IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

STATE OF TEXAS, *Plaintiff,* v. ALABAMA-COUSHATTA TRIBE OF TEXAS, *Defendant*.	§ § § § § § § § § § § §	No. 9:01-cv-00299

REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The Parties have addressed elsewhere whether the NIGC's 2015 final adjudication holding that the Tribe is governed by IGRA supersedes a 1994 Fifth Circuit case that reached the opposite conclusion. The Tribe moved for *partial* summary judgment [DE 99] ("Motion") on a separate issue that the State has interjected into this case and that is relevant *only if* the Court first concludes that the NIGC's ruling controls: whether the Tribe's bingo is a Class II game under IGRA. The Tribe emphasized the contingent nature of this inquiry in the first sentence of the Motion; that alone obviates nearly the first four pages of the State's Response [DE 100].

On the merits, the Response offers no serious rebuttal to the Motion. None of the purportedly required attributes of "bingo" advanced by the State flow from IGRA's unambiguous text or is required by the NIGC's regulations, and there is no real dispute that the Tribe's gaming meets all three statutory criteria for "bingo." The State's arguments otherwise conflate whether a game *is* bingo with whether a bingo game is Class II or III under IGRA.

The State fails to create a fact dispute on that issue. NIGC regulations exempt from the definition of "facsimile" any electronic gaming "format" that "broadens participation" so long as it is used with "bingo, lotto, and other games similar to bingo," *even if* the format "replicates a game of chance by incorporating all of the characteristics of the game." 25 C.F.R. § 502.8. The State relies on two inapposite authorities in an attempt to avoid the plain text of this regulation: the Hogen Letter, which virtually ignores it, and a 1994 case about pull-tabs, which predates it. And although the State contends that the Tribe's bingo gives "the appearance" of playing with a machine and discourages "social interaction," Resp. at 5, it provides no evidence that the players at Naskila actually *are* playing "with or against a machine" rather than—as the Tribe's evidence reflects—"with or against each other." If the Court concludes that IGRA governs the Tribe's gaming, then the Court should grant the Tribe's Motion and dismiss the State's claim.

ARGUMENT

I. IGRA's Definition of Bingo Says Nothing About a Physical Covering Requirement.

The State first argues that "the electronic bingo at Naskila does not qualify as bingo under IGRA" because players are not required to "'actually and actively participate in the play of the game'" by separately authorizing the "covering" of numbers on a bingo card. *See* Resp. at 5–6 (citation omitted). Without this activity, the State asserts, the Tribe's bingo lacks an ostensibly essential "competition" aspect. *Id.* The State also appears to argue that IGRA imposes a "social interaction" requirement that cannot be met through Naskila's player terminals. *See id.* at 5.

IGRA's text contains none of these putative elements. They are instead found in the Hogen Letter, an interpretation that contradicted NIGC regulations when it issued and that since has been repudiated by the NIGC. *See* 78 Fed. Reg. 37998, 37999 (June 25, 2013). The elements in 25 U.S.C. § 2703(7)(A)(i) are the "sole legal requirements for a game to count as class II bingo." *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1096 (9th Cir. 2000) ("*Electronic Devices II*"). Nowhere is there any reference to social interaction among players or any suggestion that the players must know the identity of their opponents.

And although IGRA uses the word "cover," electronic "covering" does not remove a game from the ambit of "bingo." Courts and the NIGC have rejected previous attempts to engraft such a requirement onto the statute. *See United States v. 103 Electronic Gambling Devices*, 1998 WL 827586, at *6 (N.D. Cal. Nov. 23, 1998) ("*Electronic Devices I*"). IGRA and its "implementing regulations merely require that a player cover the numbers without specifying *how* they must be covered." *Id.* (emphasis added). The NIGC has explained at least twice that such a "manual component to the game [of bingo] is not necessary": in 2002 when adopting the exception for bingo in the regulatory definition of "facsimile," *see* 67 Fed. Reg. 41166-02, 41171 (June 17, 2002), and in 2013 when repudiating the Hogen Letter, *see* 78 Fed. Reg. at 37999.

Regardless, the competitive and social aspects identified by the State are preserved by the Tribe's bingo format. "Whether a player presses a button one time or two, the player is engaging with the machine, participating in the bingo game, and competing with fellow players on the electronically linked bingo system." *Id.*; *see California v. Iipay Nation of Santa Ysabel*, Slip Op. at 14–15 (S.D. Cal. Dec. 12, 2016) (holding "one touch" electronic bingo meets the requirements under IGRA to constitute Class II bingo) (App. 287–88). The Court should decline the State's invitation to read into IGRA "an additional requirement not mandated by the statute," *id.*, and instead analyze whether the Tribe's gaming is an "aid" or "facsimile" of bingo.

II. The Tribe Offers Class II Bingo.

The State devotes the bulk of its Response to arguing that the Tribe uses a "facsimile" of bingo because the gaming at Naskila is an "electronic game of chance that 'wholly incorporates all of the elements of a non-electronic version." *See* Resp. at 6–10. It makes three points to that end. The State initially contends that the Tribe's gaming is a facsimile of bingo because "it is far from clear that the bingo at Naskila allows players to compete with each other rather than with or against a machine." Resp. at 6. But the Response refutes this argument just sentences later by acknowledging that the Tribe has adduced evidence showing that a player at Naskila *cannot* start a game unless someone else has "linked into the system elsewhere." Resp. at 6; *see, e.g.*, App. 142, 174, 261, 266. The State has offered no evidence to the contrary, and the NIGC has made clear that IGRA does not require that players must know the identity, location, and number of their competitors in order not to compete "with or against a machine." *See, e.g.*, *Electronic Devices II*, 223 F.3d at 1100–01; 67 Fed. Reg. at 41171 ("IGRA permits the play of bingo . . . in an electronic or electromechanical format, even a wholly electronic format, provided that multiple players are playing with or against each other. *These players may be playing at the same facility or via links to players in other facilities.*" (emphasis added)).

A. The 1994 *Cabazon Band* Opinion Does Not Address the Exception for Electronic Bingo in the NIGC's 2002 Definition of "Facsimile."

The State's next argument relies on a chronological sleight of hand that essentially asks the Court to analyze the NIGC's 2002 "facsimile" definition through the lens of a 1994 case. Resp. at 7–8 (citing *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633 (D.C. Cir. 1994)). The State focuses on *Cabazon Band*'s conclusion that a "facsimile" is a game "wholly incorporated into an electronic or electromechanical version." 14 F.3d at 636. Thus, the State reasons, even if the gaming at Naskila qualifies as "bingo" under IGRA, its incorporation into an electronic format demonstrates it is a Class III facsimile. *See* Resp. at 6–7.

That approach fails for a number of reasons. For one thing, *Cabazon Band* necessarily did not address the effect of the NIGC's decision eight years later to define "facsimile" as

> 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.

25 C.F.R. § 502.8 (emphasis added). As one of the only courts to consider the effect of this definition on tribal bingo recently explained, the plain language of the revised regulation means that "technology is *not* a facsimile" when used for electronic bingo if it "broadens participation" among "multiple players," "*even if* the wholly electronic format 'incorporat[es] all of the characteristics of the game[.]'" *Iipay Nation*, Slip Op. at 14 (second emphasis added).

This reading is bolstered by NIGC guidance and *Cabazon Band* itself. Because IGRA lacks statutory definitions of "aid" and "facsimile" and those terms are susceptible to "overlap," the NIGC adopted regulatory definitions of those terms in 1992. *See* 67 Fed. Reg. at 41167. The NIGC engaged in the 2002 notice-and-comment rulemaking that led to the revised definitions of "aid" and "facsimile" due to widespread confusion over those definitions, including from

Congress. *See id.* at 41168–69. In balancing competing policy interests, legislative intent, and case law including the *Electronic Devices* and *MegaMania* cases, the NIGC concluded that IGRA's allowance for electronic aspects of bingo such as an electronic draw, 25 U.S.C. § 2703(7)(A)(i)(II), compelled a "more narrowly construed" definition of "facsimile" when it came to "bingo, lotto, and other games similar to bingo." 67 Fed. Reg. at 41170–71. "To ensure maximum clarity," the NIGC explained that its revised definitions were based on the "parameter" that IGRA prohibits "a wholly electronic version of [bingo] that *does not* broaden participation . . . [but] permits a player to *play alone* with or against a machine rather than with or against other players." *Id.* at 41171 (emphasis added). The NIGC's policy choices in this area of statutory ambiguity are due deference.[1] *Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 865 (1984).

Cabazon Band endorses this solicitous treatment of bingo, lotto, and games like bingo. In concluding that the electronic pull-tab game at issue in *Cabazon Band* was a facsimile,[2] both the *Cabazon Band* district and circuit courts relied on the same Senate report the NIGC later consulted to revise its regulatory definitions. *See* S. Rep. No. 100-466 at 9. Both courts recognized that that this report evidenced specific congressional intent to "give maximum flexibility" in defining the scope of "facsimile" for bingo, particularly as to "technology that

[1] Tellingly, when the NIGC later considered additional revisions to the definition of "facsimile" that would have made the term include both "playing against a machine" *and* "fully incorporat[ing] all of the fundamental characteristics of the[] games electronically," *see* 72 Fed 60482-01, 60483 (Oct. 24, 2007)—the State's precise argument here—the NIGC withdrew the proposed revisions under criticism, *see* 73 Fed. Reg. 60490-01 (Oct. 10, 2008).

[2] The State says that *Cabazon Band* concerned "video pull-tab bingo." Resp. at 8. Yet, pull-tab is a different game. *See, e.g., Seneca-Cayuga Tribe of Okla. v. NIGC*, 327 F.3d 1019, 1024 (10th Cir. 2003); *United States v. 162 MegaMania Gambling Devices*, 1998 WL 36010316, at *4 (N.D. Okla. Oct. 26, 1998) ("*MegaMania I*"). Bingo was not at issue in *Cabazon Band* except as an example of an electronic game for which the definition of "facsimile" likely *would not apply*. *See* 614 F.3d at 636–37.

might be used to link bingo players in several remote locations."[3] *See Cabazon Band of Mission Indians v. NIGC*, 827 F. Supp. 26, 33 (D.D.C. 1993); *see also Cabazon Band*, 14 F.3d at 636–37. As a result, even if the 2002 regulations did not abrogate the discussion in *Cabazon Band* relied on by the State, the case poses no obstacle to the Tribe's bingo on its own terms.

B. The Hogen Letter Is Neither Controlling Nor Persuasive.

The State's last merits argument seeks *Chevron* deference for the Hogen Letter. *See* Resp. at 8–9. That request misunderstands the principles of administrative law relevant here. The State purports to claim deference for the Hogen Letter's interpretation of IGRA's plain text, but what the State actually demands is deference for the Hogen Letter's interpretation of NIGC regulations. *See* Resp at 8–9. As noted above, IGRA contains no unambiguous statutory requirement that a player have "'some—even minimal—participation in the game . . . above and beyond the mere pressing of a button to begin the game.'" Resp. at 8 (citation omitted). It does not speak to one-touch electronic bingo. Nor does it define the terms "aid" and "electronic or electromechanical facsimile" except to suggest that the former is not the latter. *Compare* 25 U.S.C. § 2703(7)(A)(i) *with id.* § 2703(B)(ii). The presence of these ambiguities necessarily makes the analysis one of reasonableness rather than statutory command.

The Hogen Letter's reading of 25 C.F.R. § 502.8 is unreasonable and thus not entitled to deference. An agency interpretation cannot be "'plainly erroneous or inconsistent with the regulation.'" *Texas Clinical Labs v. Sebelius,* 612 F.3d 771, 776 (5th Cir. 2010) (citation omitted). Nor can an agency official engage in a *de facto* rulemaking that essentially amends an otherwise clear regulation. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000).

[3] Beyond the 2002 definition of "facsimile," the NIGC has further carried out that congressional intent in its regulation for "electronic, computer or other technologic aids," which include as "[e]xamples" a list of technology that can be used to link bingo players together and to broaden participation in the game. *See* 25 C.F.R. § 502.7(c).

The Hogen Letter violates both of these rules. When the Hogen Letter issued in July 2008, the NIGC's definition of "facsimile" unambiguously *excluded*—as it does now—electronic bingo games that "broaden[] participation by allowing multiple players to play with or against each other rather than with or against a machine." 25 C.F.R. § 502.8; *Iipay Nation*, Slip Op. at 13–15. The Hogen Letter noted this prior final agency action, but dismissed it in a single, unreasoned sentence: "I disagree with this argument." Hogen Letter at 10. Similarly, the NIGC in 2008 had—and still has—not withdrawn its 2002 guidance, reflected in the definition of "facsimile," that IGRA permits bingo "even [in] a wholly electronic format, provided that multiple players are playing with or against each other," whether "at the same facility or via links to players in other facilities." 67 Fed. Reg. at 41171. The Hogen Letter nonetheless denied that "wholly electronic" bingo could even exist. Hogen Letter at 6.

The Hogen Letter did not reflect the NIGC's considered position then, and it does not now. It instead embodied the reasoning from then-pending regulations that were subsequently withdrawn. *See* 73 Fed. Reg. 60490-01, 60490-02 (Oct. 10, 2008). The State has identified no enforcement proceedings or other informal actions that demonstrate the NIGC still subscribes to the Hogen Letter, and the NIGC repudiated it in 2013.[4] Even then, the NIGC explained that one-touch electronic bingo is a Class II "aid" *independent of* the "exception for bingo in the regulatory definition of electronic facsimile" because it "meets the statutory definition of bingo and does not incorporate all of the characteristics of bingo into the machine." 78 Fed. Reg. at 38000. Agencies can change their minds, but here the State attempts to "'carve[] in stone'" an

[4] The State protests that the NIGC has not adopted its 2013 interpretation in a formal rulemaking, but it offers no reason to doubt that the interpretation is the NIGC's current position on one-touch electronic bingo. Notably, an NIGC inspection of Naskila did not identify the Tribe's version of bingo as deficient. *See* Ex. A. Even if considered "informal pronouncements," moreover, NIGC "interpretations of [IGRA] set forth . . . in the Federal Register" are nonetheless "entitled to respect." *MegaMania II*, 231 F.3d at 719.

unreasonable and unexplained interpretation of NIGC regulations that has neither legal nor persuasive authority. *See generally Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991).

III. The State's Other Objections Are Unavailing.

The State raises three additional arguments, which the Tribe addresses in turn.

A. *MegaMania* and *Electronic Devices* Remain Instructive.

The State purports to distinguish *MegaMania* and *Electronic Devices* as nonbinding cases from other circuits dealing with a different type of electronic bingo, Resp. at 10–12, but these distinctions ultimately are without substance. The State's block quote from *Electronic Devices II* itself establishes the similarity between MegaMania electronic bingo and that at Naskila: Among other things, MegaMania used a form of automatic covering and featured an "interlinked electronic game via a network of individual computer terminals" that could not begin until a minimum number of players joined the game. Resp. at 10.

Other distinctions identified by the State are irrelevant. That the bingo at Naskila requires only two players to start where MegaMania required twelve is an immaterial difference that played no role in the Ninth or Tenth Circuits' analyses and that is derived from no statutory or regulatory requirement. The State also points out that a "human operator" manually "keyed the numbers drawn into a computer to be transmitted to the player's terminals," *id.*, but IGRA does not require such human interaction. Indeed, it expressly provides for the use of electronic cards and ball draws, 25 U.S.C. § 2703(7)(A)(i); 25 C.F.R. § 502.7(c).[5] The State has no plausible argument against the persuasive value of the *Electronic Devices* and *MegaMania* cases.

[5] The State also discerns a rule not supported by either series of cases: that an "aid" to bingo cannot be "an indispensable component of the game itself," that is, the "absence" of the device "would not render the game impossible to play." Resp. at 12. The MegaMania electronic player terminals were held to be "aids" even though the absence of those devices would have prevented a player from connecting to a bingo game, which occurred outside the device itself. *MegaMania II*, 231 F.3d at 723 ("'[A]n individual terminal is useless.'" (citation omitted)).

B. The State's Layperson Testimony Does Not Create a Fact Issue.

The State next attempts to deflect its evidentiary shortcomings by essentially arguing that its putative expert—who admittedly has no experience in the field of Indian gaming, Mot. ¶ 28—should be considered a layperson and that his testimony about the *aesthetics* of the Tribe's bingo is sufficient to create a fact issue on whether the game is a "slot machine" and thus a "facsimile" of bingo. Resp. at 12–13. Yet there is no serious argument, let alone evidence, that the machines actually *are* slot machines. This distinction is critical. An electronic bingo machine is not transformed into a "slot machine" simply because its outward appearance "resembles" or is "similar" to one. *See MegaMania II*, 231 F.3d at 723 (rejecting argument made by State here); *Electronic Devices II*, 223 F.3d at 1100 ("[W]hile the government has argued that MegaMania resembles a slot machine in certain limited respects, there has been no argument that the terminal *is* a 'slot machine,' which it plainly is not." (internal citation omitted)).

The State's other arguments in this vein fare no better. The State makes much of entertainment features that display patterns associated with slot machines, Resp. at 13, but the NIGC permits such displays—even those with "spinning reel icons." *See* 71 Fed. Reg. 30238-01, 30249 (Aug. 23, 2006). Relying on two criminal cases and a contempt proceeding against another Tribe that turned on Texas law, the State then contends that expert testimony is not required to classify games under IGRA. Resp. at 12–13. The complex and technical nature of Indian gaming law and regulations belie this assertion, *see* 25 C.F.R. § 547.1 *et seq.*; *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1085–86 (7th Cir. 2015), as does the routine consideration of expert testimony in IGRA classification cases, *see, e.g.*, *United States v. Santee Sioux Tribe of Neb.*, 174 F. Supp. 2d 1001, 1007–09 (D. Neb. 2001) (analyzing expert testimony from both parties on "aid" versus "facsimile" distinction and noting lack of qualifications of government's gaming "expert," who testified that pull-tab machine was a "facsimile" because it "look[ed]"

"very similar to slot machines"). The State has presented no evidence that the Tribe is using actual slot machines, and its layperson argument essentially concedes as much.

C. The State's Part 547 Argument Is Without Merit.

Although unclear, the final portion of the Response appears to argue that the Tribe must first show that it is subject to 25 C.F.R. § 543.1 *et seq.* ("Part 543") before the Court should consider evidence of the Tribe's compliance with in 25 C.F.R. § 547.1 *et seq.* ("Part 547"). *See* Resp. at 14–15. This argument confirms what the State has already conceded: that it has no expertise in classifying games under IGRA. App. 12. Part 543 and Part 547 address entirely separate issues, and only Part 547 is relevant here. Part 547—titled "Minimum Technical Standards for Class II Gaming Systems"—sets the regulatory standards for "electronic, computer, or other technologic aids in connection with the play of Class II games." 25 C.F.R. § 547.1. Evidence that the Tribe's bingo complies with such standards speaks directly to whether it should be classified as an "aid" or "facsimile" under IGRA and NIGC regulations. Part 543 only addresses the "Minimum Internal Control Standards for Class II Gaming." The Tribe's internal gaming controls are not at issue in this case,[6] and in any case have been found substantively compliant by the NIGC. *See* Ex. A.

CONCLUSION

The Tribe's gaming satisfies every statutory element of bingo in IGRA and every criteria of a Class II "aid" in the NIGC regulations. There is no genuine dispute of material fact that the Tribe's gaming is Class II bingo.

[6] As a corollary to this argument, the State asserts that the Tribe's bingo violates Part 547 because the gaming lacks "on-site player interactions" and cannot ensure that players "receive the same rules" because they may be playing "outside of Naskila." Resp. at 15. This position merely reiterates the State's misguided "social interaction" arguments. Part 547—like IGRA and other NIGC gaming regulations—nowhere imposes such a requirement. *See, e.g.*, 67 Fed. Reg. at 41171 ("[P]layers may be playing at the same facility or via links to players in other facilities.").

Dated: March 3, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Danny S. Ashby, hereby certify that on March 3, 2017, I caused a true and correct copy of the foregoing *Reply in Support of Motion for Partial Summary Judgment* to be served on all counsel of record by email through the Court's CM/ECF system.

Dated: March 3, 2017

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