No. 17-55150

United States Court of Appeals

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA; UNITED STATES OF AMERICA,
PLAINTIFFS-APPELLEES

v.

IIPAY NATION OF SANTA YSABEL, *ET AL.*,
DEFENDANTS-APPELLANTS

On Appeal from the United States District Court
for the Southern District of California
3:14-cv-02724-AJB-NLS
3:14-cv-02855-AJB-NLS

APPELLEES' JOINT ANSWERING BRIEF

ALANA W. ROBINSON
Acting United States Attorney

GLEN F. DORGAN
Assistant U.S. Attorney
U.S. Attorney's Office
880 Front St., Rm. 6293
San Diego, CA 92101
(619) 546-7665
Attorneys for Appellee
United States of America

XAVIER BECERRA
Attorney General of California
SARAH J. DRAKE
Senior Assist. Attorney General

WILLIAM P. TORNGREN
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 323-3033
Attorneys for Appellee
State of California

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INTRODUCTION

At issue on this appeal is the scope of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq*. In May 2014, the Supreme Court held that "[e]verything—literally everything—in IGRA affords tools . . . to regulate gaming on Indian lands, and nowhere else." *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2034 (2014). Six months later, in November 2014, the Iipay Nation of Santa Ysabel and its tribal corporations (collectively "Iipay") launched Desert Rose Bingo ("DRB"), an Internet website that allows patrons to gamble online from locations off Iipay's tribal lands. Because DRB gambling violates the Unlawful Internet Gambling Enforcement Act ("UIGEA"), 31 U.S.C.

§§ 5361-5367, the district court issued a permanent injunction preventing Iipay from profiting from DRB. Citing *Bay Mills*, the district court held that Iipay is not shielded by IGRA to accept the proceeds of illegal gambling conducted off its Indian lands.

Iipay now challenges the district court's order based on the novel contention that IGRA's scope extends to gambling conducted, or wagers made, off Indian lands, provided a game itself "originates" on computer servers housed on Indian lands. Remarkably, Iipay fails to cite to, much less distinguish, *Bay Mills* in proffering this bold theory. Because IGRA, by its express terms, only applies to gaming "on Indian lands," and because the Supreme Court has rejected a broader interpretation of the statute, the district court's order should be affirmed.

JURISDICTIONAL STATEMENT

In the underlying consolidated actions, both the State of California and the United States (collectively "Appellees") sought relief under UIGEA. ER 1275, 1312.[1] The district court had jurisdiction to hear the consolidated cases pursuant to 28 U.S.C. § 1331 and 31 U.S.C. § 5365(a).

On January 4, 2017, the district court entered a final judgment in Appellees' favor, and, on February 6, 2017, Iipay timely filed a notice of appeal. ER 1, 59. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

[1] "ER" refers to the Excerpts of Record filed by Iipay; "SER" refers to the Supplemental Excerpts of Record filed by Appellees; and "OB" refers to Iipay's Opening Brief.

ISSUE PRESENTED

Whether, contrary to the express terms of IGRA and *Bay Mills*, Internet gambling conducted off Indian lands using computer servers located on Indian lands is within the scope of, and protected from UIGEA remedies by, IGRA.

STATEMENT OF THE CASE

Iipay is a federally recognized Indian Tribe, and its tribal lands are located within San Diego County. ER 101. On November 3, 2014, Iipay launched DRB, an Internet-based gambling venture. ER 103. Iipay designed DRB to allow patrons to log on to www.desertrosebingo.com using web-enabled computers, tablets, or cell phones, register and provide credit card information to fund an account, and commence gambling. ER 109-13. Almost immediately after its launch, DRB began attracting gambling enthusiasts who registered, funded accounts, and proceeded to gamble in over 300 separate online bingo games until December 12, 2014, when a court order halted the operations. ER 42, 103-104, 607-48.

By design, the patrons who gambled on the DRB website never stepped foot onto Iipay's tribal lands. Instead, they registered, funded their accounts, and placed their bets and wagers online from locations all over California, including, among other places, San Francisco, Shasta Lake, Fresno, and Los Angeles. ER 579-83. In doing so, these patrons

violated California criminal and civil laws prohibiting gambling and wagering.

UIGEA authorizes injunctive relief to prevent gambling businesses from accepting payments, including credit card proceeds, from patrons who place on-line bets or wagers within a state that outlaws gambling. 31 U.S.C. §§ 5363, 5365. Pursuant to UIGEA, the district court issued a permanent injunction on December 12, 2016, preventing Iipay from profiting from DRB. ER 4. Iipay now appeals that decision.

A. Procedural History

The State of California initiated its action (Case No. 3:14-cv-02724) on November 18, 2014, by filing a complaint seeking injunctive relief based on two claims: (1) DRB is a "class III" game[2] within the meaning of IGRA and is not authorized by the parties' tribal-state compact; and (2) DRB operates in violation of UIGEA. ER 1312. On December 12, 2014, the district court found that the State of California was likely to succeed on its claims and issued a temporary restraining order effectively halting DRB operations during the pendency of the case. ER 42.

On December 3, 2014, the United States filed a separate action (Case No. 3:14-cv-02855) against Iipay seeking injunctive relief based

[2] As explained in greater detail below on page 14, IGRA separates gaming activities into three categories for regulatory purposes. While tribes retain authority to regulate class II gaming, they must secure a compact with a state to conduct class III gaming. *See* 25 U.S.C. §§ 2710(b), (d).

solely on UIGEA. ER 1275. On August 31, 2015, the district court consolidated the two cases. ER 40.

In April 2016, after the parties completed extensive discovery in the consolidated actions, Appellees filed separate motions for summary judgment. ER 861, 914. On December 12, 2016, the district court entered an order denying summary judgment on the State of California's compact claim, but granting summary judgment as to Appellees' UIGEA claims. The district court, therefore, issued a permanent injunction preventing Iipay from accepting proceeds associated with DRB. ER 4.

B. Overview of DRB

DRB is a game of chance that electronically replicates certain aspects of the game of bingo. In a traditional bingo game, players holding pre-printed bingo cards mark or "daub" the numbers on their cards as they are randomly drawn by the bingo caller, and the winner is the first player to achieve a specified pattern and yell "Bingo!" *Cf.* Cal. Pen. Code § 326.5(o) (defining charitable bingo). By comparison, DRB is computerized. Once a minimum number of patrons log on to the DRB website and make their wagers by purchasing electronic bingo cards, the DRB computer servers complete the remaining steps by calling out the ball draw, daubing the corresponding numbers on the patrons' electronic cards, determining when the winning pattern is achieved, and declaring a winner. ER 105-14.

Because Iipay does not make DRB gaming terminals available to the public on its tribal lands, patrons interested in gambling through DRB must do so off Iipay's lands using their own web-enabled personal computers, tablets, or cell phones. ER 103-04. To make a wager and commence gambling, a patron need only navigate to www.desertrosebingo.com, register and fund an account with a credit card, select a bingo card denomination (from $0.01 to $1.00), and select the number of cards to be played (not to exceed 500). ER 109-11; *see* SER 240-242. The DRB servers automatically debit a patron's online account balance for the cost of the purchased card(s) after the patron completes these steps and clicks the "Submit Request!" tab on the web screen. ER 105-07, 111.

Once a wager is submitted, it is assigned a "Request ID" number and displayed under the "Requested" subtab of the "Bingo" page, where it will remain queued until a minimum number of patrons (ranging from 2 to 5) purchase cards for the same game. ER 112-13; *see* SER 243. After a minimum number of patrons have joined the game by making wagers, a timer under the "Requested" subtab will commence a 60-second countdown. When the timer reaches "0:00," the wager is logged by "Request ID" under the "Completed Requests" subtab. ER 113; *see* SER 243-245. At this point, a patron may click an icon to start a video that displays a facsimile of the patron's electronic bingo card and graphics depicting the ball draw, the card daubing and the announcement of a

winner. ER 113; *see* SER 245-46, 260-64. Regardless whether participating patrons watch the gameplay video, the DRB servers automatically award a prize to the winning patron by crediting the patron's account a sum calculated based on a percentage of the pay-in amount for the game, with a set percentage retained by Iipay. ER 114.[3]

C. DRB's Purported Technological "Enhancements"

In describing the technological nature of DRB, Iipay states that they "started with the standard electronically linked server-based bingo gaming system operated in Indian country since the late-1990s"[4] and

[3] Iipay has filed an unopposed motion for leave pursuant to Ninth Circuit Rule 27-14 to transmit a DVD to the Court as part of the record in this case. The DVD was originally lodged with the district court in support of Appellees' motion for summary judgment. *See* SER 33, 42. The DVD contains a video capture of a DRB game that occurred on November 14, 2014, and the video illustrates several stages of gameplay from the patron's perspective, including: (1) logging in (0:00 to 0:28); (2) selecting the card denomination (0:28 to 0:36); (3) selecting the number of cards and clicking "Submit Request!" (0:36 to 0:52); (4) monitoring the game timer in the "Requested" subtab (0:52 to 1:46); and (5) accessing the video depiction of the game in the "Completed Requests" subtab (1:46 to 3:20).

[4] Indian tribes have used Internet technology for years to operate "intertribal gaming," i.e., gambling between patrons who are located *on* the lands of two or more Indian tribes and linked through a computer network. *See, e.g., U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000) (describing a gambling system that allows "players [to] compete against each other in a single, interlinked electronic game via a network of individual computer terminals located *at tribal gaming facilities* throughout the country") (emphasis added); *cf.* S. Rep. No. 100-446 (Aug. 3, 1988), reprinted in 1983 U.S.C.C.A.N. 3079 ("tribes may wish to join with other tribes to coordinate their class II operations" by, "[f]or example, linking participant players *at various reservations* . . . by means of telephone, cable, television or satellite") (emphasis added). It is undisputed, however, that DRB is not "intertribal gaming," because patrons access the gaming, and place their wagers, from locations off Indian lands. *See* ER 104.

"enhanced it" with "VPNAPS" and "proxy play" technology. *See* OB 20. It is undisputed, however, that "VPNAPS" (an acronym for "Virtual Private Network Aided Play System") is nothing more than encryption software that protects Internet communications between the patrons and the DRB servers from being hacked. ER 933-934; SER 165, 170, 347-50. Moreover, when Iipay refers to a "proxy player" or "proxy play technology," it is *not* referring to technology that enables one or more individuals on Indian lands to act as a substitute for the patrons in gambling on their behalf. Iipay is instead referring to the software-generated algorithms of the DRB computer servers. ER 108-09, 930-32; *see* ER 32-33 ("[T]he proxy player is merely a component of DRB's software and not an actual person," and Iipay's employees "do no more than passively observe the automated gaming and ensure the gaming operates smoothly").

Given the foregoing, the purported "enhancements" to DRB do not alter its true nature: DRB is a server-based gaming operation that allows patrons located off Indian lands to gamble and make wagers over the Internet.

D. The Limited Scope of this Appeal

In ruling on Appellees' separate motions for summary judgment, the district court began by addressing California's compact breach claim. The court found that Iipay had not breached its compact with California, because DRB is properly characterized as class II gaming under IGRA,

and the compact only governed Iipay's rights to conduct class III gaming. ER 18-19. The State of California has not appealed this finding.

Turning to Appellees' UIGEA claims, the district court made numerous findings of fact and conclusions of law on issues raised by Appellees that were simply ignored by Iipay. ER 20-24 (noting that Iipay "do[es] not respond to the vast majority of the United States' contentions"). The court, for example, concluded: "DRB patrons' conduct indisputably constitutes placing a 'bet or wager' within the meaning of UIGEA"; the gambling conduct of the DRB patrons violates California's anti-gambling laws; and UIGEA applies generally to Indian tribes and specifically to Iipay because it is accepting the proceeds of its Internet gambling operation while engaged in the "business of betting and wagering." ER 20-22. Because Iipay did not address these issues before the district court, it does not (and cannot) raise these findings as a basis for its appeal.

Instead, the only issue raised by Iipay in opposition to the motions, and the only issue on appeal, is whether DRB is conducted "on Indian lands" for purposes of IGRA given two facts: (1) the patrons engaged in the on-line gambling are located off Indian lands; and (2) the DRB computer servers are located on Indian lands. *See* ER 143-69. Stated another way, Iipay contends that IGRA trumps UIGEA to permit an Indian tribe to accept the proceeds of illegal gambling activities

conducted *off* Indian lands provided the gambling transactions are processed by computer servers located *on* Indian lands.

At the summary judgment stage, the district court rejected Iipay's contention. First, the court found that the classification of DRB as a class II game is "irrelevant" to the determination whether Iipay has IGRA rights, because IGRA only affords rights to Indian tribes to conduct class II gaming when it is conducted "on Indian lands." SER 360 n.1 (concluding the classification determination turns on whether "the technology is properly characterized as a 'technological aid,'" not on whether the gaming is conducted on Indian lands); ER 25 ("This phrase—'on Indian lands'—works to constrain IGRA's scope"); ER 13 n.9, 19 ("the Court finds that the 'on Indian lands' issue is irrelevant to whether DRB constitutes permissible Class II gaming" or, whether it is class II, "DRB [is] outside IGRA's protection").

Second, the district court concluded that "DRB gaming activity occurs off Indian lands at the patron's location when the bet is placed." ER 26. Citing *Bay Mills*, the district court held:

> Here, the gaming activity is not the software-generated algorithms [of the DRB servers] or the passive observation of the [Iipay's employees]. Rather, it is the patrons' act of selecting the denomination to be wagered, the number of games to be played, and the number of cards to play per game. This off-site activity "is the gambling in the poker hall," not the on-site "administrative authority" of the DRB servers and [Iipay's] employees.

ER 26.

Based on these findings, the district court concluded that "the operation of DRB is not protected by IGRA and violates UIGEA." ER 33. Accordingly, the district court granted Appellees' motions and issued a permanent injunction preventing Iipay from accepting the proceeds of their off-site gambling venture. ER 33-37. For the reasons set forth below, the district court's decision must be affirmed.

SUMMARY OF ARGUMENT

Iipay's "central argument" on appeal is that "the IGRA statutory text 'conducted on Indian lands' is ambiguous." OB 7. Iipay then argues that the term "conducted on Indian lands" must be construed broadly to include "game play that *originates* on tribal lands" without regard to whether the patrons engaged in the gambling and making the wagers are located off Indian lands. OB 16-17 (emphasis added). In this regard, Iipay admits that DRB patrons are engaged in gambling off Indian lands,[5] but it contends that the "gaming activity" remains *on* Indian lands for purposes of IGRA simply because a component of the gaming—the DRB computer servers—is located on Indian lands. *See* OB 28.

To support its novel interpretation, Iipay relies primarily on this Court's decision in *AT&T Corporation v. Coeur d'Alene Tribe*, 295 F.3d

[5] Iipay must concede that DRB patrons are engaged in illegal gambling activities, because it did not dispute this element of Appellees' UIGEA claim before the district court, and it has not raised the issue on appeal. *See BankAmerica Pension Plan v. McMath*, 206 F.3d 821, 826 (9th Cir. 2000) (failure to raise an issue with the district court waives any related argument on appeal).

899 (9th Cir. 2002). Iipay contends that *Coeur d'Alene* recognized IGRA protections for "off-reservation means of access" to Indian gaming and rejected the notion that IGRA requires patrons of Indian gaming to be physically present on Indian lands. OB 17-19.

Iipay's bold contentions must fail for three principal reasons. First, Iipay's proffered interpretation of IGRA is wholly inconsistent with the Act's express terms, its legislative history, and the Supreme Court's own interpretation of the Act in *Bay Mills*. To adopt Iipay's broad view, this Court would not only have to ignore the Supreme Court's holding in *Bay Mills*, but would also have to re-write the Act itself.

Second, Iipay's reliance on *Coeur d'Alene* is misplaced. Contrary to Iipay's assertions, this Court has never recognized IGRA protections for gambling conducted off Indian lands.

Third, Iipay's broad interpretation of IGRA would render various provisions of UIGEA meaningless and ineffective. Yet, "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

It is clear from the express provisions of IGRA and UIGEA that Congress intended the two laws to co-exist with IGRA controlling the regulation of gambling activity confined within the boundaries of tribal lands and UIGEA governing Internet gambling transactions initiated or received off Indian lands. Because it is undisputed that the gambling

activity associated with DRB occurs off tribal lands, the district court was correct in concluding that "DRB is not protected by IGRA and violates UIGEA." ER 33. The district court's decision, therefore, should be affirmed.

STANDARD OF REVIEW

The issue on appeal—whether Internet gambling conducted off Indian lands using computer servers located on Indian lands is within the protective scope of IGRA—raises a question of statutory construction based on undisputed facts and is subject to de novo review. *See Schleining v. Thomas*, 642 F.3d 1242, 1246 (9th Cir. 2011).

ARGUMENT

I. Iipay's View of IGRA Is Inconsistent with the Act's Terms, Legislative History, and *Bay Mills*

Iipay asks this Court to construe the IGRA term "conducted on Indian lands" in a manner that disregards the physical location of patrons who are engaged in gambling and making wagers. Iipay's argument, however, disregards the plain language of IGRA, its legislative history and the recent Supreme Court decision in *Bay Mills*.

A. IGRA's Very Terms Limit Its Scope to Gaming On Indian Lands

"Logic and precedent dictate that the starting point in every case involving construction of a statute is the language itself," *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (quotations and citations omitted), and, "absent a clearly expressed legislative intention

to the contrary, the words of the statute are conclusive." *Hallstrom v. Tillamook County*, 493 U.S. 20, 28 (1989).

IGRA establishes a regulatory structure for Indian gaming by separating gaming activities into three categories: (1) class I games ("social games . . . engaged in by individuals as a part of . . . tribal ceremonies or celebrations"); (2) class II games (which, with certain exceptions, includes bingo); and (3) class III games (all other gaming). 25 U.S.C. § 2703(6)-(8). While the provisions of IGRA that define class I, class II and class III gaming make no reference to the situs of the gaming activities, *see id.*, Congress' intention to limit IGRA to gaming on Indian lands is evident throughout the Act.

In IGRA's introductory provisions, for example, Congress found that numerous tribes were engaged in or licensed "gaming activities *on Indian lands*," 25 U.S.C. § 2701(1) (emphasis added), existing federal law did not provide clarity for the "conduct of gaming *on Indian lands*," *id.* § 2701(3) (emphasis added), and tribes have the exclusive right to "regulate gaming activity *on Indian lands*," *id.* § 2701(5) (emphasis added).[6] Moreover, Congress declared that one of IGRA's purposes is to establish federal regulatory authority and federal standards for "gaming *on Indian*

[6] To further clarify that the term "on Indian lands" constrains the scope of IGRA to gaming conducted within the physical boundaries of tribal lands, the term "Indian lands" is expressly defined in IGRA as "all lands within the limits of any Indian reservation" as well as "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe . . . ." 25 U.S.C. § 2703(4).

lands," 25 U.S.C. § 2702(3) (emphasis added), and Congress generally prohibited gaming on tribal trust lands acquired after October 17, 1988. *See* 25 U.S.C. § 2719.

Additionally, the regulatory provisions of IGRA make it clear that IGRA's scope is limited to gaming on Indian lands. Class I gaming, for example, is within the exclusive jurisdiction of the Indian tribes provided it is "*on Indian lands*." 25 U.S.C. § 2710(a)(1) (emphasis added). Similarly, class II gaming "*on Indian lands*" is within the jurisdiction of Indian tribes subject to oversight by the National Indian Gaming Comission ("NIGC"). 25 U.S.C. §§ 2710(a)(2), (b)(1)(B) (emphasis added). And Class III gaming is "lawful *on Indian lands* only if," among other requirements, the gaming is conducted in conformance with a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C) (emphasis added).

IGRA's terms clearly limit its scope and protections to gambling on Indian lands. Accordingly, IGRA itself is conclusive as to its scope. *See Hallstrom*, 493 U.S. at 28.

B. IGRA's Legislative History Confirms Congress' Intention to Limit IGRA's Scope to Gaming On Indian Lands

IGRA's plain language is confirmed by its legislative history. Congress enacted IGRA in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Bay Mills*, 134 S.Ct. at 2027. *Cabazon* involved tribes in Riverside County, California, who were operating small bingo parlors on their reservations.

Cabazon, 480 U.S. at 204-05. The tribes brought an action seeking a declaratory judgment that Riverside County had no authority to regulate the gaming conducted on their tribal lands, and the State of California intervened "insist[ing] that the Tribes comply with state law." *Id.* The Supreme Court sided with the tribes and held that gambling conducted on Indian lands could not be regulated by the States. *Id.* at 221-222.

Cabazon reflects the qualified, historic sovereignty Indian tribes retain over their lands. While tribal sovereignty is dependent upon and subordinate to the federal government, *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980), federal law continues to recognize Indian tribes as distinct, independent political communities, retaining their original natural rights to control internal relations and prescribe and enforce rules of conduct on Indian lands. *Duro v. Reina*, 495 U.S. 676, 685-86 (1990); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 178 (2nd Cir. 1996). Off Indian lands, however, tribal activities are subject to nondiscriminatory state law in the absence of express federal law to the contrary, for "[i]t has never been doubted that States may [apply their laws] to crimes committed by Indians, even reservation Indians, outside of Indian country." *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962).

In the wake of *Cabazon*, negotiations began between gaming tribes, States, the gaming industry, and Congress "in an attempt to formulate a system for regulating gaming *on Indian lands*." S. Rep. No. 100-446

(Aug. 3, 1988), reprinted in 1983 U.S.C.C.A.N. 3071 (emphasis added). In this context, Congress recognized that it had the responsibility, "consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming *on Indian lands*." *Id.* at 2 (emphasis added). Accordingly, IGRA was enacted to provide "a system of joint regulation by tribes and the Federal Government of class II gaming *on Indian lands* and a system for compacts between tribes and States for regulation of class III gaming." *Id.* at 1 (emphasis added).[7]

Thus, the plain language of IGRA and its legislative history make clear that IGRA is limited to authorizing gaming activities only "on Indian lands." Off of Indian lands, where state gambling laws traditionally govern, IGRA has no application.

C. *Bay Mills*: The Supreme Court Recognizes that IGRA's Scope Is Limited to Gaming On Indian Lands

In *Bay Mills*, the Supreme Court considered and rejected efforts to interpret IGRA broadly to encompass gaming conducted off Indian lands. The State of Michigan sought to enjoin an Indian tribe from operating a casino on land located outside of its reservation. The question before the Supreme Court was whether the tribe's sovereign immunity barred

[7] Consistent with this legislative history, the NIGC's General Counsel has repeatedly advised that class II gambling activities off Indian lands are not protected by IGRA. *See, e.g.*, Letter from Kevin Washburn, General Counsel, NIGC, to Robert Rossette, Monteau, Peebles & Crowell Re: Lac Vieux Desert Internet Bingo Operation (Oct. 26, 2000). SER 3-5. The NIGC's position on this issue is addressed further below at page 29.

Michigan's suit. *Bay Mills*, 134 S.Ct. at 2028. Because Indian tribes generally are immune from suits unless authorized by Congress, Michigan argued that IGRA "abrogate[d] the Tribe's immunity" at 25 U.S.C. § 2710(d)(7)(A)(ii), which provides that district courts shall have jurisdiction over "any cause of action initiated by a State . . . to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact." *Bay Mills*, 134 S.Ct. at 2032.

In an effort to fit its case within § 2710(d)(7)(A)(ii), Michigan argued two theories: (1) notwithstanding the "on Indian lands" term within the abrogation clause, it would be "senseless" to interpret IGRA as authorizing a State to obtain an injunction against illegal gaming on Indian lands, but not off-site gaming on lands subject to the State's own sovereign jurisdiction; and, in any event, (2) the Indian tribe *was* engaged in "gaming activity" on its Indian lands because it "authorized, licensed, and operated" its off-site casino from offices located "within its own reservation." *Bay Mills*, 134 S.Ct. at 2032-2033.

In rejecting Michigan's arguments, the Supreme Court emphasized the express limited scope of IGRA to gaming on Indian lands:

> A key phrase in that abrogation is "on Indian lands"— three words reflecting IGRA's overall scope (and repeated some two dozen times in the statute). A State's suit to enjoin gaming activity *on* Indian lands . . . falls within § 2710(d)(7)(A)(ii); a similar suit to stop gaming activity *off* Indian lands does not.
>
> * * *

> Congress adopted IGRA in response to this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222, 107 S.Ct. 1083 (1987), which held that States lacked any regulatory authority over gaming on Indian lands. *Cabazon* left fully intact a State's regulatory power over tribal gaming outside Indian territory—which . . . is capacious. [citation omitted]. So the problem Congress set out to address in IGRA (*Cabazon's* ouster of state authority) arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact. [citations omitted]. Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands and nowhere else.

Bay Mills, 134 S.Ct. at 2032, 2034 (emphasis in original).

To accept Michigan's expansive view of IGRA's scope, the Supreme Court reasoned, would be to impermissibly "revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address." *Bay Mills*, 134 S.Ct. at 2033-34 ("This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader").

Further, the Supreme Court refused to accept Michigan's contention that the tribe's "operation" of its off-site casino from offices "within its own reservation" brought the case within the scope of IGRA. The Court held that "'gaming activity' means just what it sounds like—the stuff involved in playing class III games." *Bay Mills*, 134 S.Ct. at 2032; *see id.* at 2033 (drawing a similar conclusion for class I and class II

"gaming activity"). The "gaming activity," according to the Supreme Court, is "the gambling" and nothing more. *Id.* at 2033 ("the gaming activity is the gaming in the poker hall, not the proceedings of the off-site administrative authority"); *see County of Madera v. Picayune Rancheria of Chukchansi Indians*, 467 F.Supp.2d 993, 1002 (E.D. Cal. 2006) ("'gaming activity' would seem to be the actual playing or provision of the games identified as Class I, Class II, or Class III").

D. Iipay's Arguments Echo the Failed Theories Presented by Michigan in *Bay Mills*

In support of its theory that IGRA must be construed broadly to encompass off-site gambling that "originates" on Indian lands, Iipay repackages the same arguments rejected in *Bay Mills*. First, Iipay invites this Court to look beyond the express terms of IGRA, to consider the "strong congressional policy enshrined in IGRA to allow tribes to 'take advantage of modern methods of conducting Class II games,'" and to adopt an interpretation of IGRA that "'embraces rather than stifles technological advancements in gaming.'" OB 16 [citation omitted]. Yet, to do as Iipay requests—to replace every statutory reference to "gaming activity conducted on Indian lands" with the new phrase "*game play originating* on Indian lands"—would constitute an impermissible revision of the existing law. The Supreme Court rejected such efforts in *Bay Mills*, and Iipay's efforts must similarly be rejected here.

Second, Iipay attempts to downplay the gambling conduct of the DRB patrons and emphasize the role of the DRB computer servers in an effort to fit their gaming operation within the "on Indian lands" scope of IGRA. The tribe argues "all the actual bingo game play conducted by DRB originates and is controlled on the math and game management servers housed in DRB's gaming facility located on Iipay's sovereign lands." OB 28. Again, Iipay's contention must fail.

Iipay's attempt to characterize the software-generated algorithms of its DRB servers as sufficient "gaming activity" to bring its operation within the scope of IGRA flies in the face of the Supreme Court's instruction in *Bay Mills*. As the Supreme Court held, IGRA's reference to "gaming activity" is a reference to "the gambling" itself; "the gaming activity is the gaming in the poker hall, not the proceedings of the off-site administrative authority." *Bay Mills*, 134 S.Ct. at 2033.

Here, the DRB "gaming activity" is the conduct of the off-site patrons in logging on to the DRB website, selecting the denomination to be wagered, the number of games to be played, and the number of cards to be played per game. *See id*. at 2033. Indeed, DRB gambling is dependent on the conduct of the patrons; without them, no gambling occurs. *See AT&T Corp. v. Coeur D'Alene Tribe*, 45 F.Supp.2d 995, 1001 (D. Idaho 1998), *rev'd on other grounds*, 295 F.3d 899 (9th Cir. 2001) ("But for the act of placing the 'lottery wager,' a player could not participate in, and the Tribe could not operate, the Lottery"); *see also United States v.*

Calamaro, 354 U.S. 351, 354 (1957) ("Placing and receiving a wager are opposite sides of the same coin," and "[y]ou can't have one without the other") (quotations omitted).[8]

Moreover, in granting Appellees' motions for summary judgment, the district court concluded that the "DRB patrons' conduct indisputably constitutes placing a 'bet or wager,'" and that such conduct violates California's anti-gambling laws. ER 20-21. Iipay did not address or in any manner oppose these findings before the district court, and its waiver on this issue now prohibits it from characterizing the DRB patrons' conduct as anything less than gambling. *See BankAmerica Pension Plan*, 206 F.3d at 826 (failure to raise an issue with the district court waives any related argument on appeal).

Iipay's silence regarding *Bay Mills* is deafening. Nowhere in the tribe's 40-page Opening Brief does it cite to, much less attempt to distinguish, this recent Supreme Court case. The reason is simple: Iipay's theories cannot be reconciled with *Bay Mills* and must be rejected for the same reasons articulated by the Supreme Court in response to Michigan's nearly identical arguments.

[8] Notably, the NIGC defines class II gaming by referencing the activities of the *players*, i.e., the patrons themselves. *See* 25 C.F.R. § 502.3(a) (class II gaming includes "[b]ingo . . . when *players*: (1) Play for prizes with cards bearing numbers or other designations; (2) Cover numbers or designations . . .; and (3) Win the game by being the first *person* to cover a designated patter on such cards") (emphasis added).

II. Iipay's Reliance on *Coeur d'Alene* Is Misplaced

While Iipay ignores *Bay Mills*, it goes to great lengths to argue that another case—*AT&T Corporation v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002)—provides "guidance" in support of the proposition that patrons engaged in gambling within the scope of IGRA need not be physically present on Indian lands. OB 17. The Ninth Circuit's decision, however, does not support Iipay's proposition.

Coeur d'Alene arose out of the operation of a lottery by the Coeur d'Alene tribe in Idaho. Although the tribe intended to administer the lottery "entirely" on Indian lands, it also intended to permit off-reservation participants to purchase tickets by telephone. *Coeur d'Alene*, 295 F.3d at 901-902. Accordingly, the tribe sought and obtained NIGC approval of a management contract that included notice of the tribe's intention to permit customers to purchase tickets over the telephone as an "off-reservation means of access" to the lottery. *Id.* at 902, 908. The tribe then entered into a contract with AT&T to provide toll-free phone service to its customers. *Id.* However, when several state Attorneys General warned AT&T that the lottery was illegal, AT&T brought suit to void the contract. *Id.* at 903.

In reversing the district court's decision in favor of AT&T, this Court held that the NIGC's approval of the management contract was a final agency decision that "indicated that the Lottery is legal until and unless the NIGC's decision is overturned," and AT&T lacked the requisite

standing to challenge the matter. *Coeur d'Alene*, 295 F.3d at 906-909. Iipay nevertheless contends that this Court went further in its analysis and "disagreed 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." OB 18 (internal quotes omitted). Iipay, however, misreads *Coeur d'Alene*.

In reversing the district court, this Court focused only on the issue of deference due final agency decisions and did not analyze whether "off reservation means of access" are in fact authorized by IGRA. *Coeur d'Alene*, 295 F.3d at 910. In a dissenting opinion, Circuit Judge Gould argued that the Court should go further in addressing the merits of the legality of the lottery. "I . . . would conclude, as did the district court, that the [lottery] is clearly illegal under the IGRA because it involves tribe-sponsored gambling that does not occur on Indian lands." *Id.* In response, this Court emphasized the limited scope of its holding:

> This Court draws no conclusions as to how the Lottery might fair when properly challenged in federal court and balanced against state laws and interests. The dissent's desire to reach what it contends is an "obvious conclusion" does not relieve us of our obligation to address only those issues that are properly before us, and does not eliminate the deference due to final agency actions.

Id. at 910 n.12.

Accordingly, *Coeur d'Alene* offers no assistance to Iipay in its effort to broaden the scope of IGRA beyond the Act's literal terms as determined by the Supreme Court.[9]

III. Iipay's Proferred Interpretation of IGRA's Scope Would Render UIGEA Meaningless

Iipay argues that the proper construction of IGRA 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." OB 8 (emphasis omitted). Iipay presents this bold argument without citation to any legal authority, because no court has ever adopted such a myopic approach to the task of statutory interpretation. Instead, as recognized by the district court, "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." ER 25, quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see Connecticut Nat. Bank v. Germain*, 503 U.S.

[9] In a case that preceded *Coeur d'Alene*, the Eighth Circuit addressed a separate challenge to the Coeur d'Alene tribe's off-reservation lottery brought by the State of Missouri. After Missouri filed a state court action to enjoin the tribe from offering the lottery over the Internet to off-site Missouri residents, the tribe removed the case to federal court. The Eighth Circuit then remanded the case back to state court after concluding that "IGRA established a comprehensive regulatory regime for tribal gaming activities *on Indian lands*" and the tribe's decision to "leave[] its own lands and conduct[] gambling activities on state lands" is outside of IGRA's scope. *See State ex rel. Nixon v. Coeur d'Alene Tribe*, 164 F.3d 1102, 1108-9 (8th Cir. 1999) (emphasis in original). Iipay makes no mention of this Eighth Circuit decision in the Opening Brief.

249, 253 (mandating that courts, absent "'positive repugnancy' between two laws, . . . give effect to both").

Here, it is clear that IGRA and UIGEA are "capable of co-existence." While IGRA governs the regulation of gaming conducted "on Indian lands," UIGEA addresses the proceeds of bets or wagers that are initiated off Indian lands. Specifically, UIGEA authorizes proceedings to prevent or restrain "restricted transactions." 31 U.S.C. § 5365(b)(3)(A)(i). A "restricted transaction" is defined simply as a transfer of funds that is prohibited by Section 5363 of the Act. 31 U.S.C. § 5362(7). Section 5363 in turn states, "No person engaged in the business of betting or wagering may knowingly accept" credit card proceeds, electronic fund transfers, checks or similar forms of payment "in connection with the participation of another person in unlawful Internet gambling." 31 U.S.C. § 5363. A person is engaged in "unlawful Internet gambling" if such person "plac[es] . . . a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful" under the laws of the State in which the bet is "initiated" or "otherwise made." 31 U.S.C. § 5362(10)(A); *see Interactive Media Entertainment & Gaming Assn. Inc. v. Attorney General*, 580 F.3d 113, 117 (3d Cir. 2009) (nothing in UIGEA suggests that Congress meant anything other than the physical location of a bettor or gambling business).

By focusing on the location in which bets or wagers are "initiated" or "otherwise made," Congress clearly had in mind the scope and impact

of IGRA when it enacted UIGEA. Indeed, Congress went to great lengths in drafting UIGEA to ensure that gaming activity conducted entirely, or exclusively, "on Indian lands" and subject to IGRA would be unaffected. For example, UIGEA was drafted to include "intratribal transactions" as an exception to the definition of "unlawful Internet gambling." *See* 31 U.S.C. § 5362(10)(C) ("The term 'unlawful Internet gambling' does not include placing, receiving, or otherwise transmitting a bet or wager where—(i) the bet or wager is initiated and received or otherwise made exclusively—(I) within the Indian lands of a single Indian tribe . . .; or (II) between the Indian lands of 2 or more Indian tribes . . . .").

It is equally clear that Congress considered IGRA in granting the authority under UIGEA to permit the United States and States to "institute proceedings . . . to prevent or restrain a restricted transaction" that "has been or will be initiated, received, or otherwise made on Indian lands." 31 U.S.C. §§ 5365(b)(1), (2)(A), (3)(A). It is in this context that Congress included a rule of construction to state that "[n]o provision of this section shall be construed as altering, superseding, or otherwise affecting the application of [IGRA]." *Id.* § 5365(b)(3)(B).

Given the foregoing, the district court properly construed both IGRA and UIGEA in a manner that gives effect to both statutes. ER 27. In stark contrast, Iipay proffers an interpretation of IGRA that would expand its scope beyond its express terms and render meaningless multiple provisions within UIGEA. If, for example, IGRA is read to

govern Internet gaming activities conducted off Indian lands, but "originating" on Indian lands, UIGEA's provision excepting "intratribal transactions" from the definition of "unlawful Internet gambling" would be pointless; it would be wholly unnecessary for a tribe to ensure that bets or wagers associated with Internet gaming are "plac[ed], receiv[ed], or otherwise transmitt[ed] exclusively" within tribal lands. *See* 31 U.S.C. § 5362(10)(C). Accordingly, and consistent with well-settled principles of statutory construction, Iipay's broad interpretation of IGRA must be rejected.

IV. Iipay's Remaining Arguments Are Meritless

In support of its request that this Court re-write IGRA to encompass the gambling conduct of patrons located off Indian lands, Iipay presents several alternative legal theories, all of which fail under close scrutiny.

A. Iipay Misconstrues the NIGC's Position

Iipay carefully states that 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 violates IGRA." OB 19 (emphasis omitted). The reason for Iipay's careful wording is that the NIGC staff has repeatedly advised that IGRA-protected gambling is limited to Indian lands. Even though the advice is not in the form of a

final agency action, it is consistent with IGRA's terms and legislative history.[10]

For example, the NIGC's General Counsel concluded that non-electronic bingo played through persons acting as proxies offered to patrons over the Internet "is not authorized under IGRA." SER 3-5; *see Lac Vieux Desert Band*, 360 F. Supp. 2d at 65 (describing the game). Similarly, the NIGC's Office of the General Counsel has consistently concluded that tribes making Internet gambling available to persons not located on Indian lands violate IGRA. *See*, *e.g.*, Letter from Montie Deer, Chairman, NIGC, to Ernest L. Stensgar, Chairman, Coeur d' Alene Tribe, re: National Indian Lottery (Jun. 22, 1999) (SER 6-8); Letter from Penny Coleman, Deputy General Counsel, NIGC, to Terry Barnes, Bingo Networks, re: U-PIK-EM Bingo (Jun. 9, 2000) (SER 9-11); Letter from Kevin Washburn, General Counsel, NIGC, to Joseph Speck, Nic-A-Bob Productions, re: WIN Sports Betting Game (Mar. 13, 2001) (SER 12-15); *see also* Letter from Richard Schiff, Senior Attorney, NIGC, to Don Abney, Principal Chief, Sac and Fox Nation, re: Tele-Bingo (Jun. 21, 1999) (bingo played by telephone off-Indian lands violates IGRA) (SER 16-19).

[10] While the NIGC advice letters are not final agency actions, *see Lac Vieux Desert Band v. Aschroft*, 360 F.Supp.2d 64, 67-68 (D.D.C. 2004), the letters may be given some consideration proportional to their powers to persuade, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In view of IGRA's clear terms and legislative history that confine IGRA-protected gambling to Indian lands, the absence of any final agency action taken by NIGC to state the obvious is unremarkable and provides no basis for this Court to rewrite IGRA and disregard *Bay Mills*.

B. The Anti-Lottery Law Exemptions Are Immaterial

Iipay asserts that, through IGRA, Congress exempted tribal gaming from the federal anti-lottery statutes, 18 U.S.C. §§ 1301-1304, thereby indicating "that Congress expressly contemplated that purchasers of bingo cards . . . need not [for purposes of IGRA] be present on the reservation." OB 24. Iipay is mistaken. Congress did not fully exempt tribes from the proscriptions of those statutes, and certainly did not authorize off-site gambling; rather, it provided that "sections 1301, 1302, 1303 and 1304 of Title 18 shall not apply to any gaming conducted by an Indian tribe *pursuant to* [*IGRA*]," which is to say, on Indian lands. 25 U.S.C. § 2720 (emphasis added). The exemptions authorize a tribe conducting a lottery on Indian lands to disseminate, broadcast, or mail interstate advertisements, which is otherwise proscribed by sections 1301, 1302 and 1304, respectively. The exemption from section 1301 would also permit a tribe to import or receive lottery tickets for distribution on Indian lands and to ship such tickets, for example, to other tribes in different states which may be jointly sponsoring or participating in the lottery on their own Indian lands. None of these exemptions, however, expressly or implicitly vitiates IGRA's

fundamental limitation to authorizing tribal gaming only on Indian lands.

C. Contract Principles Do Not Save Iipay's Theories

While Iipay concedes, as it must, that DRB patrons place bets or wagers over the Internet from locations off Indian lands, it argues based on "traditional contract principles" that the wager is merely an offer to enter into a gambling contract. OB 30-31. The gambling contract, Iipay argues, is then formed on Indian lands where the offer is accepted. *Id*. Iipay extrapolates from this proposition that gambling only occurs in the location of the acceptance. *Id*.

Iipay's argument is fallacious. The offer, an essential element of any contract, must be conceived and transmitted before it may be accepted; it is conceptually, legally, temporally, and physically distinct from the acceptance. The notion that a patron is not engaged in contracting generally, or gambling in particular, when and where the patron conceives and communicates a wager is implausible on its face. Additionally, acceptance of a wager is administrative and not the "stuff involved" in gambling as denominated by the Supreme Court. *See Bay Mills*, 134 S.Ct. at 2032-33.

The situs of formation of a contract is an irrelevant legal concept in the context of this case. Here, the issue is whether gambling is conducted entirely on Indian lands, not whether gambling contracts are formed or enforceable on Indian lands. Because DRB patrons gamble from

locations off Iipay's lands, the gambling is outside of the scope of IGRA. And, because DRB patrons gamble from locations off Iipay's Indian lands where gambling is illegal, DRB is subject to UIGEA's remedies. *Cf. United States v. Cohen*, 260 F.3d 68, 74-75 (2nd Cir. 2001) (approving the trial court's instruction that "Congress clearly did not intend to have [the Wire Act] made inapplicable because the party in a foreign gambling business deemed or construed the transmission as only starting with an employee or an internet mechanism located on the premises in the foregoing country").

D. There Are No Proxy Agents

Iipay contends that "any communication via an Internet communication link between DRB patrons and their proxy agents . . . is a step removed from any actual 'gaming activity' to be conducted," and "the VPNAPS gaming system does not permit any bingo game play directly by a patron." OB 35-36. As properly recognized by the district court, Iipay is promoting a legal and factual "fiction." ER 33.

DRB operations do not involve individuals on Indian lands who serve as proxies for players located off Indian lands. Iipay retains only a handful of employees, and their only responsibilities are to "monitor the operation of the DRB hardware and software components" and "take remedial action in the event of a system failure." ER 8, 33 ("they do no more than passively observe the automated gaming to ensure the gaming operates smoothly"); *see* ER 108-109, 930-31.

Accordingly, when Iipay refers repeatedly to the use of a "proxy," *see, e.g.,* OB 32-37, or argues that the "communication . . . between the DRB patron and their proxy agent" is a "'pre-game' administrative function to any actual bingo game play," OB 36 n.33, it is not using the word "proxy" in its ordinary and usual sense. *See* ER 32, citing Black's Law Dictionary 1421 (10th ed. 2014) (defining "proxy" as "[*s*]*omeone* who is authorized to act as a substitute for another") (emphasis in original). It is instead referring to the automated functions of the DRB servers. *See* ER 109.

The undisputed facts are that the patrons are the only *persons* associated with DRB who are actively engaged in gambling. Accordingly, the NIGC publications cited by Iipay that address the legality of individuals acting as "proxy" substitutes for others, *see* OB 26, are distinguishable and irrelevant in this context. All that is relevant is that DRB patrons are off Indian lands when they place their illegal wagers. This fact alone removes DRB from IGRA's protection.

CONCLUSION

It is undisputed that DRB patrons use the Internet from locations off Iipay's tribal lands to place bets or wagers and, by such conduct, violate California's anti-gambling laws. IGRA does not protect Iipay's interest in collecting the proceeds of this illegal activity, because the gambling at issue occurs off Iipay's tribal lands and "[e]verything—literally everything—in IGRA" regulates gambling "on Indian lands, and

nowhere else." *Bay Mills*, 134 S.Ct. at 2034. Iipay's arguments to the contrary simply ignore the express terms of IGRA, its legislative history and the Supreme Court's decision in *Bay Mills*. Appellees respectfully request, therefore, that this Court affirm the district court's decision granting summary judgment and injunctive relief under UIGEA to Appellees.

Respectfully submitted,

ALANA W. ROBINSON
Acting United States Attorney

/s/ *Glen F. Dorgan*
GLEN F. DORGAN
Assistant U.S. Attorney

XAVIER BECERRA
Attorney General of California
SARAH J. DRAKE
Senior Assistant Attorney General

/s/ *William P. Torngren*
WILLIAM P. TORNGREN
Deputy Attorney General

July 17, 2017

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STATEMENT OF RELATED CASES

The United States and the State of California are unaware of any related cases.

ALANA W. ROBINSON
Acting United States Attorney

/s/ *Glen F. Dorgan*
GLEN F. DORGAN
Assistant U.S. Attorney

XAVIER BECERRA
Attorney General of California
SARAH J. DRAKE
Senior Assistant Attorney General

/s/ *William P. Torngren*
WILLIAM P. TORNGREN
Deputy Attorney General

July 17, 2017

9th Circuit Case Number(s) 17-55150

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