



### ***The Fight for Desert Rose Bingo Underway: Implications Felt Across Indian Country***

by Dave Vialpando

On October 9, 2014, Santa Ysabel Interactive, an iGaming enterprise of the Iipay Nation of Santa Ysabel, launched Desert Rose Bingo (DRB), a VPN-aided browser-based bingo game accessible to registered California adult residents. At the time of launch, the tribe held an open house to showcase its newest gaming enterprise. Since the unfortunate closure of the tribe's land-based casino in February of this year, the disappointment among the Iipay community has been palpable. The excitement at the open house was infectious and heart-warming. The tribal members working as DRB's proxy players, the human back-bone behind the DRB system, were proud of the extensive proxy-play training they had received as newly hired Santa Ysabel Interactive employees and eagerly demonstrated for their friends and neighbors how the system worked.

On December 12, 2014, the State of California obtained a Temporary Restraining Order (TRO) signed by Federal District Court Judge Anthony J. Battaglia, bringing an abrupt halt to the tribe's latest attempt to address the economic challenges confronting the Santa Ysabel tribal community and invest in much needed infrastructure improvements and community services. The tribe will return to court and we are confident that we will ultimately prevail on the merits of our legal argument, but substantial damage has already been done, not only in the denial of access to the loyal customers who see DRB as a safe, reliable, and well-regulated form of interactive entertainment, but to the members of the Santa Ysabel Tribe, who have been dealt one heart wrenching disappointment after another for way too long.

Let this be a warning to all tribes that the State of California will stop at nothing when it comes to tribal gaming and the state's desire for two things: control and money. Anyone who believes that the state is committed to negotiating with tribes on a mutually respectful government-to-government basis regarding the operation and regulation of tribal gaming in this state had those beliefs shattered to pieces during the state's disrespectful and culturally insulting presentation in federal court. Anyone who believes that the federal government is dedicated to preserving tribal sovereignty and protecting the right of tribes to regulate their gaming operations would be sadly disappointed by Judge Battaglia's casual dismissal of the provisions of the Indian Gaming Regulatory Act (IGRA) in his written court decision in issuing the TRO.

A brief, but important, history lesson is in order here to remind us where we've been, where we are, and where we're likely to end up if the state's unyielding maneuvering is allowed to continue unabated. When tribes across the state decided to

take advantage of technological developments in gaming and integrate electronic Class II bingo machines into their bingo halls, state investigators and county law enforcement seized hundreds of tribal gaming machines as illegal gambling devices. Curiously, when tribes objected to this action in court, the state used the same sky is falling argument they used in attacking Santa Ysabel on December 4th in Judge Battaglia's courtroom. According to the state, electronic bingo would suck hundreds of millions of dollars from the bank accounts of millions of unsuspecting Californians, seriously debilitating the state economy. Of course, this didn't happen, but it took California voters not once, but twice, through the voter-initiated proposition process, to direct the state government to work with tribes to bring gaming entertainment to California adult consumers. The state's knee-jerk reaction to any advancement in gaming technology, such as Santa Ysabel's browser-based bingo game, is to suppress innovation.

The U.S. Congress, through the Indian Gaming Regulatory Act of 1988 (IGRA), protected tribal rights to conduct and regulate Class II gaming from tribal lands. IGRA also required states to negotiate with tribes in a mutually respectful government-to-government basis to establish tribal-state gaming compacts to offer Class III (slot machines and house-banked) games to consumers. These compacts guarantee exclusivity to tribes in the offering of Class III slot machines to consumers in exchange for a substantial portion of the revenues generated from gaming going to state coffers. The state has been a major beneficiary of the revenues generated from gaming since 1988. In spite of this fact, the state has not been satisfied with the millions of dollars gleaned from tribal gaming. Through the California Gambling Control Commission, the state has assumed ever greater control over the regulation and suitability determination of those working in the state's tribal gaming industry. Nowhere is this more evident than in the state's imposed regulations shifting approval and regulations of tribal gaming internal control standards from tribal gaming agencies to state regulators.

Suffice it to say, the state government did not welcome tribal gaming with open arms. If one were to compare the first negotiated tribal-state gaming compacts from 1988 to the most recent gaming compacts, you would see that the state is intent on obtaining a greater portion of tribal gaming revenues and assuming near complete control of tribal gaming regulation. Tribal gaming agencies, arguably the most experienced and proficient gaming regulators in the state, are marginalized to the point that the Tribal-State Gaming Association, the venue through which the state and gaming agencies negotiate effective regulatory practices, is not even mentioned. The state

has gone so far as to require tribes to provide the state with information related to tribal Class II and Class III gaming, in state as well as out-of-state, as a condition of receiving revenues from the state for those tribes operating less than 350 slot machines. Nowhere in pre-2013 compacts does it outline that this information is required to be provided to the state, but the state demands the information anyway and threatens to withhold much needed funds from the tribes which do not provide the information. So much for respectful government-to-government relations. State government is not an ally of tribes in the area of gaming, and does not see itself as an equal government partner.

While the state attempts to wrestle away increasing levels of control over tribal gaming and treats tribes as acquiescent to California's priorities, we should remind ourselves that the United States established the even playing field upon which states and tribes are supposed to operate. Article 1, Section 8 of the U.S. Constitution states the, "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;[...] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Foreign nations, states, and tribes occupy equal footing in the eyes of the federal government, and so too is the way they should behave when dealing with each other. Santa Ysabel would have appreciated deference and courtesy from the state as an equal sovereign government.

The Court in its decision to grant the state's request for a TRO against Santa Ysabel not only ignored the Constitution, but ignored the recent U.S. Supreme Court decision in the Bay Mills case (*State of Michigan v. Bay Mills Indian Community*) where the Court noted at the outset of its decision, "Indian tribes are domestic dependent nations that exercise inherent sovereign authority" and possess "common-law immunity from suit traditionally enjoyed by sovereign powers." 134 S.Ct. at 2030. The right and just thing to do would have been to direct the state to work with the tribe in a mutually obeisant manner.

The District Court determined that Santa Ysabel's browser-based bingo game is a Class III game because it constituted a "facsimile" of a live bingo game, and a "facsimile" of a live game, according to the Judge Battaglia, is a Class III game. By definition bingo and poker have historically been considered Class II games, while house-banked games and electronic games (slot machines) where the interaction is between the player and the slot machine, has been considered Class III gaming. Santa Ysabel's DRB bingo game requires a minimum of two players because the players, through Santa Ysabel's proxy players located on the tribe's reservation, play against each other and not against any machine. Judge Battaglia got it wrong, but we shouldn't be surprised since he admitted nescience when it comes to the game of bingo.

The Court based its decision, in part, not on a thorough analysis of the operational framework of Santa Ysabel's inter-

active gaming system, but rather on the less than diligent allegations by state gaming investigators. The sum total of the state's investigation of Desert Rose Bingo consisted of an undercover state investigator registering online as a player, then playing a couple of games from different locations within the state, and arriving at the determination that he was playing a slot machine, that's it, nothing more. California Deputy General Bill Torngren stated in open court, "If it looks like a duck, and it walks like a duck, it must be a duck."

The state's less-than-thorough investigation of DRB failed to mention that it never responded to an invitation to the state by the tribe to visit Santa Ysabel Interactive located on the reservation, the thorough regulations related to Santa Ysabel Interactive promulgated by the Santa Ysabel Tribal Gaming Commission being made publicly available on the Commission's website, nor correspondence sent to the by the tribe advising the Governor's office of the progress being made in the design of the regulatory framework for Santa Ysabel Interactive. When I worked for the very same agency charged with conducting this investigation, I would have been embarrassed to present such a sub-standard work product in court. An investigation, by definition, is an objective examination and evaluation of all available information, not just an accumulation of information supporting one side's position. Santa Ysabel Interactive has been under review by National Indian Gaming Commission (NIGC) investigators since July 2014, and DRB has been under NIGC review since the day it launched in October. To my knowledge, the state did not contact NIGC, their federal gaming regulatory counterparts, as part of its so-called investigation of DRB.

The intent here is not to try this case in the court of public opinion, but rather to raise areas of concern for any tribe which may find itself at the opposite end of an adverse action involving California state government officials. Santa Ysabel's experience should serve as an exhortatory to all.

The state's contention in larruping Santa Ysabel and Desert Rose Bingo is that this gaming system should be classified as Class III gaming, which can only be offered by tribes pursuant to a negotiated tribal-state gaming compact. Judge Battaglia, in his decision granting the state's request for a Temporary Restraining Order, agreed with the state. Now, this erroneous determination should be of tremendous concern for tribes, state government officials, and state legislators advocating the passage of state legislation authorizing state-regulated interactive gaming.

Whether you consider the two interactive gaming bills which unsuccessfully weaved their way through the state legislative process earlier this year, or the most recent iteration of proposed state iGaming legislation, Assembly Bill 9, the Internet Poker Consumer Protection Act of 2015, introduced earlier this month by District 43 Assembly Member Mike Gatto, all of the bills define the proposed interactive play of the game of poker via a web-browser to be authorized by the legislation as Class II. This definition is correct, as discussed earlier, both bingo and poker are by definition Class II games.

But wait a minute, the court determined that Santa Ysabel's interactive bingo game, a traditionally Class II game, structured essentially the same as the interactive gaming to be licensed and regulated by the state, is actually Class III gaming because it is accessed via a web browser. The court refused to acknowledge that access via a virtual private network via a web browser is a technological aide. This determination by the court was made at the state's urging inapposite to the state's assertion when it comes to poker played via a web browser. Houston (or should I say, Sacramento) we have a problem. The state cannot have its cake and eat it too. Interactive bingo and poker cannot be defined as Class II if regulated by the state, and defined as Class III if regulated by tribes. This is an all-too-familiar double standard tribes have been forced to endure since the discovery of the New World.

Interactive poker and bingo are Class II games, thus pursuant to IGRA, they remain in the exclusive domain of tribes to operate and regulate, as long as the computer servers and all processes related to the play of the game are located on tribal lands. Santa Ysabel's interactive gaming enterprises, and other similar operations on tribal reservations, should be free from state interference. If interactive bingo is a Class III game, as the Federal District Court in San Diego has determined, then so too is iPoker a Class III game. Such a holding means the state in enacting legislation to regulate and license these iPoker games to tribal and non-tribal entities will violate the exclusivity tribes negotiated in their gaming compacts with the state, and tribes should feel free to withhold gaming revenues allocated to the state from their land-based casinos. At the very least, tribes should be extremely concerned that permitting non-tribal gaming entities, such as California's cardroom industry, to engage in Class III gaming is but one step away from the introduction of Class III slot machines in non-tribal gaming establishments, thereby devastating tribal gaming revenues across the state. My prediction is that iGaming in California will never happen as long as the District Court's ruling in the Santa Ysabel case is allowed to stand. ♣

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