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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA,

Plaintiff,

v.

IIPAY NATION OF SANTA YSABEL, *et al.*

Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

IIPAY NATION OF SANTA YSABEL, *et al.*

Defendants.

CASE NO. 3:14-cv-02724-AJB-NLS

CASE NO. 3:14-cv-02855-AJB-NLS

TRIBAL DEFENDANTS' CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO USA AND STATE OF CALIFORNIA MOTIONS FOR SUMMARY JUDGEMENT [ECF #61 & #63]

[FRCP RULE 56 & 65]

Hearing Date: June 27, 2016
Time: 3:00pm
Courtroom: 3B
Judge: **Hon. Anthony J. Battaglia**

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I. INTRODUCTION

In this consolidated action, Plaintiffs United States ("USA") and the State of California ("California") seek to stop the operation of Desert Rose Bingo ("DRB"), a tribal gaming business located on the sovereign lands of the Iipay Nation of Santa Ysabel ("Iipay" or "Tribe" and together with certain related entities and individuals collectively "Tribal Defendants" herein). Both USA and California assert claims based upon the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C. §§ 5361-5367 and California also claims an alleged breach of its class III gaming compact with Iipay. Since the very beginning of this litigation, Tribal Defendants have contended that the gaming offered by DRB is legal Class II bingo conducted under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.*, P.L. 100-497, 102 Stat. 2467 ("IGRA") and therefore is not subject to any UIGEA enforcement action or a class III compact-based claim.[1] This raises the central question to be answered by the court in this action: ***Does the gaming offered by DRB constitute "Class II bingo" that is legally "conducted on Indian lands" under IGRA?***

If the answer is yes, then the USA and California UIGEA and class III compact-based claims are meritless and must be dismissed with prejudice. If the answer is no, then DRB is subject to an appropriate injunction order precluding DRB gaming operations from using the current version of the gaming system at issue.

Answering the central question in this action requires a two-part analysis that avoids co-mingling distinct legal standards and issues. First, the court must

[1] In addition, California's claims are barred by the tribal sovereign immunity of the Tribal Defendants for the reasons described in Tribal Defendants' Motion to Dismiss Complaint Due to Lack of Subject Matter Jurisdiction and supporting memoranda [ECF #15, #16 and #19], which Tribal Defendants reassert and incorporate herein.

undertake an analysis under IGRA and applicable National Indian Gaming Commission ("NIGC") and tribal regulations concerning whether the electronic gaming system used by DRB was properly classified by the tribal regulator as a Class II "technologic aid" to "bingo." Second, the court must undertake an analysis under IGRA and applicable tribal law concerning whether the gaming is "conducted on Indian lands." Furthermore, this two-part analysis must be made ***only*** through a "*for purposes of IGRA*" focused lens – i.e. considering only those legal precedents and principles applicable to IGRA, *and without regard to any statutory language related to UIGEA or any other federal or state law*.

In this respect, keeping in mind the "backdrop of IGRA (i.e. bingo enjoys a "favored status" under IGRA)," substantial deference must be accorded to the classification determination made by the Santa Ysabel Gaming Commission ("SYGC") deeming that the gaming to be offered by DRB was Class II bingo played with a permitted technologic aid under IGRA – and not a prohibited Class III facsimile as California claims. In this action, California has lead the court astray by using the ***pre-2002*** "exact replica" standard now discarded and made obsolete by the NIGC's adoption of its 2002 Part 502 definition regulations amendments and later its Part 543 & Part 547 regulations, as well as the June 2013 NIGC "One Touch" Bingo Pronouncement. In making its classification evaluation, however, SYGC correctly applied current NIGC definition regulations and classification standards relating to the proper e-bingo system evaluation factors used under IGRA since 2002.

Nothing in IGRA requires Class II bingo game technology to be frozen in the "analog" 20th Century world. Quite the contrary, in enacting IGRA Congress specifically intended for tribes to have "maximum flexibility" in using innovative technological advancements in offering Class II bingo gaming. Neither does IGRA expressly require a person to be "physically present" on Indian lands at the time the person either (1) opens an account with the DRB operations to be used at a later

time for bingo game play, or (2) when hiring their proxy to conduct bingo game play at a later time on their behalf. Moreover, in the context of server-based gaming, the location of the servers on which the game play is conducted – not the locale of the patron – determines the legal situs of the gaming. Consistent with the goals of the federal public policy expressed in IGRA, DRB uses the first IGRA-compliant Class II e-bingo system built with 21st century high-tech advancements and innovations that enhance the client-server architecture of the standard e-bingo gaming systems currently used in most tribal casinos today; thereby continuing the natural progression of the technological evolution of Class II gaming as Congress has always intended for the Indian gaming industry.

In sum, as explained more fully below, the undisputed facts demonstrate both that (1) the electronic gaming system used by DRB was properly classified by the tribal regulator as a Class II "technologic aid" to "bingo;" and (2) the gaming offered by DRB is legally "conducted on Indian lands" under IGRA and applicable tribal law.

II. FACTUAL BACKGROUND SUMMARY

The undisputed facts are detailed in full in Tribal Defendants' Consolidated Statement of Material Facts submitted contemporaneously with this memorandum (cited herein as "TD Fact No. x").

In summary, before DRB launched operations to the public, SYGC determined by final regulatory action that the gaming to be offered through DRB constitutes "Class II gaming" within the meaning of IGRA because the bingo game play originates on the math and game management servers housed within the Tribe's gaming facility located on Iipay's sovereign Indian lands, and the gaming system used by DRB (the "VPNAPS") serves as a "technologic aid" to the bingo game play. ***TD Fact No. 44.*** All bingo game play using the VPNAPS gaming system has been specifically authorized by Tribal law and Tribal regulatory measures, and by SYGC actions adopted under the Iipay gaming ordinance

approved by the NIGC pursuant to IGRA. ***TD Fact Nos. 8, 10, 15-18***. Every process of the bingo gaming activity conducted by DRB is subject to oversight by SYGC to ensure full compliance with IGRA and the Tribal laws and Tribal regulatory measures governing the operation of the gaming offered by DRB using the VPNAPS gaming system. ***Id.***

The VPNAPS gaming system enhances the client-server architecture of standard electronic-linked bingo gaming systems currently used throughout Indian country today by adding enhanced access security features and a "proxy play technology set" that aids with the play of bingo games by proxy (tribal employee located on Iipay sovereign lands) and the reporting back to the patron on a time delayed basis the results of the bingo games played. ***TD Fact No. 163.*** The patron's proxy is aided in the proxy play by "auto-daub" functionality features built into the gaming system. ***Id.*** Patrons access the VPNAPS gaming system to request proxy play of a bingo game and receive game result information via a modern technology communication link (i.e. the Internet). ***TD Fact Nos. 93-116.***

III. LEGAL STANDARDS

A. Summary Judgment Standards

Summary judgment can be granted only when no genuine issue exists as to any material fact, and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a). A genuine issue of material fact will exist "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

The burden is on the moving party to demonstrate that it is entitled to summary judgment, with all reasonable inferences to be considered in favor of the nonmoving party. The moving party has the burden of identifying the elements of the claim and the evidence it believes demonstrates the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). In this action, as part of any UIGEA or class III compact-based claim, the USA and California

bear the burden of proving as an element of their case in chief that: (1) the gaming activity conducted by Desert Rose Bingo is not "Class II bingo" gaming activity, and (2) is not legally "conducted on Indian lands" pursuant to IGRA.

B. IGRA Related Standards

(1) Tribal sovereign authority over tribal gaming activities

Any analysis of the Tribe's authority over its tribal gaming activities under IGRA must begin with the recognition that Indian tribes are independent sovereign nations pre-existing the United States and its Constitution. 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. This historically rooted doctrine of tribal sovereignty is the primary legal and political foundation of federal Indian law and Indian gaming. See Kathryn R.L. Rand & Steven Andrew Light, Indian Gaming Law and Policy, Carolina Academic Press (2006) at pp. 11, 17-19 (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. 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 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.

In response to Cabazon, 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). 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).

As demonstrated below, the legislative and regulatory measures made by Iipay and SYGC in connection with the gaming offered by DRB are not "inconsistent" with IGRA's *unambiguous* provisions or the NIGC's regulations and pronouncements concerning class II gaming with "technologic aids" permitted under IGRA.

(2) Indian law canons of construction

To determine whether the gaming offered by DRB is consistent with IGRA requires an analysis of the statute's text, structure and legislative history, and consideration of prevailing case law regarding IGRA. And this implicates the canons of construction for statutes intended for the benefit of American Indians and tribes which 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). 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).

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); see also 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)(judicial branch has special duty to protect tribes against state incursions on Indian sovereignty by liberally interpreting Indian law in favor of Indians).

It is undisputed 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 Class II gaming offered by DRB is permitted or 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., reprinted in 1988 U.S. Code Cong. & Admin. News 3071 (1988)(hereinafter "S. Rep. No. 100-446 (1988)") at 3079 ("Committee intends . . . that tribes have ***maximum flexibility*** to utilize ***games such as bingo*** and lotto for tribal economic development")(emphasis added); and at 3085 ("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")(emphasis added).

(3) *Chevron* deference principles

In interpreting IGRA "***we look to the definitions of the terms and phrases contained therein as set forth by the [NIGC]***" because "legislative regulations are given [Chevron] deference by the courts" and are to be given "*controlling weight*." U.S. v. 162 MegaMania Gambling Devices, 231 F.3d 713, 718-19 (10th Cir. 2000)(emphasis added). Also, "informal pronouncements" of the NIGC (i.e. advisory guidance letters and interpretation of IGRA "set forth by the Commission in the Federal Register") are entitled to Skidmore "respect" if they exhibit factors which give them power to persuade. Id.

Moreover, the "NIGC's conception of what counts as bingo under IGRA as articulated in the agency's [Part 502 regulations] is entitled to substantial deference." U.S. v. 103 Electronic Gaming Devices, 223 F.3d 1091, 1097 (9th Cir. 2000)(noting that "class II bingo under IGRA is not limited to the game we played

as children"); see also NIGC 25 CFR Part 502 Final Rule Notice, 67 Fed. Reg. 41166, 41168-69 (June 17, 2002)(declaring that "Today's Final Rule more properly captures the intent of Congress as to the distinction between permissible class II aids and prohibited class III facsimiles," and expressing confidence that through "its efforts to bring greater clarity to these key definitions" courts will provide "substantial judicial deference" as they had to other NIGC regulations).

IV. ARGUMENT

The following two-part analysis demonstrates both that (1) the electronic gaming system used by DRB was properly classified by the tribal regulator as a Class II "technologic aid" to "bingo;" and (2) the gaming offered by DRB is legally "conducted on Indian lands" under IGRA and applicable tribal law. Accordingly, the USA and California UIGEA and Class III compact-based claims are meritless and must be dismissed with prejudice.

A. The Electronic Gaming System Used by DRB was Properly Classified by the Tribal Regulator as a Class II "Technologic Aid" to "Bingo"

(1) Substantial judicial deference must be accorded to SYGC's classification determination

Pursuant to the regulatory structure crafted into IGRA and the implementing regulations adopted by the NIGC, as well as the historical sovereign rights of tribes, SYGC is the primary regulator – i.e. the agency with subject matter regulatory responsibility and expertise – in connection with licensing and classifying Class II bingo games using "technologic aids." See 25 CFR Parts 543 and 547.[2] Thus,

[2] To this end, key provisions of the Parts 543 and 547 regulations rightly delegate to the tribal gaming regulatory agency ("TGRA") the legal responsibility and authority to make a classification determination as to whether a server-based electronic bingo gaming system is properly classified as Class II gaming. These provisions include Part 543.8(g) which requires the *TGRA* [not the NIGC] to establish procedures to safeguard integrity of technologic aids to the play of bingo during installations and operations, including procedures that require: (1) the *TGRA*

SYGC is the regulatory agency with authority for determining if new and innovative server-based electronic bingo gaming systems shall be deemed a "Class II gaming system."[3]

Pursuant to its authority under the Iipay Gaming Ordinance and the NIGC Part 543/547 regulations, SYGC has adopted specific tribal regulatory regulations that set the regulatory requirements and standards for licensing and classifying "Class II Bingo Gaming Systems and Equipment" and the operation of the gaming offered by DRB. See e.g. SYGC 14-I009, SYGC 14-I010 and SYGC 14-I011. As explained in the Declaration of David Vialpando, SYGC's classification determination in licensing the VPNAPS gaming system was subject to a detailed process, and the rationale for the agency decision is consistent with current NIGC definition regulations and classification standards relating to the proper e-bingo system evaluation factors used under IGRA since 2002 in making its classification evaluation. See Vialpando Declaration, ¶¶ 23-25, 30-59.

Accordingly, substantial judicial deference must be accorded to SYGC's "Classification Determination" concluding that the VPNAPS gaming system constitutes a Class II "technologic aid" to the game of "bingo" for purposes of

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[not the NIGC] to approve "all technologic aids before they are offered for play"; and (2) the *TGRA* [not the NIGC] to determine that all Class II gaming systems comply with Part 547 standards. For an in-depth analysis of the TRGA's primary role in classifying server-based electronic bingo gaming systems under IGRA, see ***Vialpando Dec. Exhibit No. 1***.

[3] See Cheyenne-Arapaho Gaming Commission v. NIGC, 214 F. Supp. 2d 1155 (N.D. Okla. 2002)(stating that advisory classification letters signed by "staff member" of NIGC (i.e. "OGC advisory letters") is "simply courtesy correspondence" offering "guidance," and suggesting that more weight may be given to a letter signed by NIGC Chairman which may be considered "informal pronouncements" – defined as "formal declaration of opinion or authoritative announcement." Court also notes that OGC advisory letters "by their very nature provide guidance *to tribes* to assist ***them in regulating*** their gambling.")(emphasis added).

IGRA. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)(deference is to be provided when an agency interprets a statute it administers); also Auer v. Robbins, 519 U.S. 452, 461 (1997) (further deference is required when an agency interprets its own regulations).[4]

(2) 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 103 Electronic Gaming Devices and 162 MegaMania Gambling Devices is instructive as to the nature of technologic aids for Class II gaming under IGRA (referred to herein collectively as the "MegaMania Bingo Cases"). Each decision concerned a game called "MegaMania," an electronic bingo game with computer and server components

[4] In this respect, the Court must bear in mind that in reviewing regulatory agency action: (1) "if the agency decision is supportable on any rational basis," it must be upheld, see McFarland v. Kempthorne, 545 F.3d 1106, 1113 (9th Cir. 2008); (2) an agency's decision is "entitled to a presumption of regularity," see San Luis & Delta-Mendota Water Authority v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014); and (3) the Court "is not empowered to substitute its judgment for that of the agency." See Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir.2001).

which links players in different locations who compete against one another in a game of bingo. Both 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 Bingo 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 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 definition regulations relating to 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 have acknowledged that these amendments helped clarify what constitutes permissible Class II gaming, and have the practical effect of expanding the field of Class II gaming when using client-server architecture systems.

As explained by the NIGC in adopting the new definitions:

> 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 CFR §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 CFR §502.8 (emphasis added).

In the wake of the foregoing prevailing case law relating to Class II games with permitted "technologic aids," the NIGC Office of General Counsel ("OGC") issued several guidance letters advising that "linked bingo systems" (i.e. electronic server-based bingo systems using client-server architecture) constitute technologic aids to Class II gaming as permitted under IGRA. See, e.g., September 23, 2003 OGC Advisory Letter re: Reel Time Bingo, pp. 8-9; September 26, 2003 OGC Advisory Letter re: Mystery Bingo, pp. 18-19; April 4, 2005 OGC Advisory Letter

re: Nova Gaming Bingo System, pp. 13-14.[5]

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").

Every "Class II gaming system" in use today in Indian casinos[6] is built and operated on the same client-server architecture that is the foundation of the VPNAPS gaming system. ***TD Fact Nos 154-155.*** Except for a "proxy play technology set" and enhanced access security features contained in the VPNAPS gaming system, the design features are the same: client-server architecture with the game play server located in a secure back room electronically linked to patron interface terminal boxes with entertaining video display screens which are located in the public space of the tribal gaming facility – i.e. "wholly-electronic format." ***Id.***, see also ***Vialpando Dec. Exhibit. No. 4***. The size of the servers used as part of a "Class II gaming system" in use today in Indian casinos are approximately same size as the servers contained in the VPNAPS gaming system. ***TD Fact No. 156.*** All of the game play video displays on the tangible components of the gaming system,

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[5] All OGC advisory letters cited herein are available on the NIGC website under the "Game Classification Opinions" subpage under "Legal Opinions" under the "General Counsel" tab.

[6] The technology used with today's "Class II gaming system" reflects the "ingenuity of gaming designers" which the NIGC has noted is "intended to be given freer rein by IGRA in the context of class II gaming." See NIGC 25 CFR Part 502 Final Rule Notice, 67 Fed. Reg. at 41168 (June 17, 2002).

including the "electronic cards" generated for the game, are merely a visual representation of the bingo mathematics and game management software programs electronically run on the back room math and game management servers. ***TD Fact No. 157.*** The key feature of today's "Class II gaming system" for purposes of IGRA is the same one contained in the VPNAPS gaming system: at least two patrons (or their proxies in the case of the DRB gaming) must have requested bingo cards for the same common game (i.e. "head-to-head competition" among persons is required) or the bingo game will not start and the bingo mathematics and game management software programs will not electronically run. ***TD Fact No. 158.***

In sum, with today's "Class II gaming system," the bingo game play originates on the math and game management servers located in the secure back office area of the tribal casino, and the game results are then sent on a time delayed basis via a communication link to the patron's interface[7], where the game results are revealed by software components that "translate" the winning or losing associated with the patron's bingo card into an entertaining graphic display. Other than making a request to join a game by purchasing a bingo card, the patron need not take any other action to play bingo games using a "Class II gaming system" if the tribal casino chooses to activate the gaming system's "auto-daub" functionality. ***TD Fact No. 159-160.***

The designers of the VPNAPS gaming system started with the standard electronically linked server-based bingo gaming system operated in Indian country since the late-1990s and enhanced it by adding a proxy play technology set to the gaming system. This technology set consists of (1) software and hardware components to assist a patron to engage their designated agent proxy (located on Iipay sovereign lands) via a modern communication link (i.e. Internet) and an

[7] There is no requirement that this patron interface be a "fixed unit." See 25 CFR Part 547.2 (definition of "player interface").

electronic proxy engagement feature; (2) auto-daub (electronic bingo card minder) functionality[8] via software and hardware components to assist the patron's designated agent proxy (located on Iipay sovereign lands) to play (on behalf of patron) a bingo game using a digital-format system with functionality like standard server-client architecture of electronic-linked bingo gaming systems; and (3) software and hardware components to assist the designated agent proxy to report via a modern communication link (i.e. Internet) on a time delayed basis to the patron the results of the bingo game played on the patron's behalf. ***TD Fact No. 163.***

More recently, the NIGC has issued other guidance as to "auto-daub" functionality that is 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" using auto-daub functionality). See 78 Fed. Reg. 37998 (June 25, 2013). 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

[8] Auto-daub features with class II bingo systems has been ***specifically authorized by tribal law and SYGC regulatory action*** and is supported by the NIGC's June 2013 pronouncement re: "One Touch Bingo" systems that is well-reasoned and comprehensive, so Chevron (or at least Skidmore level) deference must be given to these agency decisions.

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.

(3) The "exact replica" standard for "electronic facsimiles" promoted by California does not apply to *electronic bingo game systems* under current NIGC regulations

California's contention that the gaming offered by DRB using the VPNAPS gaming system constitutes an illegal Class III "facsimile" of bingo is entirely premised upon the outdated and discarded "exact replica" plain meaning standard (i.e. "computerized version") no longer applicable when determining whether an *electronic bingo game system* constitutes a class III gaming "electronic facsimile" of *bingo*. See California Summary Judgment Memorandum [ECF #63-1], pp. 15-17 ("DRB is class III gaming. It is a facsimile that through a computer system *exactly replicates* the game of bingo)(emphasis added). This is an erroneous legal standard that the Court must not adopt in connection with any game classification analysis of the VPNAPS gaming system.

In fact, when the NIGC issued in 2002 its new "less stringent" definitions for Class II gaming "technological aids" for bingo played in a *wholly electronic format* (i.e. "a manual component of the game is not necessary") it expressly replaced the "exact replica" standard for *e-bingo systems* conducted under IGRA. See 25 CFR §502.8; 67 Fed. Reg. 41166 (June 17, 2002). In this respect, the NIGC's 2002 Part 502 amendments retained the so-called plain-meaning "exact replica" definition of facsimile adopted by the Sycuan and Cabazon courts in the early 1990s (the precedent promoted by California and relied upon by the Court for its initial "facsimile" conclusion in this matter) but ***only*** as to any game of chance ***except bingo and lotto and other games similar to bingo*** – expressly carving out a so-called "server-based electronic bingo game system exception" from the definition of "facsimile." See 78 Fed. Reg. at 38000; also September 23, 2003 OGC Advisory Letter re: Reel Time Bingo, p. 9. Under *current* law, "electronic facsimile" ***does not*** include electronic, server-based bingo systems, *provided that multiple players are playing with or against each other* via the system.[9]

In contrast to the legal analysis followed by California and the district court, the classification determination issued by SYGC for the VPNAPS gaming system – which expressly declares the primary regulator's finding that the gaming activity

[9] It its noteworthy that in seeking to obtain its TRO from the Court, California went out of its way to ignore and divert the Court's attention away from the current "server-based electronic bingo game system exception" to the definition of "electronic facsimile." In the context of explaining to the Court what the NIGC considered to be an "electronic facsimile," California specifically cited to a December 17, 2009 advisory memorandum issued by the NIGC's Office of General Counsel in connection with a *poker card game* system (i.e. not an *electronic bingo system*). California attempted to use language in the advisory memorandum to support its contention that if "a particular aid [to card games] becomes a necessity" it "becomes an electronic facsimile." In citing this memorandum language to the Court, however, California appears to have deliberately omitted the important qualifying phrase "**to card games**" – thereby grossly distorting the import of the passage cited.

offered by DRB is Class II gaming under IGRA – faithfully and correctly applied the NIGC's 2002 Part 502 definition amendments (and the 2013 NIGC One Touch Bingo Pronouncement) to the VPNAPS gaming system. See Vialpando Declaration, ¶¶ 23-25, 30-59. If the Court likewise applied the correct legal standards as part of its classification evaluation of the gaming offered by DRB (and did so keeping in mind the "backdrop of IGRA (i.e. bingo enjoys a "favored status" under IGRA), NIGC regulations and [the MegaMania] cases," as well as the deference courts should grant to SYGC as the primary regulator of electronic bingo game systems under IGRA and NIGC regulations), it could reach only one legal conclusion: the game is Class II bingo played with a permitted technologic aid under IGRA – and not a prohibited Class III electronic facsimile.[10]

B. DRB's Bingo Game Play is Legally "Conducted on Indian lands" for Purposes of IGRA

Both the USA and California fail to address in any meaningful way the specific question whether the gaming offered by DRB is legally "conducted on Indian lands" *for purposes of IGRA*.[11] Both simply rely on bald assertions that it is not, without any serious legal analysis of the ***IGRA*** principles and precedents that are necessarily relevant in answering this precise question.[12] See USA Summary

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[10] See also Vialpando Declaration, ¶¶ 60-76 for the analysis and reasoning demonstrating that the process and sequence of the bingo game play offered by DRB using the VPNAPS gaming system does indeed satisfy the second and third statutory criteria for bingo under IGRA, and why, therefore, any "guidance" concern offered by OGC on this issue is not well grounded in IGRA's text and legislative history, applicable tribal and NIGC regulations and the NIGC's very own June 2013 One Touch Bingo Pronouncement.

[11] See e.g. 25 U.S.C. §§2701(3)("the conduct of gaming on Indian lands"); 2706(b)(1)("class II gaming conducted on Indian lands"); 2706(b)(4)("class II gaming conducted on Indian lands"); 2710(a)(4)(A)("class II gaming activity conducted on Indian lands").

[12] In failing to substantively address the gaming "conducted on Indian lands" issue,

Judgment Memorandum [ECF # 61-1] p. 23 ("United States does not seek to interfere with gaming activity conducted on Iipay's Indian lands"); California Summary Judgment Memorandum [ECF # 63-1] p. 10 ("Undoubtedly, [IiPay's] Internet gambling was not conducted only on the Tribe's Indian lands"). In a nutshell, both the USA and California rely on the faulty premise that any use of the Internet as a communication link for patrons to access DRB is not allowed *for purposes of IGRA* gaming because the patron needs to be "physically present" on Iipay lands either before or at the time the bingo game play is conducted at DRB's gaming facility using the VPNAPS gaming system.[13] But, as described below, this contention is erroneous and simply not supported by IGRA's text or legislative history, applicable NIGC and tribal regulations and laws, and legal precedents concerning IGRA Class II gaming utilizing modern technology.

In particular, both the USA and California ignore or fail to address the specific impact or import of the fact that *for purposes of IGRA*: (i) there is no general prohibition *under IGRA* preventing tribes from using modern technology

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USA and California beg the question what this key phrase means *for purposes of IGRA*, and, in doing so, put the Court at a disadvantage in understanding an issue that "is a difficult question involving complex issues of sovereignty, contract and statutory interpretation, and jurisdiction among others." See Arbitration Award re: Internet Gaming Dispute referred to Binding Arbitration by the Iowa Tribe of Oklahoma and the State of Oklahoma, dated November 24, 2015 (***Vialpando Dec. Exhibit No. 5***), certified by federal district court order dated April 18, 2016 in Iowa Tribe of Oklahoma v. State of Oklahoma, Case no. 5:15-CV-01379-R (W. D. Okla.)(hereinafter referred to as the "Iowa Internet Gaming Arbitration Award action").

[13] See USA Summary Judgment Memorandum [ECF # 61-1] p. 11 & 14 (alleging that "[i]t is undisputed that the Internet is a necessary component of the DRB" and when accessing DRB the patrons "are physically located off Iipay Indian lands")(emphasis added); California Summary Judgment Memorandum [ECF # 63-1] p. 1 & 7 (alleging that patrons "had to go through the Internet to access DRB" and "no trip to the [Iipay] reservation was required).

communication links like the Internet to promote participation among players so as to increase tribal revenues for tribal needs; (ii) DRB's bingo game play originates and is conducted on the math and game management servers housed in the Tribe's gaming facility located on Iipay sovereign Indian lands; (iii) the proxy play technology aids of the VPNAPS gaming system used to conduct the DRB bingo gaming means the gaming is conducted on Indian lands; and (iv) the communication link from the Account Holder to their DRB account and proxy player agent could be made by phone, fax, postcard, western union, messenger, etc. (i.e. use of the "Internet" is not relevant or dispositive to an ***IGRA*** interpretation concerning the question whether a person must be "physically present" on Indian lands at time of their interaction with DRB for account opening/funding or proxy player hiring/instructing).

(1) There is no general prohibition *under IGRA* preventing tribes from using modern technology communication links like the Internet to promote participation among players so as to increase tribal revenues for tribal needs

"Internet gaming, as such, is not expressly prohibited in the United States." See Iowa Internet Gaming Arbitration Award action (***Vialpando Dec. Exhibit No. 5***, p. 21). Moreover, the "Internet is not a game. The Internet is modern technology used to play games." Id. at 12.

It is in this context, keeping in mind the strong congressional policy enshrined in IGRA to allow tribes 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 at p. 3079 (emphasis added), that the Court must consider whether there is a general prohibition *under IGRA* preventing tribes from using modern technology communication links like the Internet to promote participation among players so as to increase tribal revenues for tribal needs. See NIGC June 2013 "One Touch" Bingo Pronouncement, 78 Fed. Reg. at 38000 (acknowledging this policy and stating that the NIGC "should give

consideration to an interpretation of bingo that embraces rather than stifles technological advancements in gaming").

In this respect, the general question whether games conducted under IGRA involving "players located off Indian land on a computer connected via the Internet to a computer located on Indian lands" is consistent with and permitted by IGRA was recently addressed in the Iowa Internet Gaming Arbitration Award action. There, the federal court in the Western District of Oklahoma affirmatively certified the arbitration decision which expressly found that the use of the Internet to connect remote game players to the game servers located on Iowa Indian lands was not contrary to IGRA nor prohibited by UIGEA. The legal analysis and reasoning in the Iowa Internet Gaming Arbitration Award action is highly instructive as to the proper analysis for the precise "conducted on Indian lands" question to be addressed here.

First, the arbitrator noted generally that "Internet gaming" consists of a user sending input information from his electronic computer device via an Internet communication link to a server physically located in another location.[14] This

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[14] As explained by the arbitrator:

> The server, based upon information received by it from the user, controls, processes, and records every aspect of the transaction and the game including; (i) the language, location (and legality of play at that location), qualifications (age of player) to play the games, and the rules of the game; (ii) the opening and finding an account; (iii) every aspect of the play of the game including the decision of the player to play, the placing of a bet, the win or loss decision, and resulting collection from or payout to a player's account. In Internet gaming, the server functions as the casino official who conducts the games where the player is physically located at the place where the game is being played. There, a player will offer to place a bet, the official will decide to accept it and the game will proceed with the official making decisions to the point of payout or collection.

See Iowa Internet Gaming Arbitration Award (***Vialpando Dec. Exhibit No. 5***, pp. 11-12)(emphasis added).

description – i.e. a player physically located off Indian lands while playing a game being operated by a computer server, which electronically controls the game and is located on Indian lands – is generally consistent with how DRB operates its bingo games using the VPNAPS gaming system from servers located on Iipay Indian Lands, *except that the VPNAPS gaming system also contains enhanced access security features and a proxy play technology aid component to assist with class II bingo game play as permitted by the tribal regulator and IGRA*.

The arbitrator then examined the question of whether this type of server-based gaming was "conducted on Indian lands" for purposes of IGRA, noting that to "date this issue has never been finally resolved by the courts" and the "[Department of the Interior ("DOI")] and the NIGC have struggled with the issue." Id. at 13. After highlighting the "inconsistency" of the DOI and NIGC on the issue, and the fact that the "NIGC"s general counsel's office has in the past issued several letters simply concluding with very little analysis that the 'use of the Internet . . . would constitute off reservation gaming,'" the arbitrator proceeded to insightfully analyze the text, intent, purpose, legislative history and DOI and NIGC agency interpretations of IGRA. This analysis led the arbitrator to conclude "that the 'conducted on Indian lands' language appearing in IGRA ***does not prohibit Internet gaming***." Id. at 15 (emphasis added). In making this conclusion, the arbitrator expressly noted that:

> Congress intended that tribes should and could by that Act take every opportunity to use and take advantage of modern technology to promote participation among players and thereby increase tribal revenues for their people. ***The Internet is modern technology that does precisely that***.

Id. (emphasis added).

A couple of specific factors that the arbitrator found to be in support of his conclusion are also relevant to the precise "conducted on Indian lands" question to be answered here regarding DRB's use of the VPNAPS gaming system containing

a proxy play technology aid component to class II bingo game play. First, the arbitrator found that since 2002 (i.e. after the NIGC adopted new Part 502 definition regulations concerning "technologic aids," and after the Ninth Circuit decision in AT&T Corporation v. Coeur d'Alene Tribe, 295 F.3d 899 (9th Cir. 2002) rejecting the "physically present" rationale offered here by the USA and California (as discussed more fully below)) the DOI had by final agency action affirmatively approved several Tribal-State Compacts permitting Internet gaming by tribes under certain conditions. Id. at 13. The logical and legal inference from these DOI compact approval actions is that such Internet gaming must be considered to be "conducted on Indian lands" *for purposes of IGRA*; otherwise such gaming would not be permitted under IGRA and could not be included in any Class III gaming compact approved pursuant to IGRA.[15]

Another factor that arbitrator found to be in support of his conclusion on the precise "conducted on Indian lands" question is the fact that the State of New Jersey "faced an issue similar to the 'conducted on Indian lands' issue." Id. at 14. Exercising its sovereign powers, New Jersey solved the issue by a legislative act declaring that the situs of Internet gaming conducted outside Atlantic City was to be the "computer servers located in Atlantic City that controlled and operated the games. In other words, the gaming is 'conducted' where the computer server controlling the game is located." Id. at 14-15. This is exactly what Iipay, as a

[15] Tellingly, one of the compacts cited by the arbitrator for this point is California's Tribal-State Compact with Iipay. This means that, regardless of any argument its raises about the technologic aid vs. facsimile issue, California has already conceded the argument that class III "Internet" gaming is indeed "conducted on [Iipay] Indian lands" *for purposes of IGRA*. Certainly, if Class III "Internet" gaming is indeed "conducted on [Iipay] Indian lands," then Class II "Internet" gaming of the type offered by DRB using the VPNAPS gaming system containing a proxy play technology aid component to Class II bingo game play must also be deemed to be "conducted on [Iipay] Indian lands" *for purposes of IGRA*.

sovereign equal to any state, has done. See Tribal Business Transactions Code; also SYGC 14-I010.[16]

The decision in the Iowa Internet Gaming Arbitration Award action that "the use of the Internet to conduct [tribal gaming] is permissible under IGRA" is supported by a number of other legal authorities.

(i) 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 an Internet communication link between patrons and the tribal gaming operation. More directly, there is *no express and unambiguous* provision in IGRA requiring that patrons be "physically present" on Indian lands when communicating via an Internet connection with a tribal gaming operation located on Indian lands. 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 Internet) 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 a DRB Account Holder must be physically present on Iipay's Indian lands for the bingo game activity to be permitted under IGRA is meritless because all that IGRA actually requires is that the bingo game play offered by a tribe be "conducted on Indian lands" – that is, bingo game play that originates on tribal lands.

[16] The arbitrator also stated that consideration of the tribal sovereignty and jurisdictional issues raised in Michigan v. Bay Mills Indian Community, 572 U.S. 134 S. Ct. 2024 (2014) also supported his conclusion regarding the "conducted on Indian lands" question; which conclusion, the arbitrator noted, "eliminates complex sovereignty issues that would result from any alternative resolutions" (i.e. like the positions taken on the issue in this action by the USA and California). Id. at 27.

As noted above, the question whether under IGRA a DRB Account Holder is required to be "physically present" on Iipay Indian lands in order to transmit to DRB their request to play, whether by proxy or otherwise, the bingo games offered by DRB 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). 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 of 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 had 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.[17]

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[17] It is telling that both USA and California only cite to the district court's "physically present" rationale, which the Ninth Circuit so soundly rejected, as the main judicial source of their "physically present" argument in this action. See USA Summary Judgment Memorandum [ECF # 61-1] p. 23; California Summary Judgment Memorandum [ECF # 63-1] p. 20. Despite what California may claim, however, it is the substance of the Ninth Circuit's legal reasoning, particularly its

(ii) Continued approval of "off-reservation means of access" to tribal game play by NIGC and tribal regulators

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 of 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 continues to permit the use of such "off-reservation means of access" to gaming activities conducted on its Indian lands.[18] 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 "conducted on Indian lands" and permitted under IGRA.

Contrary to California's erroneous contention, the NIGC has never, by final agency action or other official pronouncement from the NIGC Chairman or Commission, formally made any "conclusion" that "tribes making Internet gambling available to persons not located on Indian lands violate IGRA." See California Summary Judgment Memorandum [ECF # 63-1], p. 19. The sole source cited by California for this misleading statement is merely a handful of unofficial, non-binding "courtesy guidance" letters issued by the NIGC's OGC. Id. It is noteworthy, however, that each of these OGC "courtesy guidance" letters was

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admonition to look to and defer to final agency actions approving "off-reservation means of access" to tribal gaming for purposes of IGRA, that remains relevant and instructive on the issue.

[18] See February 4, 2010 approval by NIGC Chairman of Coeur d'Alene tribal gaming ordinance at NIGC website:

www.nigc.gov/images/uploads/gamingordinances/coeurdalenetribe20100204OrdAppr.pdf

issued during the 1999 to 2001 period when, as is well known in the Indian gaming industry, the NIGC attorney staff was under tremendous pressure from main DOJ personnel to try to "put the genie back in the bottle" after the NIGC had previously officially concluded by final agency action that the Coeur d'Alene 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." See AT&T Corporation, 295 F.3d at 902, 906-908.

In this respect, each of the OGC "courtesy guidance" letters relied upon by California for its meritless contention – that the "NIGC [has] concluded" any use of the Internet as a communication link for patrons to access DRB is not allowed *for purposes of IGRA* gaming because the patron needs to be "physically present" on Iipay lands – was issued while the Coeur d'Alene Tribe's lottery appeal was pending in Ninth Circuit (i.e. in the heat of the battle with DOJ over the "physically present on Indian lands" versus "off-reservation means of access" issues raised by that tribal lottery case). But, as explained above, the Ninth Circuit eventually rejected the legal premise of these "courtesy guidance" letters, including the June 22, 1999 NIGC Chairman letter and the Amici Curie brief of the DOJ cited by California, along with similar arguments offered by 37 state attorneys general. It is telling that California cannot point to a single formal NIGC action (or OGC "courtesy guidance" letters for that matter) issued since the Ninth Circuit decision in 2002 that actually supports its position.

There are several reasons why California can find no support ***after 2001*** from any formal NIGC action (or OGC "courtesy guidance" letters) for its contention that IGRA prevents tribes from using modern technology communication links like the Internet to promote participation among players accessing their tribal gaming operations from remote locations. First, of course, is that the NIGC continues to respects and adhere to its original decision finding that using "off-reservation

means of access" (whether by telephone, Internet or otherwise) to tribal gaming operations is authorized under IGRA. Second, is the fact that the Ninth Circuit, after admonishing the district court for its failure to give substantial deference to the final agency action that the NIGC had taken on the issue, has rejected the legal rationale underlying California's contention. Third, is the fact that the changes made in 2002 by the NIGC to the Part 502 regulations concerning "technologic aids" supports the use of modern technology communication links like the Internet to promote participation among players accessing tribal gaming operations from remote locations.[19] Fourth, the NIGC adoption by final agency action in 2008 and 2012 of the Part 543 and 547 regulations relating to technologic aids used in the

[19] These 2002 amendments to the Part 502 definition regulations, which now exclude from "facsimile" any electronic, server-based bingo system (i.e. bingo games played in "a *wholly* electronic format") and include as a "technologic aid" any mechanisms that "broaden participation levels in a common game," demonstrate that California's reliance on the October 26, 2000 OGC "courtesy guidance" letter re: LVD Internet Bingo Operation is misplaced. See California Summary Judgment Memorandum [ECF # 63-1] at p. 19. This letter is the poster child example of the OGC letters that the arbitrator in the Iowa Internet Gaming Arbitration Award action noted contained "very little analysis" on the issue of the use of the Internet for access to gaming "conducted on Indian lands." This informal letter, which "does not purport to create any law or bind the [NIGC]", see Lac Vieux Desert Band of Lake Superior v. Ashcroft, 360 F. Supp. 64, 68 (D.D.C. 2004), and which appears to be the OGC's last ditch effort to "put the genie back in the bottle" during the pendency of the Coeur d'Alene lottery case appeal to the Ninth Circuit, consists of a mere one and one-half page analysis of the "conducted on Indian lands" issue. Relying specifically on the *district court* decision analysis – which adopted the "physically present" standard *later rejected by the Ninth Circuit* – the OGC opined that "Internet bingo is not authorized by IGRA." Curiously, in stating his informal opinion, the OGC expressly declined to address whether "Internet Bingo is a class II technological aid under IGRA" under the NIGC Part 502 definitional regulations that exists at that time before the NIGC adopted the modern Part 502 definitions in 2002. This left the OGC to merely speculate that offering proxy play bingo to patrons using an Internet communication link is not authorized by IGRA.

play of bingo games (i.e. "Class II gaming systems" that are electronic linked bingo systems using client/server architecture) is consistent with the tribes use of modern technology communication links like the Internet to promote participation among players. Fifth, and perhaps most importantly, fully aware of the Ninth Circuit's reliance on the fact that the NIGC's approval of the Coeur d'Alene tribal gaming ordinance signified the agency's conclusion that the use of the Internet and other "off-reservation means of access" to gaming activities conducted on Indian lands is legal under IGRA, the NIGC has again approved the Coeur d'Alene tribal gaming ordinance which continues to permit the use of such "off-reservation means of access" to gaming activities conducted on its Indian lands. Sixth, as noted above in the Iowa Internet Gaming Arbitration Award action, even the DOI has taken final agency action since 2002 indicating that the use of modern technology communication links like the Internet by tribal gaming operations is permitted *for purposes of IGRA.* Finally, Congress is well aware of the NIGC agency action finding the use of the Internet and "other off-reservation means of access" to gaming activities conducted on its Indian lands is authorized under IGRA, and the DOJ's and states' objections to this agency action, and Congress has declined to take any steps to change the current state of the law.[20] In fact, in the only instance since 2002 where it did take action to address issues relating to the Internet and gaming, Congress went to great pains to exclude Indian gaming from that legislation. See 31 USC §5361(b) and §5362(10)(B)(iii).

Moreover, IGRA and its legislative history contain numerous indications that

[20] See Lac Vieux Desert Band of Lake Superior v. Ashcroft, 360 F. Supp. at 66 (noting that the DOJ letter describing the DOJ's position on the tribe's proposal to offer proxy play bingo to patrons using an Internet communication link was issued after a House Sub-Committee hearing held on *November 17, 2000* on the issue of "Internet Proxy Bingo" – again while the Coeur d'Alene lottery appeal was pending in Ninth Circuit).

Congress specifically contemplated that some actions relating to Indian gaming may 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, IGRA is silent on the meaning of the term "gaming activities."[21] 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 bingo card 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.[22]

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 transmit their offer to purchase bingo cards and authorize deductions from their on-reservation accounts. Congress's unmistakable silence on

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[21] In its capacity as the primary regulator of Class II bingo, SYGC has determined the meaning of this phrase under IGRA, finding that bingo "gaming activities" consist of three essential elements *for purposes of IGRA;* all of which, like is the case with other "Class II gaming systems" operating in Indian country today, are conducted and originates on the math and game management servers of the VPNAPS gaming system. See Vialpando Declaration, ¶ 55(e)-(g).

[22] In this respect, 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.

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 e.g. 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).

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.[23] 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 to require that a Class II bingo game participant be physically present on the tribe's Indian lands when offering to purchase bingo cards to be used in bingo game play which will be conducted at a later time on Indian lands.

Furthermore, IGRA's legislative history contains not a single indication that, in connection with the phrase "conducted on Indian lands," Congress intended a

[23] 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.

Class III lottery purchaser /class II bingo game participant be "physically present" on the tribe's Indian lands when purchasing lottery tickets/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, found online at http://www .indian.senate.-gov/hearings/1029_nga.htm (emphasis added). And in at least 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 gaming "conducted on Indian lands" unambiguously required a tribe's customers to be physically present on the reservation, clarification and amendment would not be required.[24]

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

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[24] Government officials and policy makers have long recognized that the IGRA is indeed, at best, ambiguous as to whether a Class III lottery purchaser/Class II bingo game participant must be physically present on the tribe's Indian lands when offering to purchase lottery tickets/bingo cards for the game activity. See National Gambling Impact Study Commission, June 18, 1999 Final Report, pages 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).

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 OGC 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).[25]

If IGRA permits a tribal patron to ***directly*** participate in the tribe's Class II bingo gaming activities through the use of "off-reservation means of access" like the Internet, 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 make a request to DRB to have their proxy agent offer to purchase bingo cards to be played on behalf of the Account Holder.

Judged against a construction of IGRA that favors the interests of Indian tribes, adheres to the express terms and legislative history of the statute, and is in accord with analogous case law as well as NIGC regulations and pronouncements, the foregoing demonstrate that the gaming offered by DRB is "conducted on Indian lands" ***for purposes of IGRA***. See Vialpando Declaration, ¶56(a)-(k).

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[25] Interpreting IGRA to permit a Class II gaming bingo participant to participate in a tribe's Class II bingo gaming activities through the use of "off-reservation means of access" like the Internet 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 926, 939 (D.S.D. 2013) ("[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.").

(2) DRB's bingo game play originates and is conducted on the math and game management servers housed in the Tribe's gaming facility located on Iipay's sovereign Indian lands

It is undisputed that all the actual bingo game play conducted by DRB originates and is controlled on the math and game management servers housed in the Tribe's gaming facility located on Iipay's sovereign Indian lands. See ***TD Facts Nos. 93-116*** (describing the bingo "game play process"). This alone, in the server-based gaming context, demonstrates that the gaming offered by DRB is "conducted on Indian lands" – i.e. because the servers are physically located on Iipay's sovereign Indian lands.[26] This conclusion is also supported by a number of other legal authorities. Most importantly, applicable tribal laws and regulations conclusively deem the bingo game play to be "conducted on [Iipay] Indian lands." For example, as noted above, pursuant to the Tribal Business Transactions Code the transaction between Account Holders and DRB relating to the gaming offered by DRB 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." In addition, under SYGC regulations the gaming offered by Desert Rose Gaming using the VPNAPS gaming system is "deemed to take place where the servers are located on the Indian lands of the Nation, regardless of a player's physical location," and the servers used by Desert Rose Bingo are "located in a restricted area of a Gaming Facility situated within the territorial limits of the Santa Ysabel Indian Reservation on Indian lands." See SYGC 14-I010.

[26] See 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, New Jersey P.L. 2013, c27 (5:12-95.17(1)(J)) found online at http://www.njleg.state.nj.us/2012/Bills/PL13/27.HTM.

These tribal laws and regulations are 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). In this respect, 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 at 938-940 (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.").

Several other legal authorities also demonstrate that the gaming offered by DRB is indeed "conducted on Indian lands" pursuant to IGRA and tribal law because the bingo game play process is originated and controlled on the math and game management servers that are physically located on Iipay Indian lands. 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 gaming offered by DRB using the VPNAPS gaming system from this perspective, it is clear that the

contracts between DRB and its bingo game customers are formed on the reservation and will be performed on the reservation, because an offer electronically transmitted via the Internet connection is accepted, and the contract is formed, where the offeree – here, DRB, 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); 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."); also Vialpando Declaration, ¶57(d)-(g).

Moreover, any payment for the purchase of bingo cards to be played as part of the bingo games offered by DRB 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 takes place on Indian lands. The bingo game prize money is collected on Iipay's reservation and paid from Iipay's reservation.

In sum, the gaming offered by DRB 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.[27] This permits

[27] In this respect, the only interaction associated with the use of the VPNAPS gaming system that may not take place on the Iipay reservation – the Account

Iipay 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 DRB bingo gaming is "conducted on Indian lands" in compliance with federal law.

(3) The proxy play component aids of the VPNAPS gaming system used to conduct the DRB bingo gaming means the gaming is conducted on Indian lands

As noted above, IGRA generally permits a tribal patron to ***directly*** participate in the tribe's Class II bingo gaming activities through the use of "off-reservation means of access" like the Internet. Even if that were not the case, however, the proxy play component aids built into the VPNAPS gaming system used to conduct the DRB bingo gaming means the gaming is "conducted on Indian lands." In this regard, proxy play with Class II bingo, ***besides being specifically authorized by tribal law and SYGC regulatory action,*** has also been given the green light by NIGC since 1995 and Chevron (or at least Skidmore level) deference must be given to these agency decisions.

(i) 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

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Holder's use of an "off-reservation means of access" to electronically transmit instructions to the proxy to make a request to DRB 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.

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.[28] 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 OGC 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).[29]

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[28] 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. at p. 2.

[29] See also June 24, 2014 OGC Advisory Letter re: Bingo Nation Game, wherein the OGC provided guidance that re-endorsed the use of proxy play and the proxy agent's use of devices with hardware and software components in connection with a class II electronic bingo game system; that is the proxy agent's use of an "electronic card minding device" in a bingo game – i.e. a mechanism which tracks the bingo cards being played by the proxy and notifies them if they have achieved a bingo. In this respect, the electronic card minding devices "do not change the fact that players still compete against one another rather than with or against the machine. [. . .] Whether a player wins or loses is determined by the contents of the cards purchased, and whether the numbers on the bingo balls drawn by the bingo blower

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 using a "technologic aid" like the Internet or "card minding" software to assist with the proxy's play on behalf of the patron.

> (ii) Any communication via an Internet communication link 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

The well-recognized legal 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" 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 communication via an Internet communication link 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 gaming system 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 management server component of the VPNAPS gaming system to purchase a specific denomination of a specified number of digital cards for a specific number of games.

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match the numbers on the bingo card." Id. at p. 7-8.

The communication activity between the Account Holders and their proxy agent using the communication link of the VPNAPS gaming system is an activity that is at most a "pre-game" administrative function to any actual bingo game play that is to be commenced at a later time by the proxy. 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 has initiated a game play and receives a randomly patterned digital card that must be matched with randomly drawn numbers.

(iii) 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 gaming system

As designed, the VPNAPS gaming system does not permit any bingo game play directly by the Account Holder. Rather, the Account Holder must request that his designated agent proxy initiate the play of a bingo game by sending a request to the game management server component of the VPNAPS gaming system to purchase a specific denomination of a specified number of digital cards for a specific number of games. In this respect, 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. See ***TD Fact No. 98***; ***Chelette Dec. Exhibit No. 30***.

Once the game management 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 gaming system 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. ***Id***., see also ***TD Fact Nos. 67, 161-163***. 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. ***TD Fact Nos. 70-71.***

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 Requests" tab. ***TD Fact Nos. 110, 112-115.*** In this respect, no live bingo game action is ever performed or even viewed by the Account Holder. Under the "Completed Requests" 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. ***Id***.

As such, play of the bingo games offered by DRB using the VPNAPS gaming system does not commence until the patron's proxy sends a request to the game management server component of the VPNAPS to purchase cards for a bingo game to be played and the game management server accepts the request. Because the patron's designated agent proxy 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 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.

In sum, the VPNAPS gaming system allows DRB 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 gaming system used by DRB is a "technologic aid" to the play of class II gaming; and (b) the class II games offered by DRB are operated legally under IGRA pursuant to the NIGC's July 26, 1995 "proxy play" declaration.[30]

(iv) Use of the "Internet" is not relevant or dispositive to an IGRA interpretation concerning the "conducted on Indian lands" question

As the Ninth Circuit's discussion in the Coeur d'Alene lottery case makes plain – discussing whether "*the use of telephone and other off-reservation means of access*" to games conducted on Indian lands is prohibited by IGRA – the fact that the "*other off-reservation means of access*" in this matter is made via the manner of a modern communication technology link like the Internet is not in any way relevant or dispositive to an ***IGRA*** interpretation concerning the "conducted on Indian lands" question. The *off-reservation means of access*" to the bingo games conducted on Indian lands by DRB could, with different technology features added, just as easily be accessed remotely by a patron via other "old-fashion" communication methods (phone, fax, postcard, western union, messenger, etc.), and the foregoing "conducted on Indian lands" analysis would be the same.

C. Legal IGRA bingo gaming activity is not subject to any enforcement action under UIGEA or a Class III compact-based claim

The USA and California's claims are meritless because the gaming offered by Desert Rose Bingo is Class II bingo that is legally conducted on Indian lands for

[30] Even if communication via an Internet 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.

purposes of IGRA. UIEGA cannot and does not prohibit legal IGRA Class II gaming activity, as the USA admits. See 31 U.S.C. § 5361(b) and § 5365(b)(3)(B); also Vialpando Declaration, ¶58. Simply put, UIGEA did not change the status quo – Indian gaming that is legal under IGRA remains legal. Therefore UIGEA does not apply to the bingo gaming offered by DRB using the VPNAPS gaming system because, as described above, the VPNAPS gaming system qualifies as a "technologic aid" to the play of a "Class II bingo" game "conducted on Indian land," and is operated legally under IGRA in a licensed Indian gaming facility.

Likewise, by its own terms, the Compact only applies to "Class III gaming" activities. Therefore, DRB's legal Class II bingo gaming using the VPNAPS gaming system is not subject to any of the provisions in the Compact nor to any California state gambling laws.

V. CONCLUSION

The foregoing undisputed facts and two-part analysis demonstrate that (1) the electronic gaming system used by DRB was properly classified by the tribal regulator as a Class II "technologic aid" to "bingo;" and (2) the gaming offered by DRB is legally "conducted on Indian lands" under IGRA and applicable tribal law. Accordingly, the UIGEA and Class III compact-based claims of USA and California are meritless. Therefore, the summary judgment motions of USA and California must be denied, and this consolidated action must be dismissed with prejudice.

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