRA. See, e.g., September 23, 2003 NIGC Advisory Letter re: Reel Time Bingo, pp. 8-9; September 26, 2003 NIGC Advisory Letter re: Mystery Bingo, pp. 18-19; April 4, 2005 NIGC Advisory Letter re: Nova Gaming Bingo System, pp. 13-14. Recently, given the evolution over the last decade of electronic server-based bingo systems permitted by IGRA, the NIGC promulgated specific regulations addressing standards for "Class II gaming systems." See 25 CFR Part 547, 77 Fed. Reg. 58473 (September 21, 2012). These regulations are designed to ensure the integrity of "electronic Class II games and [their technologic] aids." Id. at 58473. The regulations specifically contemplate a "class II gaming system" comprised of several components, including "technologic aids", that function together to aid the play of Class II server-based games. Id. at 58479 (Part 547.2 definition of "Class II gaming system").

More recently, the NIGC has issued other guidance relevant to determining the nature of technologic aids permitted with Class II gaming under IGRA. In June 2013 the NIGC announced its intention to apply a "reinterpretation" of a prior agency decision regarding the classification of server-based electronic bingo system games that can be played utilizing only one touch of a button (so-called "One Touch Bingo"). See 78 Fed. Reg. 37998 (June 25, 2013). In 2008 the NIGC had declared that an electronically linked bingo system which assists the player by "covering," without further action by the player, digital bingo cards when numbers are electronically determined and displayed to the player could not be classified as a Class II game

with technologic aids. In finding that such One Touch Bingo is more properly to be considered Class II gaming, the NIGC now states that permitting a device to assist the player to "cover" when the numbers are drawn is consistent with the second and third elements of IGRA's three statutory requirements for a game of bingo. Id. at 37999. This is consistent with the district court's holding in U.S. v. 103 Electronic Gambling Devices that "there is nothing in IGRA or its implementing regulations . . . that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately. The statute and the implementing regulations merely require that a player cover the numbers without specifying how they must be covered." See U.S. v. 103 Electronic Gambling Devices, No. 98-1984, 1998 WL 827586 at *6 (N.D. Cal. Nov. 23,1998).

In determining that One Touch Bingo systems do not change the "fundamental aspect of bingo" since in a linked electronic system a "player is still competing with other bingo players for a prize," the NIGC gave special "***consideration to an interpretation of bingo that embraces rather than stifles technological advancements in gaming.***" 78 Fed. Reg. at 38000 (emphasis added). In doing so, the NIGC relied on the "flexible" policy toward technology for Class II gaming announced by Congress in enacting IGRA, and the "key distinction" that "technological aids are 'readily distinguishable from the use of electronic facsimiles in which a *single* participant plays a game with or against a machine [i.e. "house-banked" games] rather than with or against other players.'" Id., quoting S. Rep. 100-446 (1988) at 3079 (emphasis added). In sum, even in linked electronic bingo systems with "auto-daub" features, the fundamental characteristics of a Class II bingo game are preserved, unaltered by the game's electronic format.

D. The Class II gaming system components comprising the VPNAPS used for the VPN Aided Class II Gaming are technologic aids to Class II gaming permitted under IGRA.

Based upon IGRA's statutory provisions, the tribe's gaming regulations, and NIGC regulations, as well as on prevailing case law, it is our view that the VPNAPS used for the VPN Aided Class II Gaming is a Class II gaming system containing "technologic aids." In this respect, like the game terminals considered by the courts in the MegaMania Bingo Cases, the components of the VPNAPS used for the VPN Aided Class II Gaming do not, either individually or collectively, constitute a device that is an "electronic facsimile."

There are several reasons supporting the conclusion that the VPNAPS (including each of its components) used for the VPN Aided Class II Gaming is merely a "technologic aid" to the play of bingo-based Class II games and therefore constitutes a Class II gaming system.[4]

(1) The Ninth Circuit has noted that Congress intended a technological aid "as a device that offers some sort of communications technology to permit broader

[4] The NIGC has also taken the position that IGRA does not prohibit the use of "technological aids" with Class II card games. See December 17, 2009 NIGC Memorandum to George T. Skibine from Penny J. Coleman re: Classification of Card Games Played with Technologic Aids, at pages 1, 4-7.

participation in the basic game being played, as when a bingo game is televised to several rooms or locations." See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542-43 (9th Cir. 1994)(emphasis in original). This is precisely what the VPNAPS does for its VPN Aided Class II Gaming.

(2) The legislative history is quite clear in stating Congress' intent that tribes be able to use modern technology to conduct Class II games, including computers.

> The Committee intends ...that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict Class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes 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.

See, S. Rep. No. 100-446 (1988) at 3079.

Employing maximum flexibility of new technology could certainly be read to allow for the use of a digital bingo card or playing card displayed in an electronic format as opposed to a paper card. Neither of the MegaMania Bingo Cases found it significant that the "MegaMania" game used a video screen rather than paper bingo cards. The NIGC regulations expressly provide that electronic cards are acceptable. They specifically state that technologic aids include "electronic cards for participants in bingo games." See, 25 C.F.R. §502.7(c) (emphasis supplied).

(3) Neither IGRA nor the NIGC regulations mandate the method by which a player covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined. The DOJ argued in the MegaMania Bingo Cases that the daub method in MegaMania was impermissible because it was not an actual daub, but only the pressing of a "daub" button. It is important to note that the DOJ's argument was rejected by both district courts involved with the MegaMania Bingo Cases, and the decisions by the circuit courts did not contradict the lower courts on this issue.

(4) The components of the gaming system for the VPN Aided Class II Gaming, neither individually nor collectively, incorporate all the fundamental characteristics of the Class II game. All work together in a method that broadens participation levels by allowing *many* players to play against one another. None of the gaming system components allow for a player to play the Class II game against the "house" (i.e. gaming unit) alone, rather than compete with other players. The gaming system used with any Class II game played as part of the

tribe's VPN Aided Class II Gaming is functionally the equivalent of the "Electronic Player Station" in "MegaMania".

> "In the present case, the district court determined the MegaMania machines act as aids to the game of bingo rather than unlawful electromechanical facsimiles. We agree. First, the MegaMania machines link up many different players, thus broadening the participation level of the traditional game of bingo. Second, because each player competes against other players to achieve a 'bingo' rather than with or against a machine or the 'house,' the machines are an aid to bingo, rather than a facsimile."

See, U.S. v. 162 MegaMania Gambling Devices, 231 F.3d at 724; also November 14, 2000 NIGC Advisory Letter re: National Indian Bingo, at p. 3, 7-9 (agents using "Reader/Dauber machines that within current technology can read and daub the largest volume of cards" is "***merely an aid to the play bingo, and does not replicate the game of bingo***")(emphasis added).

(5) The NIGC has now expressly recognized that the components of a linked electronic bingo system with an "auto-daub" feature – similar to the system components and features the VPNAPS contains – are technologic aids permitted by IGRA because the fundamental characteristics of a Class II bingo game are preserved, unaltered by the game's electronic form. Likewise, the tribe's gaming regulations specifically state that the use of technologic aids such as auto-daub features or reader/dauber devices are expressly permitted to assist with the playing of Class II bingo games on the Account Holder's behalf in determining whether a held card has a pre-designated pattern matching the numbers drawn for the Class II bingo game.

In the end, although a sophisticated "technologic advancement in gaming," the gaming system used for the VPN Aided Class II Gaming is simply a collection of "technologic aids" to the play of the game so that the game itself continues to meet the statutory criteria for a Class II game. This is evidenced by the fact that the game is always a bingo-based game played across a linked network of participants – who are competing against each other with different bingo cards against a common ball draw. At no time does the VPNAPS allow a single participant to play alone against the ball draw for the game.

E. The proxy play component of the VPNAPS used to conduct the VPN Aided Class II Gaming means the gaming is conducted on Indian lands.

(1) Use of a "proxy" play component with Class II gaming does not violate IGRA.

The NIGC has long recognized that IGRA contains "no statutory prohibition on the use of agents to play the game of bingo." See November 14, 2000 NIGC Advisory Letter re: National Indian Bingo, at 5. This issue was first addressed in July 1995, when the NIGC Chairman issued a declaration concerning "the legality of using agents to play bingo cards for players who are not physically present at an Indian bingo facility" – i.e. "proxy play." See, July 26, 1995, NIGC Chairman Declaration re: "Proxy Play", at p. 2. In his declaration, the NIGC Chairman described the "proxy play" concept as involving "the use of computer aided technology to assist the agent [located on Indian lands] or, 'proxy player,' to track the bingo cards for a number of proxy play purchasers." Id. In concluding that this type of "proxy play" complies with IGRA, the NIGC Chairman stated:

> ***The NIGC has considered the questions of whether this game is actually being played on Indian lands***. There is no statutory prohibition against the use of agents for the conduct of bingo. Accordingly, the acts of the agent, ***which occur on Indian lands***, are deemed to be acts of the principal.

Id. (emphasis added). Later, the NIGC reaffirmed this principle and again advised the Indian gaming industry that the use of agents to play bingo games for game participants who were not physically present when the gaming activity occurs was indeed permitted under IGRA. See November 14, 2000 NIGC Advisory Letter re: National Indian Bingo, at p. 3 & 5 (tribal gaming facility employees, acting as agents of purchasers not physically present on Indian lands at time of game activity, who use bingo card machines to read and daub cards do not violate IGRA because "[w]hen the agent plays the [bingo] card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player")(emphasis in original).

Accordingly, consistent with the canons of construction applicable in Indian law, under IGRA bingo game participants may engage a proxy located on Indian lands to act on their behalf, and there is nothing in IGRA or its implementing regulations that precludes the proxy from using a "technologic aid" to assist with the proxy's play on behalf of the game participant. See November 14, 2000 NIGC Advisory Letter re: National Indian Bingo, at p. 3 (agent responsibilities carried out by tribal gaming employees using "reader/dauber" machines to read and daub cards).

> (2) Unless and until the Account Holder's proxy initiates the play of the bingo game there is no participation in the Class II bingo game conducted on the VPNAPS.

As designed, the VPNAPS does not permit any bingo game play directly by the Account Holder. Rather, the system requires that a proxy participant, on behalf of the Account Holder, must initiate the play of a bingo game. The proxy participant does so, after receiving instructions from the Account Holder via the system's secure VPN connection linking into the tribe's gaming facility, by sending a request to the game server component of the VPNAPS to purchase a

specific denomination of a specified number of digital cards for a specific number of games. Other than accessing the tribe's gaming facility via the VPN connection of the VPNAPS, no game play request instructions from the Account Holder to the proxy is possible unless the Account Holder first checks a box acknowledging and accepting the tribe's regulatory jurisdiction and appointing a proxy to play the game on their behalf.

Once the game server component of the VPNAPS receives the proxy participant's request to play a game, the game server will add the proxy participant to the next bingo game to start on the VPNAPS that matches the denomination requested by the proxy participant on behalf of the Account Holder. There is a waiting period while this process occurs. The proxy participant will then play the bingo game using technologic aids to assist with covering the numbers on the purchased cards as the numbers are electronically drawn. At all times the proxy functions of the VPNAPS are monitored by a tribal gaming facility employee (or their designee) who also acts as a legally designated agent of the Account Holder.

After the game play is completed by the proxy participant, the results of game are revealed and reported by the proxy participant on a time delayed basis and then can be accessed by the Account Holder; but to do so, the Account Holder must first click a "completed games" tab on the patron registration site of the VPNAPS. In this respect, no live bingo game action is ever performed or even viewed by the Account Holder. Under the "completed games" tab on the VPNAPS interface the Account Holder can watch a playback of the bingo game by clicking the "theme" icon and the playback shows a traditional 5X5 "bingo" matrix with numbers for each card and a running scoreboard of balls (numbered 1 through 75) as they were drawn.

As such, play of Class II games using the VPNAPS for the VPN Aided Class II Gaming does not commence until the proxy participant sends a request to the game server component of the VPNAPS to purchase cards for a bingo game to be played and the game server accepts the request. Since the proxy participant is located on Indian lands during the time this is happening, the bingo game is actually played on Indian lands. This conclusion is in accord with the prevailing case law, IGRA's statutory text and NIGC regulations relating to technologic aids and the proxy play permitted with Class II gaming under IGRA, as described in Subsections IV2C & IV2E(1) above. In sum, the VPNAPS allows the tribe to offer Class II electronic linked bingo gaming conducted on Indian lands using a proxy system.

The reasoning behind this is that (a) the VPNAPS used for the VPN Aided Class II Gaming is a "technologic aid" to the play of Class II gaming; and (b) the Class II games offered as part of the VPN Aided Class II Gaming are operated legally under IGRA pursuant to the NIGC's July 26, 1995 "proxy play" declaration. There are other reasons supporting this legal conclusion as well.

While IGRA requires that a tribe's "gaming activities" be conducted on Indian lands, the statute does not expressly define what this means. Several legal authorities, however, demonstrate that the VPN Aided Class II Gaming to be offered is indeed conducted on Indian

lands pursuant to IGRA and tribal law. First, support for this position is found in traditional contract principles and in case law concerning interstate lotteries. The purchase of a bingo card from a bingo game operator, or the chance in a lottery, or any other 'wagering" between parties, constitute a contract. See Black's Law Dictionary, 5th Ed. at p. 1416 (defining wager as a "contract" between two or more parties). Viewing the VPN Aided Class II Gaming from this perspective, it is clear that the contracts between the tribal gaming enterprise and its bingo game customers are formed on the reservation and will be performed on the reservation, because an offer electronically transmitted via the VPN connection is accepted, and the contract is formed, where the offeree - here the tribal gaming enterprise - accepts the offer:

> The question which has arisen time and time again before the courts has been the place at which the contract should be regarded as having been made. This has been held to be the place at which the offeree speaks the words of acceptance into the telephone transmitter. The Restatement (Second) [of Contracts] in commentary recognizes this principle of Conflict of Laws. To the extent the place of making of the contract is relevant to resolving the question of which jurisdiction's law governs the formation of the contract, it unequivocally accepts the principle that the contract is made in the place where the acceptance is spoken.

J. Perillo, Ed., 1 Corbin on Contracts § 3.25, pp. 447-48 (1993) (footnotes omitted); also 2 Williston on Contracts, §6:62 (4th ed.)("[T]he general principle applicable to this and any similar question is that the place of the contract is the place where the last act necessary to the completion of the contract was done.")[5].

Moreover, the legal conclusion that the VPN Aided Class II Gaming to be offered is conducted on Indian lands is also fully justified considering the well-recognized legal elements of "gambling." The essential elements of "gambling" are (1) value received, (2) according to chance (3) for a consideration. See Black's Law Dictionary, 5th Ed. at p. 611 (gambling "consists of a consideration, an element of chance, and a reward"); also Walter T. Champion, Jr. & I. Nelson Rose, Gaming Law in a Nutshell, Thomson Reuters (2012) at pp. 8-9 ("gambling"

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[5] Judicial treatment of lotteries has followed this course. Courts have recognized for more than 150 years that the purchase of a lottery chance occurs in the state in which the lottery operator accepts the order, *not* where the purchaser is located. The Supreme Court of Vermont relied on this principle to hold that, when a Vermont resident ordered a lottery chance by mail from Rhode Island, the sale occurred in Rhode Island:

> The defendant ordered the [lottery] tickets sent by mail, and they were so sent from Rhode Island. This was a sale and delivery in Rhode Island. The title in the tickets vested in the defendant when mailed, as much as if delivered to the defendant personally there; and the plaintiff's debt then became perfect.

Case v. Riker, 10 Vt. 482, 484 (1838). Significantly, the Vermont Supreme Court reached this conclusion even though Vermont law proscribed the sale of foreign lottery tickets in Vermont. But since the lottery tickets were bought and sold in Rhode Island, the transaction did not offend Vermont law, even though the purchaser personally never left Vermont.

consists of any activity with three elements: consideration, chance, and prize; if any one of the elements is missing, the activity is not gambling). Here, any payment for the purchase of bingo cards to be played as part of the bingo games offered by the VPN Class II Gaming is withdrawn from the Account Holder's on-reservation account. The bingo game itself is played using servers located on the Indian lands, and the determination of the winning numbers for the bingo game take place on Indian lands. The bingo game prize money is collected on the tribe's reservation and paid from the tribe's reservation. Each essential defining element of any "gaming activities" conducted via the VPN Class II Gaming using the VPNAPS takes place on the tribe's reservation, irrespective of where the Account Holder might be when transmitting his instructions to the proxy participant to make a request to the tribal gaming enterprise to participate in a bingo game on the Account Holder's behalf.

In sum, the VPN Aided Class II gaming is conducted on Indian lands in such a way that it gives a tribe access to non-Indian customers that Congress recognized are essential to promoting the economic welfare of Indian tribes. This permits the tribe to compete in a viable manner with other gaming interests, including those that have more advantageous locations for potential customers and have more economic might. Statutes passed for the benefit of Indian tribes, as IGRA undoubtedly was, must be construed in a manner most favorable to the tribes. When that construction is applied to IGRA, it is plain that the VPN Class II Gaming takes place on Indian lands in compliance with federal law. In this respect, the only interaction associated with the use of the VPNAPS for the VPN Class II Gaming that may not take place on the reservation – the Account Holder's use of an "off-reservation means of access" to electronically transmit instructions to the proxy to make a request to the tribal gaming enterprise to offer to purchase bingo cards to be played on behalf of the Account Holder – is consistent with the realities of modern communication technology; everything else takes place on the reservation. Under IGRA, that is sufficient.

Judged against a construction of IGRA that favors the interests of Indian tribes, adheres to the express terms of the statute, and is in accord with analogous case law as well as NIGC regulations and pronouncements, the foregoing facts demonstrate that the VPN Aided Class II Gaming takes place on Indian lands for purposes of IGRA.

This conclusion is also supported by other tribal, federal and state legal authorities. For instance, under the tribe's governing law, the transaction between Account Holders and the tribal gaming enterprise involving the VPN Aided Class II Gaming is expressly deemed "entered into, formed and made on the tribe's Indian lands" and the situs and place of performance of that transaction is "conclusively deemed to be on the tribe's Indian lands" and "subject to the adjudicatory jurisdiction of the tribe." This is consistent with the first "Montana exception" that recognizes tribal regulatory authority over "the activities of nonmembers who enter into consensual relationship with a tribe" through commercial dealings. See Montana v. United States, 450 U.S. 544, 565 (1981); also Plains Commence Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 329 (2008). Moreover, under Montana, it is not necessary for a nonmember to be "physically located" on the reservation in order for his activities to occur "inside the

reservation" for purposes of triggering tribal regulatory authority over the nonmember's dealings with the tribe. As one federal court has stated:

> [I]n cases involving a contract formed on a reservation in which the parties agree to tribal jurisdiction, treating nonmember's physical presence as determinative ignores the realities of our modern world that a [nonmember], through the internet or phone, can conduct business on the reservation and can affect the tribe and tribal members without physically entering the reservation.

See F.T.C. v. Payday Financial, LLC, 935 F. Supp. 2d 926, 938-940 (D.S.D. 2013)(rejecting FTC argument in enforcement action against alleged tribal payday lender that Montana exception permitting tribal authority did not apply because the "location of the nonmember's activity [i.e. applying by phone or internet to obtain loan] is dispositive."). In addition, the conclusion is also consistent with recent New Jersey legislation concerning the state's internet-based gaming initiative, which declares that any internet-based gaming conducted by its licensed Atlantic City casinos actually "occurs" in Atlantic City where the casinos' servers are located – even if the casino patron participating in the internet-based gaming is not physically located in Atlantic City.

F. There is no requirement under IGRA for Account Holders to be physically present on Indian lands when communicating via a secure VPN connection with their proxy agent located on reservation regarding their proxy service relationship.

(1) Ninth Circuit guidance on the issue.

There is no specific statutory provision under federal law which expressly prohibits Indian gaming conducted on a tribe's Indian lands using a Class II gaming system accessed through technologic aids, including a secure virtual private network connection between Account Holders and their proxy agent located on reservation that allows proxy play on behalf of the Account Holders. More directly, there is *no express and unambiguous* provision in IGRA requiring that Account Holders be physically present on Indian lands when communicating via a secure VPN connection with their proxy agent located on reservation regarding their proxy service relationship. Quite the contrary, IGRA's text, structure and legislative history, as well as the Indian law canons of construction and relevant federal case law, demonstrate that modern communication technology links (like the VPNAPS) serving as technologic aids to a tribe's Class II bingo gaming activities were fully comprehended by Congress when it enacted IGRA and are not prohibited under the statute. In this respect, any argument that an Account Holder must be physically present on the tribe's Indian lands for the game activity to be permitted under IGRA is meritless because all that IGRA actually requires is that bingo games offered by a tribe be "Class II gaming on Indian lands," and, as demonstrated above in Subsection IV2E, the VPN Aided Class II Gaming is indeed "Class II gaming on Indian lands". See 25 U.S.C. §2701(5)("Indian tribes have the exclusive right to regulate gaming activity on Indian lands"); §2710(b)(1)("An Indian tribe may engage in, or license and regulate, class II gaming on Indian

lands within such tribe's jurisdiction"); §2710(b)(4)(a tribal ordinance may regulate "class II gaming activities . . . on Indian lands").

The question whether under IGRA Account Holders are required to be physically present on a tribe's Indian lands in order to transmit to their proxy agent their intent to enter into a proxy service relationship has never been directly addressed by any court decision. Guidance on this issue, however, is found in the Ninth Circuit's decision in AT&T Corporation v. Coeur d'Alene Tribe, 295 F.3d 899 (9th Cir. 2002) which raised the issue whether IGRA requires that an Indian gaming participant be physically present on Indian lands when transmitting his offer to participate in a tribe's gaming activity conducted on its Indian lands. In that case, the Coeur d'Alene Tribe requested that AT&T furnish toll-free services for the tribe's "National Indian Lottery" which allowed persons located off-reservation (both in and outside the State of Idaho) to purchase tickets for the lottery through "the use telephone and other off-reservation means of access." Id. at p. 908. When state attorneys general warned AT&T that furnishing interstate toll-free service for the lottery would violate federal and state laws, AT&T objected to providing the services and litigation commenced. After a tribal court ruled that the lottery was legal under IGRA, AT&T filed suit in federal court seeking a determination it was not required to provide the toll-free services for the lottery.

The district court "held that the lottery was operating outside IGRA, which would otherwise preempt state law" because it determined that "IGRA requires a participant in a lottery *to be present on Indian lands* ***when*** purchasing a ticket." Id. at p. 903 (emphasis added). In vacating the district court's determination that the tribe's lottery was illegal under IGRA, the Ninth Circuit disagreed for a number of reasons with the district court's conclusion that "IGRA unambiguously requires that a purchaser of a chance in the Lottery be physically present on the reservation in order for the gaming activity to fall within IGRA's preemptive reach." Id. at p. 905. The court first noted that the lottery was to be operated under a management contract with a third party that made clear the tribe's plans with respect to telephonic sales, that the NIGC approved both the "management agreement and the Lottery plan knowing that calls would be placed from other states," and therefore the NIGC's "actions approving both the management contract and the Tribe's resolution [authorizing the lottery] indicated that the Lottery is legal until and unless the NIGC's decision is overturned." Id. at p. 906-907.

The court also noted that in enacting IGRA Congress "created a detailed regulatory structure" which, when reviewing compacts, management contacts and tribal gaming resolutions/ordinances submitted for approval under IGRA, statutorily obligates federal officials to determine whether the gaming activity authorized by those documents complies with IGRA. The Ninth Circuit found that the NIGC had indeed considered the lottery's legality as IGRA requires, referencing a letter the NIGC Chairman sent in response to an inquiry about the lottery's legality, in which the NIGC Chairman specifically stated:

> In the opinion of the NIGC, the Tribe's lottery proposal, ***which involves customers purchasing lottery tickets*** with credit cards both in person and ***by telephone from locations both inside and outside the state of Idaho***, is not prohibited by the IGRA.

Id. at p. 906-908 & 902 (emphasis added). In rejecting the argument offered by 37 state attorneys general, the DOJ and even the NIGC under a new Chairman – that the NIGC had never interpreted IGRA to allow the lottery's off-reservation features – the Ninth Court found that:

> [T]he NIGC's approval of the tribe's management contract evidences the NIGC's determination that ***IGRA permits operation of the Lottery even though it allows ticket sales via off-Reservation phone calls.***

Id. at p. 909 (emphasis added). Accordingly, the court declared that IGRA governs the tribe's lottery unless and until the NIGC's decision that such gaming activity complies with IGRA is overturned.

> (2) Any communication via a secure VPN connection between Account Holders and their proxy agent located on a reservation regarding their proxy service relationship is a step removed from any actual "gaming activity" to be conducted.

As noted above, there is no "gambling" or "gaming activity" if any one of the three essential elements is missing. Here, any communication via a secure VPN connection between Account Holders and their proxy agents located on a reservation regarding their proxy service relationship is a step removed from any actual "gaming activity" to be conducted. Unlike the direct purchase of lottery tickets by individuals via off-reservation phone calls allowed by the NIGC in connection with the Coeur d'Alene Tribe's lottery, the VPNAPS does not permit bingo game play directly by the Account Holders. Rather, bingo game play is only commenced when the proxy participant initiates play by sending a request to the game server component of the VPNAPS to purchase a specific denomination of a specified number of digital cards for a specific number of games.

The communication activity between the Account Holders and their proxy agent using the secure VPN connection component of the VPNAPS is an activity that is at most a mere forerunner or antecedent to any actual gaming activity that is to be commenced at a later time by the proxy participant. Certainly this interaction between the Account Holders and their proxy agent does not itself contain an award of a prize. For example, the Account Holders do not receive a prize award merely by communicating with their proxy agent; prize awards are only issued in connection with activity that comes later (i.e. the play of the bingo game) and are based solely upon the outcome of the bingo game play. Moreover, chance is not a part of the actual communication between the Account Holders and their proxy agent – chance only occurs later when the proxy participant has initiated a game play and receives a randomly patterned digital card that must be matched with randomly drawn numbers.

(3) Even if communication via a secure VPN connection between Account Holders and their proxy agent located on a reservation can be construed to be a "part" of any "gaming activity" to be conducted, IGRA's statutory language and legislative history contemplate that Class II game participants can use off-reservation means to access a tribe's gaming activities conducted on Indian lands.

The NIGC's decision regarding the legality of the Coeur d'Alene Tribe's lottery, which allows the purchase of tickets for the lottery through "the use telephone and other off-reservation means of access", has never been overturned. In fact, since the Ninth Circuit's decision, the NIGC has again approved the Coeur d'Alene tribal gaming ordinance which expressly permits the use of such "off-reservation means of access" to gaming activities conducted on its Indian lands. See February 4, 2010 approval by NIGC Chairman of Coeur d'Alene tribal gaming ordinance at NIGC website: www.nigc.gov/Reading_Room.aspx. And with good reason, because IGRA simply does not *unambiguously* require a lottery ticket purchaser (or Class II bingo game participant) to be physically present on the tribe's Indian lands when transmitting his offer to purchase lottery tickets (or bingo cards) in order for the game activity to be permitted under IGRA.

IGRA and its legislative history contain numerous indications that Congress specifically contemplated that some actions related to Indian gaming activities would occur off Indian lands. This is particularly true when any analysis and interpretation of IGRA is done in accordance with the proper canons of statutory construction and the statute is construed liberally in favor of Indians. For example, as noted above, IGRA is silent on the meaning of the term "gaming activities." The statute never suggests, much less states, that the purchaser of bingo cards for participation in a tribe's class II gaming activities must be physically present on the reservation. Neither purchasers nor their on-reservation accounts are mentioned in the statute. Nor does the statute contain anything resembling a requirement that every "portion" of gaming activity must take place on Indian lands. This is significant because it has never been true that tribal activities were subject to state regulation simply because one portion of the tribal activity occurred off Indian lands. Thus, in Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994), the Ninth Court was confronted with the question whether California could tax revenues from on-reservation off-track betting. The thing on which the bettors bet - the off-reservation horse race - unquestionably constituted a portion of the gaming. The Ninth Court rejected the argument that holding the race off-reservation subjected the tribe to state taxation. "It is not necessary ... that the entire value of the on-reservation activity come from within the reservation's borders [so long as] the Bands have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others." 37 F.3d at 435. Accord, In re Blue Lake Forest Products, Inc., 30 F.3d 1138, 1141 (9th Cir. 1994) (federal Indian law affording heightened protection to timber held in trust for tribes preempted state law in dispute between bank and tribe over proceeds of timber sale; resolution of preemption question depended on

whether "the relevant activities occurred" on or off the reservation and where "the essential conduct occurred on the reservation;" though not all of the conduct did, relevant activities occurred on the reservation); Littell v. Nakai, 344 F.2d 486, 490 (9th Cir. 1965) (state court lacked jurisdiction even though "some of the alleged acts look place [off the reservation]" because the matter "was one demanding the exercise of the Tribe's responsibility for self-government" and of "intimate concern to the Tribe as a whole").

Congress did not specifically address - either in the term "gaming activities" or in IGRA as a whole - whether the purchasers of bingo cards for participation in a tribe's class II gaming activities are required to be physically present on Indian lands when they transmitted their offer to purchase bingo cards and authorize deductions from their on-reservation accounts. Congress's unmistakable silence on this issue precludes the conclusion that IGRA *unambiguously* requires the purchasers to be physically present on Indian lands when transmitting their offer to purchase the bingo cards. See Chevron, 467 U.S. at 841-42, 862-65 (finding Clean Air Act ambiguous on meaning of term "stationary source" where Act was silent as to term's significance); Williams, 115 F.3d at 661 n. 4 (Alaska Reindeer Act is ambiguous where it was silent as to intent to give native Alaskans monopoly in reindeer business).

In addition to IGRA's silence on the meaning of "gaming activities," the statute contains indications that Congress expressly contemplated that purchasers of bingo cards for participation in a tribe's class II gaming activities need not be present on the reservation. For instance, Congress exempted Indian gaming conducted pursuant to IGRA from the federal anti-lottery acts. See 25 U.S.C. §2720 ("sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act"). Section 1301 of the U.S Code prohibits interstate transportation of lottery tickets, and §1302 proscribes use of the mails to transmit lottery information or materials. By exempting tribes from these statutes - that is, by permitting tribes, at the very least, to conduct an interstate lottery by mail - Congress signaled its acceptance of the possibility that some actions associated with Indian gaming might be conducted off Indian lands. See also S. Rep. 100-446 (1988), at 3082 ("It is the Committee's intent [that] no other Federal statute ... preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming ***on or off Indian lands***.") (emphasis added). This part of IGRA's legislative history is incompatible with any conclusion that Congress *unambiguously* intended that each and every aspect of Indian gaming be confined to reservations.

There are other indications that the phrase "gaming activities" is ambiguous. For example, the legislative history contains not a single indication that Congress intended a Class II bingo game participant be physically present on the tribe's Indian lands when purchasing bingo cards for the game activity. This is illustrated by the fact that after the Coeur d'Alene Tribe announced its plans for the National Indian Lottery, the states with which the tribe would be competing sought to have IGRA amended to prohibit the lottery. On behalf of the National Governors' Association, Raymond C. Sheppach testified before the Senate Indian Affairs Committee that "any amendment to IGRA should ***clarify*** that the participants in tribal gambling

activities must be physically located within tribal lands to participate in these games." See Indian Affairs Comm., Indian Gaming Regulatory Act, Statement of Raymond C. Sheppach, U.S. Senate, Oct. 29, 1997, indian.senate.-gov/hearings/1029_nga.htm (emphasis added). And in two legislative sessions since then Congress has considered and rejected bills that would have required participants in Indian gaming be physically present on the reservation. S. 474, 105th Cong., 2nd Sess. (1998) (died in Senate at end of session); S. 474, 105th Cong., 1st Sess. (1997) (no action by Senate before end of session). If the phrase "class II gaming activity conducted on Indian lands" unambiguously required a tribe's customers to be physically present on the reservation, clarification and amendment would not be required. Precisely as in Chevron and Williams, IGRA is silent on the very issue. Like the Clean Air Act and the Alaska Reindeer Act, IGRA contains indications - particularly the exemption of §2720 - that are fundamentally incompatible with any conclusion that IGRA *unambiguously* requires a Class II bingo game participant be physically present on the tribe's Indian lands when offering to purchase bingo cards for the game activity.

Government officials and policy makers have long recognized that the IGRA is indeed, at best, ambiguous as to whether a Class II bingo game participant must be physically present on the tribe's Indian lands when offering to purchase bingo cards for the game activity. See National Gambling Impact Study Commission, June 18, 1999 Final Report, page 5-8, at http://govinfo.library.unt.edu/ngisc/reports/5.pdf ("The provisions of [IGRA], however, allow tribes to provide games such as bingo without state authorization or regulation. ***And IGRA is ambiguous on the subject of tribes offering such games to individuals outside of the reservation and into the states and jurisdictions.***")(emphasis added).

Beyond its actions in connection with the Coeur d'Alene Tribe's lottery, the NIGC has also made other pronouncements indicating that under IGRA a Class II bingo game participant need not be physically present on the tribe's Indian lands when electronically transmitting his offer to use his on-reservation account to purchase bingo cards for the game activity. See July 26, 1995 NIGC Chairman Declaration (affirming "legality of using agents to play bingo cards for players who are not physically present at an Indian bingo facility"); also November 14, 2000 NIGC Advisory Letter re: National Indian Bingo (affirming use of tribal gaming facility employees as agents of purchasers not physically present on Indian lands at time of game activity).

Interpreting IGRA to permit a Class II gaming bingo participant to participate in the tribe's Class II bingo gaming activities through the use of "off-reservation means of access" is also consistent with the realities of modern communication technology and how remote Indian communities can use those technologies to fulfill the congressional goal to promote tribal economic development. Cf. F.T.C. v. Payday Financial, LLC, 935 F. Supp. 2d at 939("[T]reating nonmember's physical presence as determinative ignores the realities of our modern world that a [nonmember], through the internet or phone, can conduct business on the reservation and can affect the tribe and tribal members without physically entering the reservation.").

In our view, if IGRA permits a Class II gaming bingo participant to ***directly*** participate in the tribe's Class II bingo gaming activities through the use of "off-reservation means of access," there certainly is nothing in IGRA that precludes Account Holders – who never directly perform or even view any live bingo game action – from using an "off-reservation means of access" to electronically transmit instructions to their proxy agent to make a request to the tribal gaming enterprise to offer to purchase bingo cards to be played on behalf of the Account Holder.

G. IGRA completely preempts state regulation of the VPN Aided Class II Gaming conducted by a tribe.

Enacting IGRA in 1988, Congress intended to "preempt the field in the governance of gaming activities on Indian lands." See S. Rep. No. 100-446 (1988), at 3076. The complete preemptive nature of IGRA of any state laws pertaining to licensing, regulation or prohibition of gambling is well established and recognized. See, e.g., Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1059 (9th Cir.1997), cert. denied, 524 U.S. 926 (1998); Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 538 (9th Cir. 1994), cert. denied, 516 U.S. 912 (1995); Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430, 433–35 (9th Cir.1994) (explaining that IGRA preempts "a state's authority to regulate activities on tribal lands"); Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 543–48 (8th Cir.1996) (deciding that IGRA "***completely preempts*** state laws regulating gaming on Indian lands")(emphasis added); Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 689 (1st Cir. 1994)(explaining that IGRA "is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands" that "sets in place a sophisticated regulatory scheme"), cert. denied, 513 U.S. 919 (1994). Other cases holding that IGRA provides comprehensive federal control of Indian gaming and recognizing the strong preemptive nature of IGRA include Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians, 63 F.3d 1030 (11th Cir. 1995) and Forest County Potawatomi Community of Wisconsin v. Norquist, 45 F.3d 1079, 1082 (7th Cir. 1995).

Given this precedent, it is clear that state gambling laws do not apply to the VPN Aided Class II Gaming to be offered by the tribe. Class II gaming – which encompasses bingo – can be conducted as of right by a tribe on Indian lands located within any state, such as California for example, that does not generally proscribe bingo playing. See 25 U.S.C. §2710(b)(1)A).

3. Indian gaming using technologic aids like the components comprising the VPNAPS used for the VPN Aided Class II Gaming is not generally prohibited by other federal law

A. The VPNAPS used for the VPN Class II Gaming is not prohibited by the Johnson Act.

The federal law commonly known as the Johnson Act, which generally prohibits the use of a "gambling device" in Indian country, in relevant part defines a gambling device as follows:

(1) any so called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, 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; or
(2) any 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 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; or ....

See 15 U.S.C. § 1171(a).

Based upon the foregoing, it is also our view that the VPNAPS does not run afoul of the Johnson Act, because the system's components, both individually and collectively, are mere Class II technologic aids, and not a "gambling device" as defined by the Johnson Act. See 15 U.S.C. § 1171(a). As the Ninth Circuit has noted:

> The text of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids. The statute provides that bingo using "electronic, computer, or other technologic aids" is Class II gaming, and therefore permitted in Indian country. 25 U.S.C. § 2703(7)(A)(i). Reading the Johnson Act to forbid such aids would render the quoted language a nullity.... By deeming aids to bingo Class II gaming in the text of IGRA... Congress specifically authorized the use of such aids as long as the Class II provisions of IGRA are complied with. See 25 U.S.C. § 2710 (a)(c).

See U.S. v. 103 Electronic Gaming Devices, 223 F.3d at 1101.

Perhaps the Tenth Circuit said it best:

> We further conclude Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid. See 103 Electronic Gambling Devices, 223 F.3d at 1101-02 (holding "[t]he text of [the Gaming Act] quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids."); Cabazon II, 827 F. Supp. at 31-32 (concluding the Johnson Act does not apply to aids to Class II games, and a narrow interpretation of the Johnson Act's definition of a gambling device is appropriate); United States v. Burns, 725 F. Supp. 116, 124 (N.D.N.Y.1989) (holding "Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA. Thus, the IGRA makes 15

> U.S.C. § 1175 ... inapplicable to class II bingo and lotto gaming."), aff'd. sub nom., United States v. Cook, 922 F.2d 1026 (2d Cir.),, 500 U.S. 941, 111 S.Ct. 2235, 114 L.Ed.2d 477 cert. denied (1991). We conclude the Johnson and Gaming Acts are not inconsistent and may be construed together in favor of the Tribes. See also, 103 Electronic Gambling Devices, 223 F.3d at 1102 (concluding the Acts must be read together, giving each "the greatest continuing effect."). For these reasons, we join the Ninth Circuit in concluding MegaMania is not a gambling device as contemplated by either Act, but rather an electronic aid to bingo or a game 'similar to bingo.'

See U.S. v. 162 MegaMania Gambling Devices, 231 F.3d at 725.[6] Accordingly, we conclude that mere technologic aids to Class II gaming such as the VPNAPS are not prohibited by the Johnson Act.

B. The VPNAPS used for the VPN Class II Gaming is not prohibited by UIGEA.

The Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§5361-5367, the federal law which applies to certain online gambling transactions, in relevant part defines the term "unlawful Internet gambling" generally to mean:

> To place, receive or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received or otherwise made.

See U.S.C. §5362(10)(A). UIGEA defines "wager" as:

> 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 vent of certain outcome.

See 31 U.S.C. §5362(1)(A). "Wager" includes instructions or information concerning the establishment of, or moving money into or out of, a wagering account established with the "business of betting or wagering." See 31 U.S.C. §5362(1)(D). In other words, UIGEA directly addresses what is commonly called "Internet gaming."

UIGEA, however, should not apply to VPN Class II Gaming using the VPNAPS. As described above, the VPNAPS qualifies as a "technologic aid" to the play of a Class II game

[6] See also Seneca Cayuga Tribe v. NIGC, 327 F.3d 1019, 1032 (10th Cir. 2003)(holding that technological aids are shielded from the Johnson Act and reasoning that a contrary conclusion would expose "users of Class II technological aids to Johnson Act liability for the very conduct authorized by IGRA"); but see United States v. Santee Sioux Tribe, 324 F.3d 607, 611-13 (8th Cir. 2003)(stating that in operating Class II games, a tribe must comply with both IGRA and the Johnson Act).

conducted on Indian land, and therefore would be operated legally under IGRA "in" a licensed Indian gaming facility. Since UIGEA only applies to "unlawful Internet gaming", it would not apply to this lawful gaming under IGRA. See 31 U.S.C. §5361(b)(rule of construction is that "[n]o provision of this [Act] shall be construed as ***altering, limiting***, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States")(emphasis added). In this respect, UIGEA did not change the status quo – Indian gaming that is legal under IGRA remains legal. This would be consistent with the following:

(1) The Senate Report for IGRA (at page 12) makes a reference that 18 U.S.C. §1084 (the "Wire Act") will not "preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on *or off* Indian lands." (Emphasis added).

(2) Wire Act Generally (18 U.S.C. §1084) – Wire Act violation if the operator knowingly uses a 'wire communication facility" to transmit information related to wagering on "any sporting event or contest." Exception, however, exists if the act is legal in both the source and destination locations of the transmission. See 18 U.S.C. §1084(b).

(3) NIGC Bulletin 2009-3 – Effect of the UIGEA of 2006 on Wide- Area Progressive Systems and Networked, Multi-Site Bingo Games, states on page 1 that "The Commission believes that UIGEA has no effect on multi-site bingo and WAPs as these systems are implemented today [i.e. using "closed, proprietary communication networks"]. They do not fall within UIGEA's definition of unlawful Internet gaming;" and on page 2 that "UIGEA has no effect on existing WAPs or multi-site bingo games properly authorized under IGRA."

Another reason that UIGEA should not apply to VPN Class II Gaming using the VPNAPS is because the VPN gateway link used by Account Holders to establish their accounts with the tribal gaming enterprise and to connect with their proxy agent regarding their proxy service relationship is segregated and isolated from the publicly accessible Internet network (also known as the World Wide Web), such as to constitute a closed, proprietary communication network. As the NIGC has declared,

> [N]either WAPS nor multi-site-bingo systems make use of the Internet at all. Instead they use closed, proprietary communication network. Systems so constructed do not, by definition, 'involve the use . . . of the Internet,' even in part, and thus do not fall within the definition of *unlawful Internet gaming*.

See NIGC Bulletin 2009-3 at p. 3 (emphasis in original).

Based on the foregoing, because the VPNAPS uses a "closed, proprietary communication network" the system should fall outside UIGEA's definition of "unlawful Internet gaming."

While the NIGC did not directly describe in Bulletin 2009-3 what constitutes a "closed, proprietary communication network," it has since provided an advisory opinion which provides substantial guidance in this respect.

A detailed, technical description of what constitutes a "closed proprietary network" and why it does not "involve the use, at least in part, of the Internet" appears in an advisory letter dated September 24, 2009 from Penny J. Coleman, Acting General Counsel of the NIGC, to Donald Bailey, President of Atlantis Internet Group, Corp., concerning the *Casino Gateway Network* ("CGN Advisory"). In the CGN Advisory, the NIGC stated that:

> A closed proprietary network or, more commonly, a "private network" is separate and distinct from "the Internet" through its use of leased communication lines, Virtual Private Networks (VPNs), or some combination of the two. Communications that travel over private networks are isolated from, and not accessible to the Internet, and vice versa. This is true even though private networks may share some infrastructure with the Internet.
> . . .
>
> [A] VPN, is a form of communication that utilizes secured connections over a publicly available network. While VPNs do use existing infrastructure such as the Internet to establish connections, these connections are nonetheless separate from the Internet. The term most often used to describe these dedicated connections is a "tunnel" because, conceptually speaking, these connections are isolated from their surrounding environment.
> . . .
>
> More technically, VPNs are designed to only allow access to users on either end of the connection. These are point-to-point (or casino-to-casino) connections segregated from the Internet. This level of isolation is accomplished by using various technologies that not only establish the tunnel but also how the information is transported. These include:
>
> > a) Firewall(s): A security system consisting of a combination of hardware and software that limits the exposure of a computer or computer network to attack from crackers; commonly used on local area networks that are connected to the Internet.
> > b) IPSec: Internet Protocol Security provides interoperable, high quality and cryptographically based security services for traffic at the IP layer, such as authenticity, integrity, confidentiality and access control to each IP packet.
> > c) Biometric Authentication: end user security measure that ensures user login and identification are based on unique physiological characteristics such as fingerprint identification, iris/retinal scanning, voice recognition, etc.
> > d) Advanced Encryption: A cryptographic algorithm that can be used to protect electronic data. The AES algorithm can be used to encrypt (encipher) and decrypt (decipher) information. Encryption converts data to an unintelligible form called

ciphertext; decrypting the ciphertext converts the data back into its original form, called plain text.

More technically still, the Internet Assigned Numbers Authority (IANA), the central registry for Internet protocol addresses, states that addresses reserved for private networks are separate from addresses allocated to the public Internet. Internet protocol addresses (or "IP addresses") are the unique identifiers for each computer on the Internet or on private networks. They range in value from 0.0.0. to 255.255.255.255.

The addresses that range from 10.0.0.0.0-10.255.255.255, 172.16.0.0-172.31.255.255, and 192.168.0.0-192.168.255.255 are so-called "special use" addresses reserved [for] private networks.

See CGN Advisory at pp. 2-4.[7]

Based upon your representations and the description of the system provided to us, we understand that the VPNAPS uses a VPN that constitutes a "closed, proprietary communication network" of the sort that the NIGC's Bulletin 2009-3 declared should "not fall within UIGEA's definition of unlawful Internet gaming." The VPNAPS network's level of isolation is clearly demonstrated by (1) its use of an encrypted HTTPS secure connection to the tribal gaming facility through the gaming portal using a proprietary communications protocol, and (2) the fact that no component of the VPNAPS will function without a physical and logical connection to the network.

It has been represented to us, although we have made no independent determination of such, that each of the solutions provided to the above technical references from the CGN Advisory will be certified by an independent compliance testing lab prior to any real-money play of VPN Class II Gaming using the VPNAPS. If this certification does takes place as represented to us, it would be further support for our conclusion that the VPNAPS used for the VPN Class II Gaming as described constitutes a "closed proprietary communication network."[8]

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[7] The NIGC's conclusion that a VPN communication link does not "involve the use, at least in part, of the Internet" is supported by patent law case decisions. See Oracle Corporation v. DrugLogic, Inc., No. 11-00910, 2013 WL 6172523 at (N.D. Cal.); Automated Transactions LLC v. IYG Holding Co., 768 F. Supp. 2d 727, 738 (D.Del. 2011)("Simply because the VPN server is accessible from the Internet does not mean that the network it enables access to is part of the Internet. To find otherwise would be the equivalent of saying that the Daytona International Speedway is part of the public highway system because one can drive a car onto the racetrack from the street with the permission of the Speedway's owners.").

[8] Our conclusion in this regard would not be different even if the Tunnel VPN lacked one of the standard VPN technologies described in the CGN Advisory. In our view the listing of standard VPN technologies described in the CGN Advisory is meant to be illustrative, not necessarily mandatory. See p. 4 of CGN Advisory ("[CGN] can link games in multiple casinos across a VPN where each casino is at the end of a secure VPN tunnel. It does so with some of the standard VPN technologies described above.")(emphasis added). In other words, we believe that the VPNAPS communication network as described achieves the "level of isolation" necessary to make it a "VPN" that does not use the "Internet", so as to qualify as a "closed proprietary communication network" consistent with the CGN Advisory conclusion and NIGC Bulletin 2009-03.

We also note that the legal conclusion that UIGEA should not apply to the VPN Class II Gaming using the VPNAPS is also consistent with Congress's intent in enacting IGRA, as specifically expressed in IGRA's legislative history:

> It is the Committee's intent that with the passage of this act, ***no other Federal statute*** . . . will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands.

See S. Rep. No. 100-446 (1988) at 3082 (emphasis added).

C. The VPNAPS used for the VPN Class II Gaming is not prohibited by Wire Act.

In December 2011, the DOJ Office of Legal Counsel released an agency memorandum dated September 20, 2011 describing the agency's revised position concerning the federal law commonly called the Wire Act, 18 U.S.C. §1804. For many years the DOJ's Criminal Division had asserted that the Wire Act prohibits any gambling–related communication via the Internet if the transmissions over the Internet during the transaction cross State lines. The threat of a potential DOJ enforcement action against any use of the Internet for gambling-related communication effectively precluded any use of the Internet even for "intrastate" online gaming offered by tribes, State lotteries or others.

In revising its position on the application of the Wire Act, the DOJ announced that it had concluded that interstate transmissions of wire communications that do not relate to a "sporting event or contest" fall outside the reach of the Wire Act. Since the "in-state" lotteries proposed to be conducted online by New York and Illinois did not involve "sporting events or contests" within the meaning of the Wire Act, the DOJ concluded that the Wire Act did not prohibit the in-state lottery transactions via the Internet, even if the transmissions over the Internet crossed State lines or the States transmitted lottery data to out-of-state transaction processors.

In light of the December 2011 DOJ agency pronouncement regarding the reach of the Federal Wire Act, it is our view that the Act should not prohibit the use of the VPNAPS in a licensed Indian gaming facility since (1) all gambling conducted on the VPNAPS does not involve "sporting events or contests", see, e. g., In re Mastercard International, Inc., 132 F. Supp. 2d 468 (E.D. La. 2001), affirmed 313 F.3d 257 (5th Cir. 2002)(concluding that Wire Act prohibitions on using interstate electronic communications links applies only to sports betting activities); see also U.S. v. Dicristina, 2012 WL 3573895 (E.D. NY August 21, 2012)(Wire Act "applies only to wagering on sporting events")(emphasis added), and (2) pursuant to the July 26, 1995 NIGC Chairman Declaration regarding "proxy play", the VPNAPS would be operated legally under IGRA "in" a licensed Indian gaming facility located on the Indian lands of the host tribe.

V. Professional Qualifications

Our legal practice is primarily in the area of Indian law, with most of our practice concentrated on Indian gaming law matters involving the development, management and regulation of Indian gaming operations conducted under the authority of IGRA, and applicable state and tribal law. We have extensive experience with IGRA related regulations issued by the NIGC, the federal agency with oversight responsibility for Indian gaming operations. Kevin Quigley has advised a wide variety of gaming equipment vendors regarding IGRA related issues, as has Doug Twait, who is also a former tribal official involved with the development of tribal gaming operations. Tom Foley is a past commissioner (and acting Chairman) of the NIGC. Both Kevin Quigley and Tom Foley are elected members of the International Masters of Gaming Law, considered the preeminent organization for lawyers in the gaming industry.

PROOF OF SERVICE

I, Little Fawn Boland, hereby declare:

I am employed by Ceiba Legal, LLP in the City of Mill Valley and County of Marin, California. I am a resident in the City of Mill Valley. I am over the age of eighteen years and not a party to the within action. My business address is CEIBA LEGAL, LLP, 35 Madrone Park Circle, Mill Valley, California, 94941. I hereby certify that on November 25, 2014, I electronically filed the foregoing with the Clerk of the Court using the ECF system.

DECLARATION OF DAVID VIALPANDO IN SUPPORT OF DEFENDANTS' OPPOSITION TO STATE OF CALIFORNIA'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, described as:

Kamala D. Harris
Attorney General of California
Sara J. Drake
Senior Assistant Attorney General
William P. Torgren
Deputy Attorney General
1300 I Street Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 25, 2014 in Mill Valley, California.

By: /s/ Little Fawn Boland
LITTLE FAWN BOLAND
CEIBA LEGAL, LLP
35 Madrone Park Circle
Mill Valley, California 94941
Telephone: (415) 684-7670 ext. 101
Facsimile: (415) 684-7273