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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA,

Plaintiff,

v.

IIPAY NATION OF SANTA YSABEL, also known as SANTA YSABEL BAND OF DIEGUENO MISSION INDIANS, a federally-recognized Indian Tribe, SANTA YSABEL INTERACTIVE, a tribal economic development entity, SANTA YSABEL GAMING COMMISSION, DAVID CHELETTE, DAVID VIALPANDO, ANTHONY BUCARO, MICHELLE MAXCY, VIRGIL PEREZ, and BRANDIE TAYLOR,

Defendants.

Case No. 3:14-cv-02724-AJB/NLS

APPENDIX A

TO MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Date: December 4, 2014
Time: 2:00 p.m.
Courtroom: 3B
Judge: Honorable Anthony J. Battaglia
Trial Date:
Action Filed: November 18, 2014

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**Letter from Kevin Washburn, General Counsel, NIGC,
to Robert Rossette, Monteau, Peebles & Crowell,
re: Lac Vieux Desert Internet Bingo Operation
(Oct. 26, 2000)**

NATIONAL INDIAN GAMING COMMISSION

OCT 26 2000

Robert A. Rosette, Esq.
Monteau, Peebles & Crowell
555 Capitol Mall
Suite 1440
Sacramento, CA 95814

Re: Lac Vieux Desert Internet Bingo Operation

Dear Mr. Rosette:

Thank you for visiting our office on June 21, 2000, and explaining the position of the Lac Vieux Desert Band of Superior Chippewa (LVD) on its proposed Internet Bingo operation. The LVD's position, as articulated during that meeting, is that the internet is an aid to the play of class II bingo and, consequently, that LVD may legally offer Internet Bingo to patrons nationwide pursuant to the Indian Gaming Regulatory Act (IGRA). During our meeting, we indicated that we were skeptical, but that we would consider your theory. Having carefully considered the LVD proposal, we have determined that Internet Bingo is not authorized by IGRA. We reach this conclusion because the play of Internet Bingo does not necessarily occur on Indian lands.

Pursuant to IGRA, a tribe may engage in, or license and regulate, class II and class III gaming on Indian lands within the tribe's jurisdiction if (1) the Indian gaming is located within a state that permits such gaming for any purpose by any person, organization, or entity, (2) such gaming is not otherwise specifically prohibited on Indian lands by federal law, and (3) the tribe adopts an ordinance or resolution which permits gaming that is then approved by the Chairman of the NIGC. For class III gaming, a tribe must, in addition, obtain a tribal-state compact that authorizes the games. See 25 U.S.C. §§ 2710(a)(2) and (d)(1).

Indian lands, as defined by IGRA, are lands within the limits of any Indian reservation and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by an Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power. See 25 U.S.C. § 2703(4).

Obviously, the concept in using the internet is to draw players from a wide area. Internet Bingo apparently seeks to draw any player who can log on to the internet site from any location and who is willing to pay the fee. The game itself does not depend on the player

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being located in a tribal bingo facility or even on Indian lands. As explained in a recent case in the U.S. District Court for the District of Idaho, IGRA preempts state laws that purport to regulate Indian gaming. The scope of this preemption, however, is limited to the reach of IGRA. Thus, IGRA allows only gaming that occurs on Indian lands. AT&T v. Coeur d'Alene Tribe, 45 F.Supp.2d. 995 (D. ID. December 17, 1998) (Memorandum Decision and Order), *appeal docketed*, No. 99-35088 (9th Cir. January 14, 1999).

Because not all of its gaming activity occurs on Indian lands, Internet Bingo lies outside IGRA's safe harbor for class II gaming or compacted class III gaming. Accordingly, the game operators may be subject to criminal prosecution for violation of state or federal law if 1) any of the states in which players are located prohibits conduct of an internet gambling business or 2) the underlying gaming activity is itself a violation of state law. As the court notes at page 6 in the Coeur D'Alene decision, "[b]ecause the Tribes' Lottery consists of gaming activities that occur out-of-state and outside the limits of any reservation, state law applies to regulate that conduct." Several states are active in the prohibition of Internet gaming activity.

Based on our conclusion that the IGRA does not authorize Internet Bingo, we need not address whether Internet Bingo is a class II technological aid under the IGRA, as put forth in your proposal. We understand LVD's argument that the internet is being used in this instance only to extend the play of bingo. Assuming *arguendo*, that the internet could appropriately be characterized in this case as a technological aid to the play of bingo, the principle of extending play has limits. In essence, we are confident that Congress did not intend to allow the play of bingo to be extended outside Indian lands.

In summary, a tribal gaming operation is not authorized to operate under IGRA if all or part of the gaming occurs at locations that do not fall within the definition of "Indian lands." Further, such action may violate other federal and state laws.

If you have any question regarding this matter, please do not hesitate to contact Staff Attorney Maria Getoff at (202) 632-7003.

Sincerely yours,

Kevin K. Washburn
General Counsel

cc: Charles Gross, Assistant United States Attorney, Western District of Michigan
Kevin DiGregory, Deputy Assistant Attorney General, United States Department of Justice, Criminal Division

Letter from Montie Deer, Chairman, NIGC,
to Ernest L. Stensgar, Chairman, Coeur d' Alene Tribe,
re: National Indian Lottery
(Jun. 22, 1999)

GAMING COMMISSION

JUN 22 1999

Ernest L. Stensgar, Chairman
Coeur d'Alene Tribe
Route 1
Plummer, Idaho 83851

Re: National Indian Lottery

Dear Chairman Stensgar:

The Coeur d'Alene Tribe (Tribe) is presently involved in litigation in the 9th Circuit Court of Appeals with respect to whether the National Indian Lottery (NIL), an internet gambling enterprise of the Tribe's, is legal. It has come to our attention that, in the course of this litigation, the Tribe has argued that the National Indian Gaming Commission (NIGC), by approval of the Tribe's management contract and a subsequent amendment, implicitly authorized the off-reservation features of the NIL. It is the view of the NIGC that the Indian Gaming Regulatory Act (IGRA) does not authorize off-reservation gaming and, moreover, that the NIGC did not authorize such gaming when it approved the Tribe's management contract and amendment.

In a press release issued in March of 1995, less than two months after our approval of the management contract, we stated:

> The National Indian Gaming Commission did not approve a nationwide Indian lottery. The Commission did approve a management contract between the Coeur d'Alene Indian Tribe and Unistar. The Tribe is well aware that there may be legal obstacles to its proposed lottery and that it must deal with other tribes and states on an individual basis."

Accordingly, we did not intend by our approval of the contract to expressly or implicitly state that the off-reservation gambling contemplated by the NIL was authorized by IGRA or legal under other applicable federal or state laws. The NIGC's review of the management contract simply found that the contract complied with the management contract requirements of the IGRA and NIGC regulations.

It is the position of the NIGC that the tribal gaming actions of the NIL to the extent they involve off reservation gaming are not authorized by IGRA. Further, such actions may be subject to other federal or state laws.

Finally, we concur in the opinion of the United States as more fully articulated in its amicus curiae brief filed today in the 9th Circuit.

Sincerely,

Montie R. Deer
Chairman

Letter from Penny Coleman, Deputy General Counsel, NIGC,
to Terry Barnes, Bingo Networks,
re: U-PIK-EM Bingo
(Jun. 9, 2000)

NATIONAL INDIAN GAMING COMMISSION

JUN - 9 2000

Terry Barnes, Director of Gaming
Bingo Networks
Tele-Mark, LLC
P.O. Box 5066
Shawnee, OK 74801

Dear Mr. Barnes:

This letter responds to your inquiry of October 31, 1999, and to subsequent communications concerning the classification of your organization's new version of U-PIK-EM bingo that utilizes the Internet to enable players to purchase cards and play them at home. You state that Tele-Mark, LLC, has a contract with the Sac & Fox Nation of Oklahoma and wishes to introduce Internet U-PIK-EM bingo to "reach people out of their territory," according to your telefaxed transmission of April 4, 2000. The view of the National Indian Gaming Commission (NIGC) is that the Indian Gaming Regulatory Act (IGRA) does not authorize off-reservation gaming.

In response to questions posed by Mr. Richard Schiff in his letter of March 17, 2000, your telefax of April 4 provided a description of Internet U-PIK-EM, and you provided additional clarification to Ms. Sandra Ashton in a telephone conversation of April 17, 2000. According to your description of the game, players would open an online account with the gaming center by credit card or electronic check through the Internet. You stated that the gaming center is located on tribal land.

From home computers, players would purchase the desired number of cards and choose eight numbers (between 1 and 75) in the "small picture frame" designated pattern in the center of each card. Each player would agree to elect a proxy player at the gaming center. When asked during the April 17 telephone conversation about how many proxy players would be required, you indicated that only one proxy might be necessary, as the computer identifies the winner. The proxy player would merely verify the winner. At the 8:00 P.M. game time, a mechanical ball blower would randomly select numbers, and players would daub their duplicate cards online at home. Numbers would be drawn until there is a winner, with the winnings being larger if fewer numbers are drawn before there is a winner. The computer would identify the first player whose card matched the selected numbers. Winnings could be used to support additional play or the winner could request a draw that would be mailed the following day.

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The IGRA does not authorize off-reservation gaming as contemplated in the game described. The Chairman of the NIGC stated this position in the enclosed letter dated June 22, 1999, to the Chairman of the Coeur d'Alene Tribe of Idaho. The United States asserted this position in related litigation in the Court of Appeals for the Ninth Circuit. Please see the enclosed brief of the United States as amicus curiae. In addition, U-PIK-EM bingo accessed via the Internet may also run afoul of other laws that are outside the area of NIGC's expertise.

If you have any questions or concerns on this matter, please contact Sandra Ashton at 202-632-7003.

Sincerely,

Penny J. Coleman
Deputy General Counsel

Enclosure

cc w/enc: Don W. Abney, Principal Chief, Sac & Fox Nation
Route 2, Box 246, Stroud, OK 74079

Indian Gaming Management Staff, Department of the Interior

Letter from Kevin Washburn, General Counsel, NIGC,
to Joseph Speck, Nic-A-Bob Productions,
re: WIN Sports Betting Game
(Mar. 13, 2001)

Clearte

March 13, 2001

Joseph M. Speck
Nic-A-Bob Productions
5025 Southern Eastern Avenue, #439
Las Vegas, NV 89119

Re: WIN Sports Betting Game

Dear Mr. Speck:

This letter responds to your inquiry as to whether the National Indian Gaming Commission regards the game "WIN" as a Class II or Class III game under the Indian Gaming Regulatory Act (IGRA) for play in Arizona and California. We reviewed the information you provided and conclude that the game, as discussed below, does not meet any of the Class II gaming definitions, and consequently is a Class III game. Furthermore, because sports betting is unlawful in Arizona and California, (as well as most other states), and because the use of the Internet is not authorized by IGRA, tribes in Arizona and California may not lawfully operate WIN pursuant to the IGRA.

As described in the materials you submitted, WIN is a sports betting game. The game may be played via the Internet in the future, but is currently available for play only in a casino sports book facility. In playing the game, players compete against other players in different slots. A slot consists of a certain set number of players and has a wager limit. For instance, Slot-A contains 10 players, Slot-B contains 20 players, etc. The maximum wager for Slot -A is $10.00, for Slot-B $20.00, and so on. When a slot reaches capacity, players who choose that slot are offered the next available slot. Players may wager on all manner of sporting events, including NFL Football, Baseball, Golf and the Olympics.

The Indian Gaming Regulatory Act (IGRA) governs gambling on Indian lands. The IGRA identifies certain specific forms of gambling as Class II, and therefore subject to regulation by tribes and the NIGC. Those forms of gambling are as follows:

(i) The game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) Which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) In which the holder of the card governs such numbers or

designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) In which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) Card games that –

(I) Are explicitly authorized by the laws of the State, or

(II) Are not explicitly prohibited by the laws of the State and are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

25 U.S.C. § 2703 (7)(A).

All other forms of gambling (except Class I gaming which consists of social games for prizes of minimal value and gaming by individuals in connection with tribal ceremonies, *See* 25 U.S.C. § 2703(6) are considered Class III games and may be lawfully played only pursuant to a Tribal-State compact. 25 U.S.C. §§ 2703(8) and 2710(d).

Because sports betting does not fit into any of the specifically defined categories of Class II gaming set forth above, it is a Class III form of gaming. Therefore, it may be played only pursuant to a Tribal-State compact.

Moreover, specific forms of gaming, including sports betting, are subject to compact only if located in a state that permits such gaming for any purpose by any person, organization or entity. 25 U.S.C. § 2710(d)(1)(B). If sports betting is unlawful in a state, it is unlawful for tribes in that state to engage in it. Sports betting is unlawful in most states, including Arizona and California. Statutes in both Arizona and California specifically prohibit this form of gambling. *See* ARIZ. REV. STAT. § 13-3305(1989); CA. PENAL CODE § 337a(1978).

In addition to state statutes prohibiting sports betting, federal law makes it a crime to engage in the interstate transmission of information assisting in the placing of bets on a sporting event unless the transmission is between states or foreign countries where

betting on that sporting event is lawful. 18 U.S.C. § 1084(2000). Those states that we are aware sports betting is lawful are Delaware, Montana, Nevada and Oregon. *See* DEL. CODE ANN. tit. 28 § 1101(1953); OR. REV. STAT. § 1462.020(1999); MONT. CODE ANN. § 23-5-405(1999); NEV. REV. STAT.§ 463.010(1999).

Furthermore, the IGRA does not authorize off-reservation gaming as contemplated in your submission. The use of the Internet, even though the computer server may be located on Indian lands, would constitute off-reservation gaming to the extent any of the players were located off of Indian lands. The Chairman of the NIGC stated this position in the enclosed letter dated June 22, 1999, to the Chairman of the Coeur d'Alene Tribe of Idaho. Moreover, the United States asserted this position as *amicus curiae* in related litigation in the United States Court of Appeals for the Ninth Circuit. A decision in that case is pending. Finally, WIN accessed via the Internet may run afoul of other laws outside the area of NIGC's expertise.

Both because sports betting is unlawful in Arizona and California, and because the use of the Internet for gambling purposes is not authorized by IGRA, we conclude that tribes in Arizona and California may not lawfully operate WIN. Furthermore, tribes in any state where sports betting is illegal may not operate WIN.

If you have any questions please contact Staff Attorney Maria Getoff at (202) 632-7003.

Sincerely yours,

Kevin K. Washburn
General Counsel

Enclosure

**Letter from Richard Schiff, Senior Attorney, NIGC,
to Don Abney, Principal Chief, Sac and Fox Nation,
re: Tele-Bingo
(Jun. 21, 1999)**

OGC R/F

NATIONAL INDIAN GAMING COMMISSION

JUN 21 1999

Don W. Abney, Principal Chief
Sac and Fox Nation
Route 2, Box 246
Stroud, Oklahoma 74079

Dear Chief Abney:

The purpose of this letter is to respond to your fax transmission of March 29, 1999, in which you request the National Indian Gaming Commission (NIGC) to review the proposed Lease Agreement, dated November 22, 1994 (Lease), and Indemnity, dated November 22, 1994, between the Sac and Fox Nation (Nation) and Telemark, LLC. The purpose of our review is normally to determine whether the agreement is a contract for management of an Indian tribal gaming operation or a collateral agreement to such a management contract, and therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA).

Because we were unfamiliar with the game being offered under the Lease, we also reviewed the game to determine whether its play is lawful under IGRA. We have determined: that Tele-Bingo is not being run as a tribal gaming operation under IGRA; that, in any event, it is a class III game which cannot be played lawfully on Indian land in Oklahoma; and that, therefore, the Nation should immediately close down the game.

Authority to review the Lease and Indemnity

The authority of the NIGC to review and approve gaming related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. The authority of the Secretary of the Interior to approve such agreements under 25 U.S.C. § 81 was transferred to the NIGC pursuant to the IGRA. 25 U.S.C. § 2711(h).

Management Contracts

The NIGC has defined the term "management contract" to mean "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. The NIGC has defined "collateral agreement" to mean "any contract, whether or not in writing, that is related either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5.

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Determination as to management of the game.

Although it is not clear from the face of the lease, NIGC field investigators visiting the site report that the Nation is not involved in the operation of Telemark's game, "Tele-Bingo." It appears that the game is wholly operated by Telemark on the Nation's land, and the Nation does not participate materially in any aspect of the operation. Under this arrangement, Tele-Bingo is not tribal gaming, and therefore does not meet the fundamental requirement of the Indian Gaming Regulatory Act (IGRA) that the Nation have the sole proprietary interest and responsibility for the conduct of the game. Based upon this determination, it is not necessary to decide whether or not the Lease and Indemnity constitute a management agreement. The question of whether Telemark is managing a tribal gaming operation would only arise if Tele-Bingo was in fact a tribal gaming operation, but that is not the case. Stated otherwise, this operation does not meet even the basic requirement of being gaming by an Indian tribe under IGRA, and we cannot therefore get to the management issue. There is no legal basis for the conduct of Tele-Bingo on the Nation's land.

Classification of the game

In addition I am informed that the description of the game in the Lease, which involved play using a 900 telephone number to get payment, is incomplete and inaccurate. As currently played the game apparently uses the Internet to provide the player with the bingo card (all players use the same card), to solicit payment and to provide a PIN to the player. Utilizing the PIN, the player then engages in "play" by phone. The play consists of telephoning a location on the Nation's land and receiving, from the person on the other end, 20 randomly generated numbers. Payouts are based upon achieving a bingo with the fewest numbers, although a bonus is paid for covering the top row with the first five numbers.

IGRA (25 U.S.C. § 2703) defines class II gaming to mean:

1. The game of chance commonly known as bingo:

   a. Which is played for prizes with cards bearing numbers or other designations

   b. In which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn

   c. In which the game is won by the first person covering a previously designated arrangement on such card (s)

Tele-Bingo is far removed from the "game of chance commonly known as bingo." The Tele-Bingo player is not engaged in play of a game with other players, covering numbers as they are called, and does not win by being "the first person covering a previously designated arrangement." Rather, the Tele-Bingo player receives randomly generated numbers by telephone, and wins by matching those numbers to a card which remains the same for all players in all games.

Tele-Bingo is simply a lottery, and as such it is a class III game.

Please be advised that the Nation should take all necessary steps to close down this game, without delay. Operation of this non-tribal game on the Nation's land is a violation of IGRA. Additionally, operation of a class III game on Indian land, without a compact, is a violation of IGRA and constitutes a crime under 18 U.S.C. § 1166.

If you have any questions or concerns, please call me at (202) 632-7003.

Sincerely,

Richard B. Schiff
Senior Attorney

Memorandum from Penny Coleman, General Counsel, NIGC,
to George Skibine, Chairman, NIGC,
re: classification of card games played
with technological aids
(Dec. 17, 2009)

Memorandum

To: George T. Skibine, Chairman (Acting)

To: Norman H. DesRosiers, Vice Chairman

From: Penny J. Coleman, General Counsel (Acting)

Subject: Classification of card games played with technologic aids.

Date: December 17, 2009

On December 21, 2004, the Office of General Counsel issued a game classification opinion for the DigiDeal Digital Card System (DigiDeal). The 2004 opinion concluded that DigiDeal is a Class III game "because the use of technologic aids does not come within the Indian Gaming Regulatory Act's definition of Class II gaming." Upon reconsideration, I have determined that the 2004 opinion's ultimate conclusion was not the best interpretation of IGRA. I have therefore revisited the issue and reached a different, better conclusion.

IGRA's definition of *Class II gaming* includes non-banked card games unless certain exceptions apply, in which case the game is Class III. The use of a technologic aid is not one of the listed exceptions. In spite of this, though, does an otherwise Class II card game become Class III when played with a technologic aid? As will be discussed below, it does not. The definition of *Class II gaming* does not exclude card games played with a technologic aid and, therefore, such games are Class II.

IGRA

There are three classes of gaming under IGRA. Class I, which is not at issue here, means "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies of celebrations." 25 U.S.C. § 2703(6). Class II is defined, in relevant part, as:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that -

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "Class II gaming" does not include

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7).

Class III is a catch-all category that includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8).

Though IGRA does not define *technologic aid* or *electronic facsimile*, NIGC regulations clarify that a technologic aid is any device that:

1. assists a player or the playing of a game;
2. is not an electronic or electromechanical facsimile; and
3. is operated in accordance with applicable federal communications law.

25 C.F.R. § 502.7(a). The regulations also define *electronic facsimile*, in relevant part, 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...." 25 C.F.R. § 502.8.

Game and Equipment

As described in the 2004 opinion, DigiDeal is an electronic card table the size and are shape of any common, felt-covered table used in casinos for games like Pai Gow Poker or Let it Ride Poker. The dealer stands in his or her customary place, and there are six player positions, each with a video screen built in. In lieu of an ordinary deck of cards, those screens display video representations of cards. The dealer shuffles, deals, and controls play by pressing buttons on a device made to look like a dealer's shoe. There are spots in each player position for placing antes and bets, and the spots are equipped with sensors so that the table can determine the number of players that begin each hand, the number that continue to play or fold, and the amounts wagered.

Technologic Aid to a Class II Card Game

Although this memo disagrees with the 2004 opinion's ultimate resolution, I concur with its analysis concluding that the DigiDeal table constitutes a technologic aid rather than an electronic or electromechanical facsimile.

The DigiDeal table satisfies the first element of a technological aid—that it assists the player or the playing of a game. The table assists play by displaying each player's hand, thus making it easier to decide whether to continue or to fold. The table also identifies qualifying hands, hands that were folded, and the amount of the pot won, thus making the play of the game simpler and more accurate.

The table also satisfies the third element, that it "is operated in accordance with applicable Federal communications law." 25 C.F.R. § 502.7(a)(3). The table is not linked with other tables and, in communicating with the dealer's shoe, apparently meets FCC regulations on radio emissions.

That leaves the second element of the definition, that the table "not be an electronic or electromechanical facsimile of a game of chance." It is not. NIGC regulations define electronic or electromechanical facsimile, in relevant part, 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...." 25 C.F.R. § 502.8. Though courts have adopted this definition as it reads, *see, e.g., United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 615 (8th Cir. 2003), until the 2004 DigiDeal opinion, no one had tried to make the distinction between a technologic aid and a facsimile for an electronic game of cards. Regardless of the analysis's novelty at the time, though, it correctly found the table is not a facsimile because it does not incorporate all of the characteristics of poker. That fact has not changed in the ensuing years.

In *Sycuan Band of Mission Indians v. Roache*, 54 F. 3d 535 (9th Cir. 1994), for example, the Ninth Circuit reviewed a wholly electronic pull-tab game in which the player bought and played pull-tabs generated by computer and displayed on a video screen without producing a traditional paper-pull tab. The court concluded that this was an exact, self-contained copy of paper pull-tabs and thus an electronic facsimile. While we still follow the holding in *Sycuan*, pull-tab machines that merely dispense and display the results of paper pull-tabs are not facsimiles. *Id.* at 542-543.

In *Diamond Game v. Reno*, 230 F.3d 365, (D.C. Cir. 2000), the machine in question, Lucky Tab II, sold and dispensed paper pull-tabs from a roll. The machine also read and displayed the results of each tab, presenting those results in such a way as to resemble a three-reel slot machine. Nonetheless, the paper tabs could be played and redeemed manually. The D.C. Circuit held, therefore, that the Lucky Tab II dispenser was not an electronic facsimile containing all characteristics of pull tabs and thus was not a Class III device. The "game is in the paper rolls," the court held, and the Lucky Tab II is "little more than a high-tech dealer." *Id.* at 370. Like Lucky Tab II, DigiDeal is a "high tech dealer."

Video Poker machines commonly found in Class III and non-Indian casinos are examples of electronic facsimiles. The typical machine accepts bets, deals a poker hand, evaluates that hand against the standard poker rankings, and pays winning hands according to paytables. Thus, the machine incorporates all of the aspects of the game offered and is an electronic facsimile of a game of chance.

DigiDeal, on the other hand, incorporates some of the aspects of poker—shuffling, dealing, and ranking winning and losing hands—but not others. The placing of antes and wagers and the player's decision to play or fold are made by the players. Put slightly differently, the DigiDeal table is not essential to playing poker. One can play poker with or without the table. The table, therefore, meets all of the criteria for a technologic aid and is not a Class III electronic facsimile.

Using Technologic Aids with Card Games

Upon concluding that the DigiDeal table is a technologic aid, the 2004 opinion next considered whether an otherwise Class II card game is Class III when played with a technologic aid. The opinion's analysis begins by asking "whether IGRA allows the use of technologic aids with card games…or, more specifically, whether IGRA places the use of technologic aids with card games within Class II." The opinion concludes that it does not and, accordingly, is Class III. But IGRA's language and legislative history indicate that the proper question is whether IGRA *prohibits* the use of technologic aids with card games or, more specifically, whether IGRA *excludes* the use of technologic aids with card games from Class II. Although a subtle distinction, it leads to a fundamentally different answer.

The 2004 opinion defines the category of Class II card games through reading the definition of Class II bingo. Congress explicitly permits technologic aids to Class II bingo

but is silent regarding technologic aids to Class II card games. The opinion deduces from this that Congress intended that card games played with a technologic aid do not meet the definition of Class II gaming. Such reasoning, however, does not acknowledge a distinction IGRA makes between Class II bingo and card games.

IGRA's definition of *Class II gaming* necessarily frames its descriptions of bingo and card games in fundamentally different ways. Congress defined bingo by describing what it includes and card games by what they exclude. *Class II gaming* includes any card game unless it is banked; an electronic facsimile; explicitly prohibited by the state; or, if neither explicitly prohibited nor permitted by state law, is not played at any location in the state or does not conform state law regarding hours or limitation on wager and pot sizes. If a card game does not run afoul of any of these provisions, it is Class II.

The definition of bingo, by contrast, is essentially a description of the traditional game of bingo, even when played with electronic aids. Because bingo is a game with an established set of rules, it is far simpler to describe precisely what bingo is, rather than what it is not. The same cannot be said for a category as nebulous as "card games." Consequently, Congress defined Class II card games by what that definition excludes. A card game is Class II unless it possesses one of the characteristics listed above, *e.g.* banked or played outside the hours permitted by state regulations. Congress did not include technologic aid in the definition for the same reason it did not list every possible card game that could meet the definition; an exhaustive list is impossible. Rather than try to populate such a list, it is far simpler to detail what is not a Class II card game. This is what Congress did. Because the description of permitted Class II card games does not exclude games played with a technologic aid, such games may qualify as a Class II game.

Although IGRA's Class II definition is clear, the earlier opinion's conclusion was a reasonable, if ultimately incorrect, interpretation of IGRA. These opposing opinions and interpretations of IGRA indicate that IGRA's Class II gaming definition is open to interpretation. Any ambiguity, though, is resolved by the legislative history and other rules of statutory construction. The Senate report and construction of the statute indicate that Class II card games may include card games played with a technologic aid. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981) ("We look first, of course, to the statutory language... Then we review the legislative history and other traditional aids of statutory interpretation to determine congressional intent.").

The Senate Report accompanying IGRA indicates Congress's intent to include technologic aids to card games in the Class II gaming definition. The Senate Select Committee on Indian Affairs affirmed in its report that it "intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility." S. Rep. No. 100-446 at p. A-9.

While it is true that this language is found in a paragraph concerned primarily with bingo, pull tabs, etc., there is no evidence to suggest that Congress intended its

policy toward technology to be so limited. When IGRA was drafted, bingo played with electronic equipment was the "modern method" of conducting Class II games. It was an established game, played widely enough to enter Congress's scope of vision when drafting IGRA. *Id.* The same cannot be said of card games played with an electronic aid. DigiDeal, for example did not exist until 1998, and a similar company, PokerTek, did not install an electronic poker table in a casino until May 2005. At the time of IGRA's passage, card games were played as they always had been, with physical cards and a dealer. The fact that Congress did not specifically address a game not in use at the time of IGRA's passage does not lead to the conclusion that Congress intended to exclude it from Class II gaming.

In explaining its policy toward technology, a key distinction for the Committee was 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 rather than with or against other players." *Id.* Congress was not concerned that technologic aids should be used only with bingo; rather, it was concerned that there is a distinction between an aid and a facsimile. Such a distinction can be made for Class II card games as well as bingo, as is demonstrated by both this and the 2004 opinion's finding that the electronic table is not a facsimile.

This policy's application to all Class II games, including card games, is also made evident in the adopted version of IGRA, which specifically excludes "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" from Class II gaming. 25 U.S.C. § 2703(7)(B). This prohibition was not applied to bingo only, but to "all games of chance," indicating that Congress intended to differentiate between technologic aids, which are acceptable for all Class II games of chance, and electronic facsimiles, which are acceptable for none.

Congress's policy toward technology notwithstanding, it was emphatic about restrictions on Class II card games. The Senate Report clarifies that Class II card games is meant to be an inclusive category with specific, narrow exceptions. Class II card games, according to the Committee, are non-banked and should be "operated in conformity with laws of statewide application with respect to hours or periods of operation or limitations on wagers or pot sizes for such games." S. Rep. 100-446 at p. A-9. The report also details that the definition of card games is to be read in conjunction with what was to become sections 2710(a)(2) and 2710(b)(1)(A) of IGRA, which specify that Class II gaming can only occur on Indian lands located in a state that otherwise permits such gaming. *Id.* The Committee specified that "*[n]o additional restrictions are intended by* [2703(7)(A)(ii)(I) & (II)]." S. Rep. No. 100-446 at P. A-9 (emphasis added). Deciding that a technological aid to an otherwise Class II card game makes the game Class III would create a new restriction on Class II gaming in conflict with Congress's clearly stated intent.

The 2004 opinion cited to *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003) to support its conclusion that technologic aids to card games are not Class II. The scope of the case was overestimated though, and it does not negate any of the above analysis. In *Seneca-Cayuga*, the 10th

Circuit Court of Appeals discussed the definition of *Class II gaming* and, in doing so, stated:

> [U]nder IGRA, Class II games include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are in used in connection therewith)…including (if played in the same location) *pull-tabs*, lotto, punch boards, tip jars, instant bingo, *and other games similar to bingo*…" 25 U.S.C. § 2703(7)(A) (emphasis supplied). IGRA further provides that "electronic, computer, or other technologic aids to such games are Class II gaming, and therefore permitted in Indian country. *Id.*

Seneca-Cayuga, 327 F.3d at 1032 (emphasis in original).

From this, the 2004 opinion reasoned that "the Court described IGRA as placing within Class II only technologic aids to bingo and like games, not aids to non-banking card games." The opinion put special emphasis on the court's use of the words, "such games" and surmised that because the court concluded that technologic aids to pull-tabs, etc. are Class II, those are the only technologic aids allowed under Class II gaming. But such a broad deduction from the *Seneca-Cayuga* opinion is not warranted. At no point in the *Seneca-Cayuga* opinion does the court discuss Class II card games. In fact, when reciting the definition of Class II games, the court leaves card games out entirely. The 10th Circuit never claims that IGRA excludes technologic aids to non-banking card games from Class II gaming. The court held that technologic aids to "such games" are Class II gaming because those are the games the opinion was concerned with. *Seneca-Cayuga* says nothing of technologic aids to Class II card games.

The language of IGRA, its legislative history, and the rules of statutory construction all champion the inclusion of technologic aids to card games in the Class II gaming definition. Case law cited by the 2004 opinion to support a contrary conclusion does not defeat that analysis.

Technologic Aid v. Electronic Facsimile

As discussed above, I agree with the 2004 DigiDeal opinion's conclusion that DigiDeal is a technologic aid rather than an electronic facsimile. It is important to note, though, that the discussion of the DigiDeal system and its classification is limited to the broader category of technologic aids to Class II games. Each purported aid to a card game must be looked at individually to ascertain whether it is actually an aid or a Class III electronic facsimile.

An electronic facsimile is distinguishable from a technologic aid in that it replicates a game of chance by incorporating all of the characteristics of the game. 25 C.F.R. § 502.7(a). The DigiDeal table, for example, incorporates only some of the characteristics of poker, namely shuffling, dealing, and ranking winning and losing

hands. The player still controls the key aspects of poker, such as whether to ante or place a wager, play a hand or fold, and when and whether to bluff opponents.

If, however, a particular aid to card games becomes a necessity, or encompasses all the aspects of a particular game, it ceases to be a technologic aid and becomes an electronic facsimile. For example, in *Sycuan Band of Mission Indians v. Roache*, 54 F. 3d 535 (9th Cir. 1994)the United State Court of Appeals held that the "Autotab Model 101 electronic pull-tab dispenser" is a class III facsimile of a pull-tab device. The Autotab Model 101 produced only an electronic reproduction of a paper pull-tab ticket on a computer screen. The player electronically picked numbers and, if the player won, the machine would print out a winning ticket or add the winning amount to a credit balance for further play. The game was played entirely on the machine without producing a paper pull-tab. The court found that the machine was a Class III facsimile because "the machine presents self-contained computer games copying the pull-tab principle, and they are played electronically." *Id.* at 542. Autotab was an "exact and detailed copy" of a pull-tab game. *Id.*

In *Sycuan*, the Autotab game was played electronically and encompassed all the aspects of a pull-tab game. It was thus ruled a Class III electronic facsimile. Similarly, should an electronic poker table or other game encompass all of the aspects of poker, it will be ruled a Class III facsimile. Put simply, a technologic aid merely assists the players. It is a way to play the game, not the game itself.

Johnson Act

Although technologic aids to card games are permissible Class II games under IGRA, there is a question as to whether the games are impermissible under the Johnson Act, which prohibits the use of gambling devices in Indian Country. 15 U.S.C. § 1175. They are not. The Johnson Act does not apply to Class II and Class III games played pursuant to IGRA.

The Johnson Act defines *gambling device* as any slot machine and:

> Any other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1171(a).

IGRA, enacted long after the Johnson Act, exempts Class III gaming from the application of the Johnson Act but is silent as to Class II gaming. While courts have not directly addressed the Johnson Act and technologic aids to Class II card games, three of

the four circuits that have considered whether IGRA implicitly provides a Johnson Act exemption for class II devices have decided that the Johnson Act is not applicable to technologic aids to bingo or Class II pull tabs, lotto, etc. Although the cases themselves are game-specific, the analysis supporting the decisions centers on reconciling IGRA and the Johnson Act and is equally applicable to technologic aids to card games.

In 2000, the Ninth Circuit Court of Appeals held that the Johnson Act does not apply to an electronic bingo game called Megamania. *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000). In reaching its decision, the court first found that Megamania is a technologic aid to bingo rather than an electronic facsimile and, therefore, Class II. *Id.* at 1101. The court then looked to the text of IGRA, noting that it explicitly repealed application of the Johnson Act to Class III gaming devices used pursuant to a tribal-state compact, but did not address the relationship between the two acts as applied to Class II gaming. *Id.* The court recognized the apparent conflict in the two statutes and reconciled it by reading the statutes together to discover "how two enactments by Congress over thirty-five years apart most comfortably coexist, giving each enacting Congress's legislation the greatest continuing effect." *Id.*

With coexistence as its goal, the court found that "IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids." *Id.* Pursuant to IGRA, bingo using "electronic, computer, or other technologic aids" is Class II gaming, and therefore permitted in Indian country. *Id.* If the Johnson Act prohibited such aids, IGRA's Class II gaming definition would be meaningless. *Id.* It made no sense to the court that Congress would "carefully protect such technologic aids…yet leave them to the wolves of a Johnson Act forfeiture action." *Id.* at 1102. The court refused to presume "that in enacting IGRA, Congress performed such a useless act." *Id.*

The Megamania game once again came under scrutiny a few months later in *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000). This time the Tenth Circuit Court of Appeals examined the Megamania electronic bingo game and, like the Ninth Circuit, concluded that it is not prohibited by the Johnson Act. The court followed an analytical path similar to that of the Ninth Circuit. It first established that Megamania is a Class II technologic aid rather than an electronic facsimile. From there, the court considered the Johnson Act's application and held that "Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game and is played with the use of an electronic aid." *Id.* at 725. For this proposition, the court looked to the earlier Ninth Circuit holding in *103 Electronic Gaming Devices*. It also relied on *103 Gaming Devices* to find that "the Johnson and Gaming Acts are not inconsistent and may be construed together in favor of the Tribes." *Id.* The court explicitly joined the Ninth Circuit in concluding that "MegaMania is not a gambling device contemplated by either [the Johnson Act or IGRA]." *Id.*

Both MegaMania cases are admittedly specific to electronic bingo and rely at least in part on the technologic aid language in IGRA's Class II gaming definition. Other cases, however, have taken the analysis in the MegaMania cases to the next step and found that technologic aids to pull tabs, lotto, etc. are also immune from the Johnson Act.

In *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (2003), the Tenth Circuit Court of Appeals reviewed the Magical Irish Instant Bingo Dispenser System, a pull tab dispenser with electronic elements such as a "verifier" feature that allows players to see the results for a particular pull tab on a video display. The court determined the Magical Irish system is a technologic aid rather than an electronic facsimile. The appellees argued that technologic aids to *all* enumerated Class II games are insulated from the Johnson Act and cited to *103 Electronic Games* in support. *Id.* at 1031 (emphasis added). The Court, however, pointed out that the *103 Electronic Games* ruling was clear that it applied only to MegaMania and that there was no precedent clarifying the relationship between the Johnson Act and technologic aids to Class II games beyond just bingo. *Id.* at 1031. Accordingly, the court had to address for the first time "whether aids to those non-bingo games such as pull-tabs that are enumerated in 25 U.S.C. § 2703(7)(A) are protected from Johnson Act scrutiny…." *Id.*

In spite of the court's limited holding in *103 Electronic Games*, the *Seneca-Cayuga* court applied the supporting analysis of *103 Electronic Games* and found that IGRA's authorization of technologic aids extends to pull-tabs. The court held that although the text of IGRA is ambiguous, the "technologic aids parenthetical" is not limited to bingo, but also refers to "other games of chance authorized as Class II gaming." *Id.* at 1038. As a technologic aid to a pull tab machine is a permitted Class II game, Congress did not intend that it be subject to the restrictions of the Johnson Act. The court held:

> Absent clear evidence to the contrary, we will not ascribe to Congress the intent both to carefully craft through IGRA this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA.

Id. at 1032.

As *Seneca-Cayuga* applied the underlying analysis in *103 Electronic Games* to electronic bingo, we can apply it to technologic aids to card games. *103 Electronic Gaming* held that the Johnson Act does not apply to technologic aids to bingo because Congress would not permit something in one act only to forbid it through another. This same reasoning was used by the court in *Seneca-Cayuga* to conclude that technologic aids to pull tabs are not prohibited by the Johnson Act. So too can it be applied to a Class II technologic aid to a card game. As established above, an otherwise Class II card game played with a technologic aid is still a Class II game. Congress would not permit such a game through IGRA only to prohibit it through the Johnson Act. Accordingly, the Johnson Act does not apply to Class II card games played with a technologic aid.

Similarly, in *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), the D.C. Circuit found that the Johnson Act does not apply to the Lucky Tab II, an electro-mechanical pull tab dispenser. The court cited to its decision in *Cabazon Band of*

Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633 (D.C. Cir. 1994), and held that "this court [has] interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor Class III games covered by tribal state compacts." *Id.* at 367. Although the case focuses more on the classification of the game than the application of the Johnson Act, it is clear that the D.C. Circuit has decided that the Johnson Act does not apply to any Class II game. As discussed at length in the preceding section, a technologic aid to an otherwise Class II card game remains a class II game, and according to the D.C. Circuit, the Johnson Act does not apply.

The Eighth Circuit, however, has taken an opposing position. In *United States v. Santee Sioux*, 324 F.3d 607 (8th Cir. 2003), *cert. denied*, 525 U.S. 813 (U.S. Oct. 5, 1998) (No.97-1839), the Circuit rejected the argument that IGRA repealed the Johnson Act by implication. The court pointed to § 2710(b)(1)(A), which permits Class II gaming on Indian lands so long as it is not specifically prohibited on Indian lands by federal law. The court concluded that the Johnson Act must be the federal law implied in this section of IGRA. *Id.* at 611. This, according to the court, clearly indicated that the two statutes are not irreconcilable and must be read together. Therefore, a tribe must adhere to both IGRA and the Johnson Act for its Class II games to be legal. *Id.* at 612.

The Eighth Circuit's ruling in *Santee Sioux*, however reasonable it may be, represents a minority among the circuits. Most, including the District of Columbia, which has jurisdiction over NIGC actions, have decided that the Johnson Act is not applicable to Class II games. The NIGC should therefore adopt a similar interpretation. Because a Class II card game played with a technologic aid remains Class II, the Johnson Act does not apply.

Conclusion

For the above stated reasons, technologic aids to otherwise Class II card games meet IGRA's definition of Class II gaming and do not violate the Johnson Act. Please contact me or Staff Attorney Michael Hoenig with any other questions or comments you may have.