



April 15, 2016

Via registered mail & email

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Re: Desert Rose Bingo – Revised Game Classification Advisory Legal Opinion

Dear Chairman Perez, Chairman Vialpando, Mr. Chelette, and Mr. Valandra:

On November 18, 2015, I sent a letter to you expressing the National Indian Gaming Commission Office of General Counsel's advisory legal opinion on Desert Rose Bingo. Upon review, we have discovered minor corrections that needed to be made prior to posting on the NIGC's website. Please see the attached, corrected version of the opinion and disregard the November 18, 2015 version.

Thank you, and if you have any further questions, please contact Jo-Ann M. Shyloski, Of Counsel, at (202) 632-7003.

Sincerely,

A handwritten signature in blue ink that reads "Michael Hoenig". The signature is fluid and cursive.

Michael Hoenig
General Counsel



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Re: Desert Rose Bingo – Game Classification Advisory Legal Opinion

Dear Chairman Perez, Chairman Vialpando, Mr. Chelette, and Mr. Valandra:

This letter constitutes an advisory legal opinion regarding the game classification of Desert Rose Bingo. Although neither the Nation nor the game's manufacturer formally requested this advisory legal opinion, there has been correspondence between the Santa Ysabel Tribal Gaming Commission and the NIGC Office of General Counsel regarding the classification of the game.¹ In that correspondence, the Tribal Gaming Commission informed the NIGC that it had

¹ Letter to David Vialpando, Chairman, Santa Ysabel Tribal Gaming Commission, from Eric Shepard, NIGC Acting General Counsel (Feb. 13, 2015) at 2. Letter to Jonodev Chaudhuri, NIGC Chair, from David Vialpando, Chairman, Santa Ysabel Tribal Gaming Commission (February 15, 2015).

determined the game is Class II.² The NIGC Office of General Counsel responded, clarifying that the NIGC retains the right to determine how a particular game should be classified under the Indian Gaming Regulatory Act.³ Given that correspondence and the Nation's opinion on the classification of the game, I felt this legal opinion necessary.

After careful review and consideration of the materials provided by the Iipay Nation of Santa Ysabel, including a game description, tribal regulations, test lab report;⁴ materials provided by the NIGC Compliance Division regarding two demonstrations of the game;⁵ and explanations of game play provided by a testing laboratory,⁶ I conclude that Desert Rose Bingo is a Class III game under the Indian Gaming Regulatory Act, 25 U.S.C. § 2703(8), and NIGC regulations, 25 C.F.R. § 502.4. Desert Rose Bingo does not satisfy the statutory and regulatory definitions of bingo and does not constitute a game similar to bingo since it lacks a majority of the bingo criteria to qualify as a variant of the game.

I. Factual Background & Game Description

During late October or early November 2014 through mid-December 2014, the Nation offered Desert Rose Bingo for play,⁷ which it contends is a “server-based bingo game[]” “played

² Letter to Jonodev O. Chaudhuri, NIGC Acting Chair, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman (Feb. 8, 2015) at 2 (requesting that the NIGC “state affirmatively in writing that the NIGC has no objection to” the Nation’s game classification); *see also* Letter to Jonodev O. Chaudhuri, NIGC Chair, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman (April 30, 2015) (“I urge the NIGC not to remain silent on this issue.”).

³ Letter to David Vialpando, Chairman, Santa Ysabel Tribal Gaming Commission, from Eric Shepard, NIGC Acting General Counsel (Feb. 13, 2015) at 2. Early in NIGC’s existence, Senator Inouye, the Chairman of the Select Committee of Indian Affairs, advised: “under the statutory framework of the Indian Gaming Regulatory Act, the determination of which machines come within the definition of Class II or Class III gaming activities has been vested in the National Indian Gaming Commission.” Letter to Honorable Eddie Brown, Assistant Secretary – Indian Affairs, Interior, from Senator Daniel K. Inouye, Select Committee of Indian Affairs (Jan. 17, 1991). The D.C. Circuit Court of Appeals agrees, and has explained that the agency was created “to resolve such issues.” *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000); *see also Cohen’s Handbook on Federal Indian Law*, 5th ed. § 12.03 (the NIGC is tasked with determining “whether games are classified as Class II or Class III.”); *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1085 (7th Cir. 2015) *cert. denied*, (U.S. Oct. 5, 2015). Further, the 10th Circuit Court of Appeals has found that “[w]ith regard to classifying devices under IGRA, the NIGC’s specialization warrants [] deference.” *Seneca-Cayuga Tribe of Oklahoma v. Nat’l Indian Gaming Comm’n*, 327 F.3d 1019, 1037 (10th Cir. 2003). And, specifically in regard to NIGC advisory opinions on classification issues, the 10th Circuit noted that they are entitled to *Skidmore* weight. *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000).

⁴ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System (“VPNAPS”) at 1 (June 24, 2014); Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System (June 24, 2014); Santa Ysabel Tribal Gaming Commission, Commission regulation, SYGC 14-I011, “Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation”; BMM Certification Test Report (Jan. 8, 2015).

⁵ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo at 3 (Jan. 23, 2015); NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor at 2 (Nov. 10, 2014).

⁶ NIGC meeting with BMM Testlabs (May 28, 2015); Email from Peter Nikiper, BMM Testlabs, to Sean M. Mason, NIGC (May 21, 2015).

⁷ Letter to Jonodev O. Chaudhuri, NIGC Acting Chair, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman at 1 (Feb. 8, 2015); Letter to Douglas Hatfield, NIGC Compliance Director, from David Vialpando, Santa Ysabel Tribal Gaming Commission Chairman at 1 (Nov. 3, 2014); Email to Lance

using a Class II gaming system known as the ‘Virtual Private Network Assisted Play System’ (‘VPNAPS’),” “a proxy system.”⁸ The maker of the VPNAPS system describes it as follows:

Just as the first generation of Class II electronic bingo machines represented the “electrification” of bingo by making the technological leap in putting the classic paper & dauber bingo game into a wholly *electronic* format, the [VPNAPS] gaming system takes the next technological leap, deploying new software and hardware enhancements that ... represent the ‘digitalization’ of bingo by transforming the client-server architecture of e-bingo gaming systems and putting it in an wholly *digital* format⁹

The Nation represented that the game can be played from any internet connection within the State of California and is set up to reject any attempt to access the site for play outside the boundaries of the state.¹⁰ There is no designated game play area for this game within the Santa Ysabel gaming facility.¹¹ The equipment for the game is located at the Santa Ysabel Gaming Commission office and the play of the game is monitored by the Commission from the office.¹² The main game server and a backup server are located at the Santa Ysabel gaming facility.¹³

An individual uses a “web-browser enabled device¹⁴ to access the Santa Ysabel Interactive gaming facility and its servers” via the VPNAPS.¹⁵ Essentially, this means that an individual accesses the gaming facility in part,¹⁶ via a virtual private network (VPN) that

Vallo, NIGC Region Director, from Dave Vialpando, Santa Ysabel Tribal Gaming Commission Chairman (Dec. 13, 2014).

⁸ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System (“VPNAPS”) at 1 (June 24, 2014).

⁹ Email to Eric Shepard, NIGC Acting General Counsel, from Tom Foley, Representative of Great Luck, LLC (Apr. 16, 2014) with attachment “Nature of VPNAPS Gaming System” at 1; *see also* Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 5.

¹⁰ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo at 3 (Jan. 23, 2015). As an aside, the Nation has made no representations about access to the site for play on other Tribes’ Indian lands in California. For the play of this game on other Tribe’s Indian lands in California to be legal, it would need to conform to the requirements of 25 U.S.C. § 2710(d)(1), including being authorized by such Tribes’ NIGC approved gaming ordinances and permitted by California for any purpose by any person, organization or entity (and not otherwise specifically prohibited on Indian lands by Federal law).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* (NIGC Compliance officers were informed that Santa Ysabel Interactive servers are linked to Kahnawakee Gaming Commission servers, located in Quebec, Canada, for the purposes of providing back-up for the Interactive game servers, but that the Kahnawakee Gaming Commission does not have any involvement with the game.).

¹⁴ Such as a computer, a phone, or a tablet with worldwide web access.

¹⁵ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Timeline diagram 3, *supra* (“The Nation describes the VPNAPS as a “[c]losed loop intranet system with [a] private IP address; includ[ing] hardware (servers) and software components.”); Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1.

¹⁶ The Nation’s diagrams indicate that an individual connects to the “virtual registration booth” via the internet, without use of a VPN. Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Timeline diagrams 4 (registration booth), 5 (account holder department), 6 (proxy station).

utilizes¹⁷ the internet.¹⁸ Initially, an individual must establish an account and receive approval to qualify as an Account Holder, which requires that the individual use the “virtual registration booth.”¹⁹ An individual connects to the “virtual registration booth” via the internet, without use of a VPN.²⁰ From there, the virtual registration booth uses the VPN to convey information to the Account Holder Department.²¹ “The initial registration process for accessing the tribal gaming enterprise . . . gathers basic identification information.”²² Subsequently, additional information is required from the individual, including: further identification information, age and location verifications, affirmations of policies regarding privacy and other requirements, and payment and settlement information and authorizations.²³ Once established, the account contains the following information: deposits; withdrawals; amounts risked; amounts paid for prize winnings; and adjustments to the account.²⁴

Upon becoming a registered Account Holder, an individual must fund his or her account.²⁵ “An Account Holder can fund their account by several different means, including direct cash deposits, mailed checks or money orders, wire transfers, ACH transfers, or debits from Visa or MasterCard debits or credit cards made using features of the VPNAPS.”²⁶

Once the player registers as an Account Holder and funds his or her account, game play is only possible via a proxy.²⁷ As set forth in the Nation’s game description, “no live bingo game action is ever performed” by the Account Holder.²⁸ Instead, the “VPNAPS allow[s] the Account Holder to access a ‘VPN gateway’ connecting them to a virtual ‘proxy engagement station’ – to hire a proxy to conduct the bingo game play on their behalf.”²⁹ “The Account Holder engages

¹⁷ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Appendix B, Features of a Closed Proprietary Communications Network, *supra* at 8 (“a virtual private network shares some connectivity infrastructure with the Internet”).

¹⁸ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2 (The Nation contends that: “The VPN gateway link used by Account Holders . . . will be assigned a ‘special use’ Internet protocol address by the Internet Assigned Numbers Authority and uses a form of communication that utilizes secured and restricted access connections (i.e. via software and a server that authenticates users, encrypts data, and manages sessions with users) over connectivity infrastructure to create point-to-point connections segregated and isolated from the publicly accessible Internet network (also known as the World Wide Web), such as to constitute a closed proprietary communication network.”).

¹⁹ *Id.*

²⁰ *Id.*, Timeline diagram 4 re: registration booth.

²¹ *Id.*, Timeline diagram 5 re: account holder department.

²² *Id.* at 3.

²³ *Id.*; see also Santa Ysabel Tribal Gaming Commission, Commission regulation, SYGC 14-I011, “Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation”, § 14 (Sept. 4, 2014).

²⁴ Santa Ysabel Tribal Gaming Commission, Commission regulation, SYGC 14-I011, “Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation”, *supra* at § 2(a).

²⁵ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 3.

²⁶ *Id.*

²⁷ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1-2.

²⁸ *Id.* at 1; see also Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2 (“Game play, however, is achieved via ‘proxy play’” and “real live bingo game action is played only by the ‘proxy’”).

²⁹ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1-2.

their proxy via a request form,” instructing the proxy “to purchase (in U.S. currency) bingo cards to be played on their behalf.”³⁰ On the request form, the Account Holder selects the denomination for the cards, the number of games in which to engage, the number of cards to play in each game, and the theme of the cards.³¹ The Account Holder may choose the game-ending pattern or can allow the pattern to be randomly selected.³² Thus, Account Holders “may purchase multiple cards for each game with the option to purchase cards for succeeding bingo games.”³³ This allows Account Holders who purchase succeeding bingo game cards to automatically continue play in such games.³⁴

Further, the system “does not require a player to stay on-line while bingo games are being played,”³⁵ and, in fact, an Account Holder cannot do so.³⁶ However, Account Holders can “witness the status of” a game, including whether the game is waiting for other players to join, the number of seconds until the game begins, and when a game is closed and is not accepting players.³⁷

Next, the proxy³⁸ attempts to initiate play of the game on the VPNAPS “by requesting from the game action server component of the VPNAPS the purchase of one or more digital bingo cards...” “with a set domination” of a penny, 5 cents, 10 cents, 25 cents, 50 cents, or a dollar game.³⁹ There is “no limit to the number of cards available for purchase for each bingo

³⁰ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2-3.

³¹ *Id.*, Attachment No. 4 “Desert Rose Bingo” at 1-3.

³² *Id.*, Attachment No. 4 “Desert Rose Bingo” at 2. (“Choose A Pattern” “A pattern is randomly selected by default. If you want to choose a pattern, click on ‘My Pick.’”); BMM Certification Test Report, “Desert Rose Bingo v1.5 rev 6171” (Jan. 8, 2015) at 3 (“A random game ending pattern is selected by the system for all games except the Half Hour bonus games.”).

³³ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

³⁴ *Id.*

³⁵ *Id.* at 2-3.

³⁶ NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor at 2 (Nov. 10, 2014) (The Account Holder’s “access and authorization permissions [are] limited to initial account set-up requests, account payment and receipt preferences, rate/speed of game replay view, game selection and selection of game graphical themes.”); Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System at 4 (“the ‘proxy function’ element of the VPNAPS ... will allow the Account Holder’s proxy to play the bingo game in real time on behalf of the Account Holder and reveal and report on a time delayed basis to the Account Holder the results of the games previously played on their behalf.”); Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 (“Game play results are revealed on a time-delayed basis to the Account Holder”).

³⁷ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Attachment No. 4 “Desert Rose Bingo” at 4.

³⁸ The Nation contends that “[a] Gaming Enterprise employee monitoring the proxy functions of the VPNAPS shall act as the legally designated agent of the Account Holder and, assisted by the technologic aid of proxy software elements contained in the VPNAPS, shall conduct proxy play of Class II bingo games on the Account Holder’s behalf.” Santa Ysabel Tribal Gaming Commission, Commission regulation SYGC 14-I011, “Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation” at 18 (Sept. 4, 2014). However, the NIGC found that “[o]n-site, ‘round the clock’ Tribal proxy monitors manage player relations, view real-time game play and provide ‘live’ chat room management. Proxy monitor permissions and authorizations are limited to these functions with no systems administrative access.” See NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor, *supra* at 2.

³⁹ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.

game.”⁴⁰ The digital bingo cards consist of a traditional 5x5 bingo matrix with numbers for each card.⁴¹ “All digital bingo cards used by prox[ies] for a common game of bingo are unique”⁴² and are “randomly distributed to each proxy.”⁴³

Once five or more proxies purchase digital bingo cards of comparable dollar denominations within a set period of time,⁴⁴ the game commences.⁴⁵ At that time, the game presents a screen to the tribal proxy monitors⁴⁶ and Account Holders⁴⁷ showing a 15 second count down until play begins.⁴⁸ And, each proxy receives a digital bingo card(s).⁴⁹

There is a single bingo ball draw for all prox[ies] in each bingo game.⁵⁰ “Ball numbers are randomly drawn using an electronic random number generator”⁵¹ and “displayed respectively one (1) by one (1).”⁵² A Nation document describes the sequence of game play as follows:

⁴⁰ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 3.

⁴¹ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2. (“The five columns of the digital bingo card face are labeled ‘B’‘I’‘N’‘G’‘O’ from left to right. The center space on the card is marked ‘Free Space’ and is considered automatically filled when contained in a pattern. The range of numbers is restricted by column, with the ‘B’ column containing numbers between one and fifteen inclusive, the ‘I’ column containing sixteen through thirty, the ‘N’ column containing thirty-one through forty-five, the ‘G’ column containing forty-six through sixty, and the ‘O’ column containing sixty-one through seventy-five.”); *see also* BMM Certification Test Report, “Desert Rose Bingo v1.5 rev 6171” (Jan. 8, 2015) at 3 (“Bingo cards are provided by the game with spaces arranged in five (5) columns and five (5) rows, with numbers assigned to each space. There is a free spot in the center of the card.”).

⁴² *See* BMM Certification Test Report, *supra* at 3 (“The system is designed to preclude duplicate bingo cards from being used in the same game.”).

⁴³ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 (“each card contains a uniquely identifying serial number”).

⁴⁴ “In the event that there are not five or more prox[ies] initiating game play for a common game within the maximum allotted period, that bingo game will not be permitted to commence. Failure to attain five or more prox[ies] within the allotted period will result in the common game being cancelled and the value of the purchased cards being refunded to the Account Holder’s account.” Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2; *see also* BMM Certification Test Report, *supra* at 3 (“This game requires a minimum of five (5) players to initiate play ... The game does not initiate until the required number of players are participating.”).

⁴⁵ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.

⁴⁶ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 4 (“the electronic hardware and software components will permit a video or digital representation of the Class II game play and results to be displayed in real time to proxy participants”).

⁴⁷ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, Attachment No. 4 “Desert Rose Bingo” at 4 (“[U]sers will be able to witness the status of the game. The Time category indicates the following status: ... # of Seconds: When the timer displays numerical values in a descending order, this indicates the game starting ...”).

⁴⁸ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

⁴⁹ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.

⁵⁰ *Id.*

⁵¹ *Id.* at 2 (“Each bingo game uses a pool of 75 bingo balls numbered from 1 to 75 inclusive which are randomly selected without replacement.”); *see also* BMM Certification Test Report, *supra* at 3 (“The bingo numbers are randomly drawn by an electronic random number generator ...”).

⁵² BMM Certification Test Report, *supra* at 3.

Digital bingo cards are first randomly distributed to each proxy [] as requested *and then ball numbers are randomly drawn* using an electronic random number generator. *As they are drawn*, the ball numbers are released one at a time in rapid succession in the same sequence and delivered to all prox[ies] at the same time.... *The ball draw release continues* until a ‘bingo’ has been made (i.e. game-ending pattern is achieved) and the game ends.⁵³

However, nothing in the test lab report explicitly confirms this sequence of game play events. Therefore, the test lab was consulted to clarify when the ball draw occurs. To that end, the test lab affirmed that the ball draw is done and stored before the bingo cards are created.⁵⁴ Further, the test lab explained that *after* the bingo cards are created and distributed to the proxies, the ball draw numbers – which were drawn before the bingo cards were created– are compared one at a time to the numbers on the bingo cards.⁵⁵ This process was described by the test lab as “virtual daubing.”⁵⁶

In fact, for game play no physical daubing occurs.⁵⁷ The VPNAPS system “is equipped with an auto-daub feature to assist the [] proxies in their play of the bingo games.”⁵⁸ In this regard, “[c]omponents of the VPNAPS” system “daub[] or cover[] the corresponding numbers on the digital bingo card when matched with ball numbers.”⁵⁹

Once a match between a game-ending pattern on a bingo card and the numbers from the ball draw occurs, the game ends.⁶⁰ Each bingo game is “played to cover a single prize pattern randomly selected prior to commencement of the game from a set of seven (7) designated

⁵³ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2-3 (emphasis added). In addition, it appears that at the demonstration of the game, NIGC Compliance officers were advised that “[o]nce a bingo game is initiated, a ball draw occurs.” However, it also appears that they were advised that “[t]he ball draw is a *pre-drawn* combination of number patterns generated by a random number generator (RNG).” NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

⁵⁴ NIGC meeting with BMM Testlabs (May 28, 2015); Email from Peter Nikiper, BMM Testlabs, to Sean M. Mason, NIGC (May 21, 2015) (“The ball draw is performed all at once such that the ball draw process is complete and no further ball draws will be necessary. The ball draw happens before the cards are created.”) (“In the *init_new_game* is where the ball drop is performed. ... Then ..., the game-ending pattern is assigned to the BingoGameRoom. On... the card generation takes place. Finally ... the BingoGame is played.”); In addition, it also appears that NIGC Compliance officers were advised at the demonstration of the game that “[t]he ball draw is a *pre-drawn* combination of number patterns generated by a random number generator (RNG).” NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

⁵⁵ NIGC meeting with BMM Testlabs (May 28, 2015).

⁵⁶ *Id.*

⁵⁷ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2; BMM Certification Test Report, *supra* at 3 (“No daubing is required by the player to claim a winning bingo pattern.”).

⁵⁸ Email to Eric Shepard, NIGC Acting General Counsel, from Tom Foley, Representative of Great Luck LLC (Apr. 16, 2014) with attachment “Nature of VPNAPS Gaming System” at 1.

⁵⁹ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2; Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2.

⁶⁰ NIGC meeting with BMM Testlabs (May 28, 2015); *see also* Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3 (game ends when a bingo has been made); *see also* BMM Certification Test Report, *supra* at 3 (“For a win to occur, the bingo card patterns have to completely match the predetermined bingo winning pattern.”).

patterns that each require a minimum of eight (8) numbers to achieve ‘bingo’ (i.e. an ‘X’ pattern, ‘7’ pattern, ‘T’ pattern, etc.).”⁶¹ “When a winning match occurs, the numbers on the card are highlighted by flashing the matching numbers.”⁶² The game does not necessarily need to use all the ball draw numbers to complete a match.⁶³

And even though the bingo game described above ends upon a winning match, other bingo games will continue based on the number of cards and number of consecutive succeeding games purchased by an Account Holder.⁶⁴ Once all purchased bingo cards and purchased consecutive succeeding games are exhausted, an Account Holder must once again hire a proxy to play additional games.⁶⁵

All bingo games pay out prizes in a pari-mutual format, meaning the prize amount is a certain percentage of the pay-in amount of the game cards purchased for that common game.⁶⁶ And, if a card held by a proxy meets the standards for a bonus prize – meaning, it achieves the game-ending pattern within a pre-determined limited set of ball numbers – the proxy’s card will win both the iBonus prize⁶⁷ and the game-ending prize.⁶⁸ Further, upon the initial opening of the Santa Ysabel Interactive, additional bonus games were to be offered.⁶⁹ It is unclear whether they were. Moreover, additional bonus games may be offered in the future, but at this time, Santa Ysabel Interactive is shut down.⁷⁰

Once a game is complete, “[g]ame play results are revealed on a time-delayed basis to the Account Holder.”⁷¹ “[A]n Account Holder can select the theme for watching the replay display

⁶¹ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3.

⁶² BMM Certification Test Report, *supra* at 3.

⁶³ NIGC meeting with BMM Testlabs (May 28, 2015); BMM Certification Test Report, *supra* at 3 (“The ball draws end once a game ending pattern is achieved and for this reason the game will often draw and display a different number of balls.”); *see also* Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 (“Each bingo game uses a pool of 75 bingo balls numbered 1 to 75 inclusive which are randomly selected without replacement.”).

⁶⁴ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 3.

⁶⁵ *Id.*

⁶⁶ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2.

⁶⁷ *Id.* at 3 (An iBonus is equal to “ten thousand times the card cost.” Unless, “[i]f the iBonus is not won before one million cards are sold cumulatively for that game denomination, then the iBonus activates a ‘floodgate’ feature that permits the iBonus to be won without regard to the limited set of numbers drawn requirement”); *see also* BMM Certification Test Report, *supra* at 3 (“If a card matches the predetermined bingo winning pattern within a prescribed number of ball draws then the player will be awarded the iBonus in addition to the base prize. All bingo games are eligible to win the iBonus. The iBonus prize will award 10,000x the bingo game denomination.”).

⁶⁸ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3.

⁶⁹ *Id.* at 3-4 (“[U]pon the initial opening of Santa Ysabel Interactive, four percent (4%) of the pay-in amount for every common bingo game will be retained for prize pay-out for a ‘Half Hour Bonus Game,’ one percent (1%) will be retained for prize pay-out for an in game bonus (‘iBonus’), and a certain percentage will be retained by Santa Ysabel Interactive.”).

⁷⁰ *Id.* at 4-5.

⁷¹ *Id.*

of the game played by their proxy on their behalf.”⁷² And, the Account Holder’s account is automatically credited or debited for game wins and losses.⁷³

II. Applicable Law

IGRA defines Class II gaming 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.⁷⁴

In contrast, Class III gaming is defined under IGRA as “all forms of gaming that are not class I gaming or class II gaming.”⁷⁵

NIGC regulations further elucidate the statute, defining Class II gaming as:

- (a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
 - (1) Play for prizes with cards bearing numbers or other designations;
 - (2) Cover numbers or designations when object, similarly numbered or designated, are drawn or electronically determined; and
 - (3) Win the game by being the first person to cover a designated pattern on such cards;
- (b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo.⁷⁶

⁷² *Id.*

⁷³ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 3.

⁷⁴ 25 U.S.C. § 2703(7)(A).

⁷⁵ 25 U.S.C. § 2703(8).

⁷⁶ 25 C.F.R. § 502.3.

Although IGRA does not define “other games similar to bingo,” NIGC regulations interpret the term to mean: “any game played in the same location as bingo (as defined in 25 U.S.C. § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.”⁷⁷

Class III gaming is defined by NIGC regulations, in relevant part, to “mean[] all forms of gaming that are not class I gaming or class II gaming, including but not limited to: ... Casino games”⁷⁸

Both IGRA and NIGC regulations provide that Class II games may use “electronic, computer, or other technologic aids.”⁷⁹ NIGC regulations define electronic, computer or technologic aid as: “any machine or device that: (1) Assists a player or the playing of a game; (2) Is not an electronic or electromechanical facsimile; and (3) Is operated in accordance with applicable Federal communications law.”⁸⁰ “Electronic, computer or other technologic aids include, but are not limited to, machines or devices that: (1) Broaden the participation levels in a common game; (2) Facilitate communication between and among gaming sites; or (3) Allow a player to play a game with or against other players rather than with or against a machine.”⁸¹ “Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.”⁸²

On the other hand, an electronic or electromechanical facsimile is defined by NIGC regulations to mean “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.”⁸³

Thus, if a game contains the fundamental characteristics of a Class II game, meaning it satisfies IGRA’s and NIGC regulations’ definitions of Class II gaming, and is played using an electronic, computer or other technologic device, the determining factor in the game’s classification is whether the device is an aid to the play of the game, in which case the game is Class II, or whether the device is a facsimile of a game, in which case the game is Class III.

III. Analysis

As set forth above, the Nation asserts that Desert Rose Bingo (DRB) is a Class II server-based bingo game played using the VPNAPS gaming system, which the Nation describes as a

⁷⁷ 25 C.F.R. § 502.9.

⁷⁸ 25 C.F.R. § 502.4(a)(2).

⁷⁹ 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3(a).

⁸⁰ 25 C.F.R. § 502.7.

⁸¹ *Id.* (b).

⁸² *Id.* (c).

⁸³ 25 C.F.R. § 502.8.

“proxy system.”⁸⁴ The Nation further maintains that the VPNAPS is a “technologic aid.”⁸⁵ In particular, the Nation believes that the “proxy function” of VPNAPS, among others, serves as a technological aid,⁸⁶ because “[a] Gaming Enterprise employee monitoring the proxy functions of the VPNAPS shall act as the legally designated agent of the Account Holder and, assisted by the technologic aid of proxy software elements contained in the VPNAPS, shall conduct proxy play of Class II bingo games on the Account Holder’s behalf.”⁸⁷

At bottom, however, this function involves a tribal gaming employee monitoring electronic auto-daubing⁸⁸ by watching it occur on a computer screen, which the Nation equates to “proxy play” by an Account Holder’s agent.⁸⁹ As previously described, to play DRB, no physical daubing occurs,⁹⁰ because the VPNAPS “is equipped with an auto-daub feature”⁹¹ that “daub[s] or cover[s] the corresponding numbers on the digital bingo card when matched with ball numbers.”⁹² Also of note is that the ball draw occurs, is completed, and is stored before the bingo cards are created.⁹³ After the bingo cards are created and distributed to the proxies, the previously drawn and stored ball draw numbers are compared one at a time to the numbers on the bingo cards.⁹⁴

Given these particular facts, the task before me is to opine on the game classification of DRB. Because the Nation claims that DRB is bingo, its classification depends on whether it

⁸⁴ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 1; Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 1.

⁸⁵ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 3.

⁸⁶ *Id.* at 3-4.

⁸⁷ Santa Ysabel Tribal Gaming Commission, Commission regulation SYGC 14-I011, “Requirements for VPN Aided Class II Gaming Conducted Within Boundaries of the Santa Ysabel Tribal Reservation”, *supra* at 18.

⁸⁸ NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor, *supra* at 2 (“[o]n-site, ‘round the clock’ Tribal proxy monitors manage player relations, view real-time game play and provide ‘live’ chat room management. Proxy monitor permissions and authorizations are limited to these functions with no systems administrative access.”).

⁸⁹ Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 4 (“the ‘proxy function’ element of the VPNAPS, monitored by the tribal gaming employee designated for the Account Holder, will allow the Account Holder’s proxy to play the bingo game in real time on behalf of the Account Holder and reveal and report on a time delayed basis to the Account Holder the results of the games previously played on their behalf.”).

⁹⁰ NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2; BMM Certification Test Report, *supra* at 3 (“No daubing is required by the player to claim a winning bingo pattern.”).

⁹¹ Email to Eric Shepard, NIGC Acting General Counsel, from Tom Foley, Representative of Great Luck LLC (Apr. 16, 2014) with attachment “Nature of VPNAPS Gaming System” at 1.

⁹² Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2; Description of Proposed VPN Aided Class II Gaming Using 25 CFR Part 547 Class II Gaming System, *supra* at 2.

⁹³ NIGC meeting with BMM Testlabs (May 28, 2015); Email from Peter Nikiper, BMM Testlabs, to Sean M. Mason, NIGC (May 21, 2015) (“The ball draw is performed all at once such that the ball draw process is complete and no further ball draws will be necessary. The ball draw happens before the cards are created.”) (“In the *init new game* is where the ball drop is performed. ... Then ..., the game-ending pattern is assigned to the BingoGameRoom. On... the card generation takes place. Finally ... the BingoGame is played.”); In addition, it also appears that NIGC Compliance officers were advised at the demonstration of the game that “The ball draw is a *pre-drawn* combination of number patterns generated by a random number generator (RNG).” NIGC Compliance Division’s Final Report of the Santa Ysabel Site Visit re: Desert Rose Bingo, *supra* at 2.

⁹⁴ NIGC meeting with BMM Testlabs (May 28, 2015).

meets IGRA's and NIGC regulations' definition of Class II gaming, specifically, the three elements necessary to qualify as bingo. Therefore, the question that must be answered is whether DRB contains the fundamental characteristics of bingo.

A. Does DRB contain the fundamental characteristics of bingo?

In IGRA, neither Congress, in devising the statutory definition of bingo, nor the NIGC in its interpretation of the definition⁹⁵ found in its regulations implementing IGRA, intended to limit bingo to its classic form.⁹⁶ That being said, IGRA's and NIGC regulations' three explicit criteria for bingo are the legal requirements for a game to qualify as Class II bingo.⁹⁷ These criteria, as set forth above, require that: the game must be played for prizes with cards bearing numbers or other designations; cardholders must cover numbers as they are drawn; and the game must be won by the first person to cover the designated pattern.⁹⁸

i. Is DRB played for prizes with cards bearing numbers or other designations?

The first criteria for bingo mandates that the game be “played for prizes . . . , with cards bearing numbers or other designations.”⁹⁹ DRB uses digital bingo cards that have a traditional 5x5 bingo matrix, numbers assigned to each space and a free space in the center of the card.¹⁰⁰ As is apparent from the first bingo criteria, there is no requirement that bingo be played with paper cards.¹⁰¹ Further, IGRA and NIGC regulations explicitly allow the use of technologic aids in the game of bingo.¹⁰² NIGC regulations specifically cite “electronic cards for participants in bingo games” as an example of a technologic aid.¹⁰³ Moreover, both the 9th and 10th Circuit Courts of Appeal have found Megamania, a bingo game played with electronic cards, to meet this criteria.¹⁰⁴

As for the requirement that the game be played for prizes, DRB awards monetary prizes in a pari-mutual format, meaning the prize amount is a certain percentage of the pay-in amount

⁹⁵ *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000) (NIGC's interpretation of IGRA's bingo definition is entitled to substantial deference.); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 718 (10th Cir. 2000) (affording *Chevron* deference to NIGC regulations); *Seneca-Cayuga Tribe of Oklahoma v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1037 (10th Cir. 2003) (noting that NIGC regulations are given *Chevron* deference, including the regulations that classify devices under IGRA).

⁹⁶ *103 Elec. Gambling Devices*, 223 F.3d at 1096-97 (citing 57 Fed.Reg. 12382, 12382 – “The Commission does not believe Congress intended to limit bingo to its classic form.”) (“[T]he NIGC's interpretation of both IGRA and the NIGC's primary IGRA implementing regulation, 25 C.F.R. § 502, rests on the proposition that neither Congress nor the Commission intended to ‘limit bingo to its classic form.’”).

⁹⁷ *Id.* at 1096; *162 MegaMania Gambling Devices*, 231 F.3d at 719.

⁹⁸ 25 U.S.C. § 2703(7)(A); 25 C.F.R. § 502.3.

⁹⁹ 25 U.S.C. § 2703(7)(A)(i)(I); 25 C.F.R. § 502.3(a)(1).

¹⁰⁰ BMM Certification Test Report, “Desert Rose Bingo v1.5 rev 6171” (Jan. 8, 2015) at 2-3; Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 2 (“digital bingo cards”).

¹⁰¹ *Id.*

¹⁰² 25 U.S.C. § 2703(7)(A) & 25 C.F.R. § 502.3(a).

¹⁰³ 25 C.F.R. § 502.7(c).

¹⁰⁴ *103 Elec. Gambling Devices*, 223 F.3d at 1095; *162 MegaMania Gambling Devices*, 231 F.3d at 719.

of the bingo cards purchased for the game.¹⁰⁵ Consequently, DRB satisfies the first criteria for bingo.

- ii. Do cardholders cover numbers or other designations as they are drawn?
 - a. Do cardholders cover?

The second criteria of bingo mandate that the cardholders cover the numbers when they are drawn or electronically determined.¹⁰⁶ Specifically, IGRA provides that bingo is a game “in which *the holder of the card covers* such numbers or designations when objects [] are drawn or electronically determined.”¹⁰⁷ NIGC regulations interpreting this provision require that for bingo, “*players cover numbers* or designations when object, similarly numbered or designated, are drawn or electronically determined.”¹⁰⁸ As recognized by the 9th and 10th Circuit Courts of Appeal, this regulation is accorded *Chevron* deference.¹⁰⁹

In addition, although IGRA states that the “holder of the card cover” and NIGC regulations further define such holder as a “player,” there is no statutory or regulatory prohibition against agents “covering” on behalf of a player.¹¹⁰ The NIGC Office of General Counsel has previously articulated that:

It is a fundamental tenet of the law of agency that the acts of the agent are deemed to be the acts of the principal. When the agent plays the [] card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player. Therefore, the use of agents violates neither IGRA’s provision regarding the holder nor NIGC’s regulations that discuss the player.¹¹¹

But here, in the play of DRB, neither the player nor the “proxy agent” takes any action or actively participates in any way to cover numbers on the electronic bingo card. As noted above, in DRB “no live bingo game action is ever performed” by the player.¹¹² Similarly, in its review of the DRB, the NIGC Compliance Division found that the sole functions of the “proxy agents” are to manage player relations, view real-time game play, and provide live chat room

¹⁰⁵ Description of Bingo Games to be Conducted by Santa Ysabel Interactive Using Virtual Private Network Assisted Play System, *supra* at 3.

¹⁰⁶ 25 U.S.C. § 2703(7)(A)(i)(II); 25 C.F.R. § 502.3(a)(2).

¹⁰⁷ 25 U.S.C. § 2703(7)(A)(i)(II) (emphasis added).

¹⁰⁸ 25 C.F.R. § 502.3(a)(2) (emphasis added).

¹⁰⁹ See note 95, *supra*.

¹¹⁰ 25 U.S.C. § 2703(7)(A)(i)(II); 25 C.F.R. § 502.3(a)(2).

¹¹¹ Letter to Bertram E. Hirsch, Esq. from Kevin K. Washburn, NIGC General Counsel, re: National Indian Bingo Game Classification Opinion at 3 (Nov. 14, 2000) (citing 3 Am. Jur. 2D Agency § 2 (1986); *Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 272 (5th Cir. 1980); *U.S. v. Sylvanus*, 192 F.2d 96, 108 (7th Cir. 1951); and *Lux Art Van Service, Inc. v. Pollard*, 344 F.2d 883, 887 (9th Cir. 1965)); See also Letter to Mr. Larry Montgomery, President and COO, Multimedia Games, Inc., from Anthony J. Hope, NIGC Chairman re: MegaBingo Game Classification Opinion at 1-2 (July 26, 1995).

¹¹² See *supra* notes 27 & 28.

management.¹¹³ In essence, the proxy agents' interaction with DRB game play is limited to viewing it on a computer screen.¹¹⁴ Consequently, the second bingo criteria is not satisfied, because DRB does not conform with the statutory and regulatory mandate that the "holder of the card," the "player" or their agent "cover."¹¹⁵ At bottom, the player or proxy agent must undertake some act to actually and actively participate in the play of the game. In this instance, the player does not participate in live game play and the proxy agent takes no action whatsoever to cover nor actively participates in the covering in any way.

This conclusion is in line with a proposed rule of the Commission and numerous prior NIGC Office of General Counsel legal opinions, all of which underscore that the player or the agent must perform some act to be involved in the play of the game of bingo.¹¹⁶ This proposed rule and all of these opinions with the exception of one occurred after the issuance of the NIGC regulation that clarified the definition of electronic, computer and technologic aids.¹¹⁷ So, any argument that certain explanatory language in the preamble to the final rule defining electronic, computer and technologic aids, allows a wholly electronic bingo game that *omits any* player participation to qualify as Class II bingo is specious.¹¹⁸

¹¹³ NIGC Memorandum to Eric Schalansky, Region Director, from Michael L. Curry, Information Technology Auditor, *supra* at 2 ("Proxy monitor permissions and authorizations are limited to these functions with no systems administrative access.").

¹¹⁴ See *supra* notes 57, 88, & 90.

¹¹⁵ The cover of the bingo card is performed by the VPNAPS auto-daub feature, which is not initiated by the "player" or the proxy.

¹¹⁶ See 78 Fed. Reg. 37998, 37999 (June 25, 2013) (In the proposed rule, the player takes the initial action of touching a button. To this end, the proposal stated: "In one touch bingo, the player covers the numbers or designations when drawn. That step is achieved by the assistance of a machine via the first, and only touch of the button."); Letter to Bertram E. Hirsch, Esq. from Kevin K. Washburn, NIGC General Counsel, re: National Indian Bingo Game Classification Opinion at 6-7 (Nov. 14, 2000) (agent uses reader/minder to cover and using such a device requires the agent to take an independent action to enter into the machine data identifying each letter and number combination drawn); Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 12-13 (Sept. 26, 2003); Letter to Joseph H. Webster, Esq., Hobbs, Straus, Dean & Walker from Penny J. Coleman, NIGC Acting General Counsel re: Rocket FastPlay Bingo 1.0 Advisory Opinion at 12 (Oct. 18, 2004) ("FastPlay meets the requirement that a player cover when objects are drawn in that numbers are not stored on the game's computer. Instead, numbers are released sequentially and displayed in the order released and players all have the same opportunity to cover (or daub) immediately upon release of drawn balls."); Letter to Jack Saltiel, Cadillac Jack, Inc., Chief Technical Officer from Penny J. Coleman, NIGC Acting General Counsel re: Cadillac Jack Triple Threat Bingo Advisory Game Classification Opinion at 12 (Dec. 23, 2004) ("the player is actually performing some act to be involved in the play of the game of bingo."); Letter to Nancy McAlister, Commissioner, Eastern Shawnee Tribe of Oklahoma from Penny J. Coleman, NIGC Acting General Counsel at 1 (April 22, 2005) ("As I understand Lucky Lotto, it automatically daubs matching numbers for the player without the player taking any overt action, and it lacks a designated game-winning pattern. These features make the game Class III."); Letter to David Matheson, President, Bingo Nation Network Authority, from Eric Shepard, NIGC Acting General Counsel re: Bingo Nation Game Advisory Opinion at 5 (June 27, 2014) ("Following the draw of a number, the proxy player must press a 'Daub/Claim' button on their minding device, which covers the corresponding number on each matching game card.").

¹¹⁷ *Id.*, 67 Fed. Reg. 41166-02 "Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo" (June 17, 2002).

¹¹⁸ See 67 Fed. Reg. 41166-02, 41171, Summary of Comments section ("IGRA permits the play of bingo, lotto, and other games similar to bingo in an electronic or electromechanical format, even a wholly electronic format, provided that multiple players are playing with or against each other. These players may be playing at the same facility or via links to players in other facilities. A manual component to the game is not necessary. What IGRA does not allow with regard to bingo, lotto, and other games similar to bingo, is a wholly electronic version of the game that does not

In the same vein, this conclusion – that the player or agent must actively participate in the play of the game - is also consistent with an opinion from the United States District Court for the Northern District of California, which addressed the question of whether MegaMania, an electronic gaming device, qualified as bingo or a game similar to bingo.¹¹⁹ In so doing, the court examined whether the “covering” done by the player met the criteria for bingo. In MegaMania, the device automatically identified the numbers on each electronic bingo card that were electronically determined, and the player “covered” them on the card by pushing a daub button.¹²⁰ In holding that this method of covering was sufficient to qualify as bingo, the court explained: “[t]here is nothing in IGRA or its implementing regulations [] that requires a player to independently locate each called number on each of the player’s cards and manually ‘cover’ each number independently and separately. The statute and the implementing regulations merely require that a player cover the numbers without specifying how they must be covered.”¹²¹ Thus, in finding that IGRA and NIGC regulations “merely require a player to cover,” the court recognized the requirement for bingo that the player carry out some action to “cover.”

Since in DRB neither the player nor the proxy agent takes any action to cover, nor actually and actively participates in any way in such covering, the game fails to meet the second criteria for bingo.

b. Pre-drawn numbers

Furthermore, there is yet another reason that DRB does not comply with the second criteria for bingo - that “players ... [c]over numbers or designations *when* ... drawn or electronically determined.”¹²² In a guidance bulletin, the NIGC stated: “[w]e conclude that the statutory requirement for bingo is met only when numbers or designations are drawn *after* a player begins play of the game.”¹²³ This is due to the statutory and regulatory mandate that a player cover *when* numbers are drawn.¹²⁴ Specifically, the bulletin explained:

Some have argued that, for the purposes of IGRA, “when” means “after” and that it should not matter how long after balls are drawn that the card is daubed, thus allowing for pre-drawn numbers. This is in opposition to the common meaning of the word “when.” Webster’s Collegiate Dictionary (10th ed.) defines the conjunction “when” as: 1a: at or during the time that: WHILE...b: just at the moment that...c: at any or every time that...2: in the event that: IF...3a: considering that...b: in spite of the fact that: ALTHOUGH...4: the time or occasion at or in which.... This definition is counter to the proposition that

broaden participation, but instead permits a player to play alone or against a machine rather than with or against other players.”).

¹¹⁹ *United States v. 103 Elec. Gambling Devices*, No. C 98-1984 CRB, 1998 WL 827586, at *1 (N.D. Cal. Nov. 23, 1998) *aff’d*, 223 F.3d 1091 (9th Cir. 2000).

¹²⁰ *Id.* at *1 and *6.

¹²¹ *Id.* at *6; *see also United States v. 162 MegaMania Gambling Devices*, No. 97-C-1140-K (N.D. Okla. October 26, 1998), *aff’d*, 231 F.3d 713 (10th Cir. 2000) (court found pressing a daub button was sufficient to “cover” for purposes of bingo).

¹²² 25 C.F.R. § 502.3(a)(2) (emphasis added).

¹²³ NIGC Bulletin No. 03-3 “Guidance on Classifying Games with Pre-Drawn Numbers” (Sept. 23, 2003) at 1 (emphasis added).

¹²⁴ *Id.* at 2.

“when” means “at any point after.” The draw by either a bingo blower or some other method where numbers are “electronically determined,” must occur in real time or very near in real-time to the actual play of the particular bingo game.¹²⁵

In sum, the bulletin concluded that “the requirement that a player cover *when* objects are drawn means that games that use pre-drawn numbers cannot constitute bingo.”¹²⁶

NIGC Office of General Counsel legal opinions have reiterated and expounded on this guidance, by analyzing particular gaming systems to ascertain whether they fulfill the requirement that “a player cover when numbers are drawn.” Such opinions have found that this criteria is complied with when numbers are not stored in the game system’s computer; players purchase their cards *before* the numbers are generated; and, once the numbers are generated, the players may take action to cover.¹²⁷ As to the Triple Threat Bingo system, which met this criteria, OGC explained:

The electronic cards ... are provided to the player before actual game play begins. ... Thus a player is actually playing the card and hoping to achieve a winning bingo pattern on the card when the numbers are drawn rather than buying a card with winning numbers pre-selected and hoping his purchase yielded a card containing a winning pattern. ... A player “daubs” or covers the numbers on the player’s card when the numbers are electronically determined. The numbers are determined in real time by a random number generator.¹²⁸

In contrast, in Quick Shot Bingo, where a bingo blower chose certain numbers, the numbers were then posted on boards, and then customers purchased bingo cards to compare the

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Letter to Clifton Lind, President & COO, Multimedia Games, Inc., from Penny J. Coleman, NIGC Acting General Counsel, re: Reel Time Bingo at 6 (Sept. 23, 2003); Letter to Michael Fletcher, CEO, NOV Gaming Inc., from Penny J. Coleman, NIGC Acting General Counsel, re: NOVA Bingo System Advisory Classification Opinion at 10 (Apr. 4, 2005); *See also* Letter to Alan Frank, The HomeBingo Network, from Penny J. Coleman, NIGC Acting General Counsel re: 8 Draw Kingo at 6 (May 11, 2004) (“It does not appear that numbers are drawn before the play of the game, which would negate a conclusion that the game is either bingo or a game similar to bingo.”); *Compare* Letter to Frank Banyai and Mike Macke, Cadillac Jack, Inc., from Kevin K. Washburn, NIGC General Counsel at 2, 3 & 8 (Mar. 22, 2001) (finding that game satisfied criteria even though the numbers were drawn via a bingo blower and then put on a computer chip in the system, but emphasizing that “an important consideration ... is the real-time or near real-time selection of the winning numbers in the bingo blower draw compared to the display of those numbers. It is significant also that players are playing against each other in real time *as the numbers are drawn and called*”); Letter to David Matheson, President, Bingo Nation Network Authority, from Eric Shepard, NIGC Acting General Counsel re: Bingo Nation Game Advisory Opinion at 2, 3, (June 27, 2014) (Drawings are conducted using a bingo ball blower and “once the game begins, the drawn numbers are entered into server software.” Thus, the pre-drawn numbers were not inserted into the game system until the game began.).

¹²⁸ Letter to Jack Saltiel, Cadillac Jack, Inc., Chief Technical Officer from Penny J. Coleman, NIGC Acting General Counsel re: Cadillac Jack Triple Threat Bingo Advisory Game Classification Opinion at 11 (Dec. 23, 2004); *see also* Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 12 (Sept. 26, 2003) (“It is important to note that the electronic cards in ‘Mystery Bingo’ are provided to the player before actual game play begins. ... Thus a player is actually playing a card and hoping to achieve a winning pattern on the card when the numbers are drawn rather than buying a card with winning numbers pre-selected and hoping this purchase yielded a card containing a winning pattern.”).

numbers on the card to the numbers that had been drawn, the NIGC Office of General Counsel opined that the game did not meet the regulatory definition of bingo for several reasons, including the fact that the players did not cover the numbers when they were drawn but instead all the winning numbers were drawn and posted before the players bought their cards.¹²⁹ Similarly, as to Megananza, the Office of General Counsel found that the covering did not occur when the numbers were drawn, because pre-determined numbers - the numbers were chosen by a random number generator at some time prior to the cards being sold - were revealed on the game's screen at the same time as such numbers on electronic bingo card were automatically covered.¹³⁰

In the matter at hand, the ball draw occurs, is completed, and is stored in DRB before the bingo cards are created.¹³¹ Then, after the cards are created and "distributed" to the proxy agents, the ball draw numbers are compared one at a time to the numbers on the bingo cards.¹³² Hence, DRB uses pre-drawn numbers - the winning numbers are produced by a random number generator before the bingo cards are made and issued. As a consequence, in the play of DRB, the bingo card numbers are not covered *when* the ball draw numbers are drawn, and therefore, DRB does not satisfy the second criteria for bingo.

iii. Is DRB won by the first person to cover the designated pattern?

The third criteria of bingo requires the game be won by the first person to cover a previously designated pattern.¹³³ Because, as explained in section A(ii)(a) herein, in DRB, neither the player nor the proxy agent takes any action to cover or actually and actively participates in such covering, DRB does not fulfill the third criteria for bingo either.

B. Is DRB a game similar to bingo?

IGRA permits games similar to bingo to qualify as Class II if they are played in the same location as bingo.¹³⁴ Although IGRA does not define "games similar to bingo," NIGC regulations do, interpreting the term to mean "any game played in the same location as bingo (as defined in 25 U.S.C. § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes."¹³⁵

¹²⁹ Memorandum to Region Chief, Region IV from NIGC Acting General Counsel re: Quick Shot Bingo (Sept. 19, 2002) at 1-2; *see also* Memorandum to Tadd Johnson, NIGC Chair, from Penny Coleman, Acting General Counsel re: King Dobber bingo card dispenser (Mar. 11, 1998) (opining that the game is not bingo because it does not meet the regulatory criteria of covering numbers when they are drawn since all the winning numbers are drawn and posted on boards before the players buy cards and then the players compare and cover the numbers on their cards).

¹³⁰ Letter to Mr. Clifton Lind, President & COO, Multimedia Games, Inc., from Penny J. Coleman, NIGC Acting General Counsel at 6-7 (Apr. 15, 2002).

¹³¹ *See supra* notes 54 & 93.

¹³² *See supra* notes 55 & 94. As explained previously, the proxy agents have no physical interaction with the game, which is why the quotation marks are used around the term "distributed."

¹³³ 25 U.S.C. § 2703(7)(A)(i)(III); 25 C.F.R. § 502.3(a)(3).

¹³⁴ 25 U.S.C. § 2703(7)(A)(i)(III).

¹³⁵ 25 C.F.R. § 502.9.

In devising this definition, the Commission explained that “games similar to bingo” have to satisfy some, but not all, of the three criteria for bingo:

It is particularly noteworthy that the statutory listing of specific games followed by the phrase, “and other games similar to bingo,” can be read in two ways. First, it can be interpreted to mean merely that the specified games are similar to bingo. The Commission finds this interpretation unlikely. Alternatively, this language can be interpreted to leave class II open to other games that are bingo-like, but that do not fit the precise statutory definition of bingo. This second reading, that the class was left open to a group of non-specific, bingo-like games, or “variants” on the game of bingo, is consistent with legislative history and the holdings of the Courts of Appeal for the Ninth and Tenth Circuits in their analysis of the game *Megamania* []. ... It defies logic to conclude that the Congress intended to require that these other “similar” games satisfy the same statutory requirements of bingo. If this were Congress' intent, there would have been no need for the phrase “and other games similar to bingo.” These games would not in effect be “similar” to bingo; they would be bingo. The definition announced today corrects this flaw by accurately stating that “other games similar to bingo” constitute a “variant” on the game and do not necessarily meet each of the elements specified in the statutory definition of bingo.¹³⁶

As to this matter, DRB does not qualify as a game similar to bingo. To qualify as such, a game must be “bingo-like,” meaning close enough to bingo to be considered a variant. In that vein, a game must include nearly all the characteristics that are inherent in bingo's statutory and regulatory criteria. Because DRB only possesses one of the three criteria, it fails to come within the zone of games that may be considered a variant.¹³⁷ In this regard, in DRB, the ball draw numbers are electronically drawn before the bingo cards are created and distributed, which eliminates the possibility that DRB qualifies as a game similar to bingo.¹³⁸ Additionally, DRB utilizes an auto-daub and, as a consequence, neither the player nor the proxy agent cover. Taking an act to cover or actually and actively participating in such covering is an essential element to the play of bingo or a variant of the game.¹³⁹ Thus, for this reason as well, DRB is not a game

¹³⁶ 67 FR 41166-02 “Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo” (June 17, 2002).

¹³⁷ See Letter to Alan Frank, The HomeBingo Network, from Penny J. Coleman, NIGC Acting General Counsel re: 8 Draw Kingo at 8 (May 11, 2004).

¹³⁸ *Id.* at 6 (“It does not appear that numbers are drawn before the play of the game, which would negate a conclusion that the game is either bingo or a game similar to bingo.”); NIGC Bulletin No. 03-3 “Guidance on Classifying Games with Pre-Drawn Numbers” (Sept. 23, 2003) at 1 (“We conclude that the statutory requirement for bingo is met only when numbers or designations are drawn after a player begins play of the game. We conclude further that, in order to constitute a game similar to bingo, numbers must be likewise be drawn after the play of the game begins.”).

¹³⁹ See Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 13 (Sept. 26, 2003) (“We find that covering numbers as they are called is an essential ingredient to the play of the game of bingo or a variant of that game. We conclude that a game offered as class II bingo or a ‘game similar to bingo’ must provide a ‘daub’ or ‘cover’ requirement for all players after the bingo numbers are announced and not just for winning players.”); Letter to Robert A. Luciano, President, Sierra Design Group, from Penny J. Coleman, NIGC Acting General Counsel re: Mystery Bingo Game Classification Opinion at 3 fn. 5 (May 26, 2004) (same).

similar to bingo. And, even if DRB met the requirements of a game similar to bingo, it is not played in the same location as bingo, so cannot be considered as Class II under IGRA, 25 U.S.C. § 2703(7)(A)(i)(III), or NIGC regulations, 25 C.F.R. § 502.9.

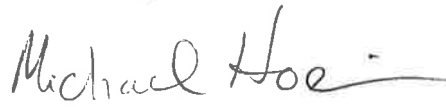
IV. Conclusion

For the reasons set forth in detail above, DRB does not qualify as a Class II game. It is not bingo because it does not satisfy two of the three statutory and regulatory criteria for the game. Nor is it a game similar to bingo, as it is not a variant on the game and lacks a majority of the elements that make-up bingo under IGRA and NIGC regulations. Besides, even if DRB did qualify as a game similar to bingo, it is not played in the same location as bingo and, therefore, cannot constitute a Class II game. Thus, in the legal opinion of the NIGC Office of General Counsel, DRB constitutes a Class III game.¹⁴⁰

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised or reconsidered by a subsequent General Counsel or Acting General Counsel. Moreover, this advisory legal opinion is not binding upon the NIGC Chairman or the NIGC Commission, who are free to disagree with it in any action that comes before them or via the Chairman's prosecutorial discretion. In sum, this advisory legal opinion does not constitute agency action or final agency action for purposes of review in federal district court. Further, by issuing this advisory legal opinion, the NIGC Office of General Counsel does not speak on behalf of the U.S. Department of Justice or the United States Attorneys in regard to their enforcement responsibilities.¹⁴¹

If you have any questions regarding this legal opinion, please contact Jo-Ann M. Shyloski, Of Counsel, at (202) 632-7003.

Sincerely,



Michael Hoenig
General Counsel

¹⁴⁰ Although the NIGC Office of General Counsel is aware of and has considered the opinion of the United States District Court for the Southern District of California in *California v. Iipay Nation of Santa Ysabel et al.* that provides a differing analysis as to why Desert Rose Bingo constitutes a Class III game, that opinion and analysis is not binding on this office or the agency, as neither the United States nor the NIGC is a party to the suit. See *California v. Iipay Nation of Santa Ysabel et al.*, No. 14cv2724 AJB (NLS) (S.D. CA. Dec. 12, 2014). Nor is the opinion circuit law that the NIGC is bound to follow. See *N.L.R.B. v. Ashkenazy Prop. Mgmt. Corp.*, 817 F.2d 74, 75 (9th Cir. 1987); *Cardoza-Fonseca v. U.S.I.N.S.*, 767 F.2d 1448, 1453-54 (9th Cir. 1985) *aff'd sub nom. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987); *Spraic v. U.S. R.R. Ret. Bd.*, 735 F.2d 1208, 1211 (9th Cir. 1984); *Ithaca Coll. v. N.L.R.B.*, 623 F.2d 224, 228 (2d Cir. 1980).

¹⁴¹ See, e.g., 18 U.S.C. §§ 1166-1168; 15 U.S.C. §§ 1171-1178; 31 U.S.C. §§ 5361-5367.