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National Indian Gaming Commission

25 CFR Part 502
Definition for Electronic or Electromechanical Facsimile; Proposed Rule

DEPARTMENT OF THE INTERIOR

NATIONAL INDIAN GAMING COMMISSION

25 CFR Part 502

RIN 3141–AA31

Definition for Electronic or Electromechanical Facsimile

AGENCY: National Indian Gaming Commission ("NIGC" or "Commission"), Interior.

ACTION: Proposed rule.

DATES: Submit comments on or before August 23, 2006.

Consultation: The Commission will be conducting government-to-government consultations with Tribes on this proposed rule at the following times:

July 10–11	Minneapolis, Minnesota.
July 12–13	Denver, Colorado.
July 18–19	Washington, DC.
July 24–25	Tacoma, Washington.
July 26–27	Ontario, California.
August 8–9	Oklahoma City, Oklahoma.

Invitations will be mailed out to Tribal leaders in the coming weeks. These consultation meetings will be transcribed. To schedule a consultation please contact Natalie Hemlock, Special Assistant to the Commission, at (202) 632–7003.

ADDRESSES: Mail comments to "Comments on Electronic or Electromechanical Facsimile definition" National Indian Gaming Commission, Suite 9100, 1441 L Street, NW., Washington, DC 20005, Attn: Penny Coleman, Acting General Counsel." Comments may be transmitted by facsimile to 202–632–0045, or mailed or submitted to the above address.

FOR FURTHER INFORMATION CONTACT: Penny Coleman or John Hay, Office of General Counsel, Telephone 202–632–7003. This is not a toll free call.

SUMMARY: The proposed rule revises the definition of a term Congress used to define Class II gaming under the Indian Gaming Regulatory Act, 25 U.S.C. 2701, *et seq.* ("IGRA" or "Act"). Specifically, the proposed rule revises the definition for "electronic or electromechanical facsimile" that appears in part 502 of the Commission's regulations (25 CFR part 501 *et seq.*). The Commission defined these terms in 1992 and revised the definitions in 2002. The proposed rule offers further revision.

SUPPLEMENTARY INFORMATION:

Background

IGRA, 25 U.S.C. 2701–21, enacted by the Congress in 1988, establishes the NIGC and sets out a comprehensive framework for the regulation of gaming on Indian lands. The Act establishes three classes of Indian gaming.

"Class I gaming" means social games played solely for prizes of minimal value or traditional forms of Indian gaming played in connection with tribal ceremonies or celebrations. 25 U.S.C. 2703(6). Indian tribes regulate Class I gaming exclusively.

"Class II gaming" means the game of chance commonly known as bingo, whether or not electronic, computer, or other technologic aids are 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, and various card games so long as they are not house banking games. 25 U.S.C. 2703(7)(A). Specifically excluded from Class II gaming, however, are banking card games such as blackjack and electronic or electromechanical facsimiles of any game of chance or slot machines of any kind. 25 U.S.C. 2703(7)(B). Indian tribes and the NIGC share regulatory authority over Class II gaming. Indian tribes can engage in such gaming without any state involvement.

"Class III gaming" includes all forms of gaming that are not Class I gaming or Class II gaming. 25 U.S.C. 2703(8). Class III gaming thus includes all other games of chance, including most forms of casino-type gaming such as slot machines of any kind, electronic or electromechanical facsimiles of any game of chance, roulette, banking card games such as blackjack, and pari-mutuel wagering. Class III gaming may be conducted lawfully only if the state in which the tribe is located and the tribe reach an agreement called a tribal-state compact. Alternatively, a tribe may operate Class III gaming under gaming procedures issued by the Secretary of the Interior if the tribe and the state have not reached agreement or if the state has refused to negotiate in good faith toward an agreement. The tribal-state compact or Secretarial procedures may contain provisions for concurrent state and tribal regulation of Class III gaming. In addition, the NIGC also exercises regulatory authority over Class III gaming under IGRA, and the United States Department of Justice and United States Attorneys possess exclusive criminal jurisdiction over Class III gaming on Indian lands and also possess certain civil jurisdiction over such gaming.

As a legal matter, Congress defined the parameters for game classification when it enacted IGRA. As a practical matter, however, the congressional definitions were general in nature and specific terms within the broad gaming classifications were not explicitly defined. The Commission adopted regulations in 1992 that included definitions for many terms used in the statutory classification scheme, including "electronic or electromechanical facsimile", 25 CFR 502.7, and "electronic computer or other technologic aid", 25 CFR 502.8. The Commission revised the definitions in 2002. See 67 FR 41166 (June 17, 2002) for an extensive discussion of the reasons for the Commission's decision to revise these key terms.

A recurring question as to the proper scope of Class II gaming involves the use of electronics and other technology in conjunction with bingo and lotto as well as pull tabs, instant bingo, and other games similar to bingo that may be Class II if played in a location where Class II bingo is played. In IGRA, Congress recognized the right of tribes to use "electronic, computer or other technologic aids" in connection with these forms of Class II gaming. Congress provided, however, that "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" constitute Class III gaming. Because a tribe wishing to conduct Class III gaming may do so only in accordance with an approved tribal-state compact, it is important to distinguish the two classes.

As the Commission worked through a process to develop classification standards, it became apparent that the revised definitions issued by a divided Commission in June 2002, See 67 FR 41166, did not provide the clarity that had been a goal in that rulemaking. Accordingly, the Commission proposes to revise the definition of the term "electronic or electromechanical facsimile."

Development of the Proposed Rule Through Consultation With Indian Tribes

In recognition of tribal sovereignty and the fundamental importance of game classification to the operation and regulation of gaming on Indian lands under IGRA, the Commission developed a policy and process for consultation with Indian tribes that would provide opportunity for early and meaningful tribal input regarding formulation of the change to this regulation.

In particular, while initially advising tribes of the Commission's intention to develop these Class II Game Classification Standards, the Commission also actively consulted with tribes regarding formulation of the Commission's first-ever official government-to-government tribal

consultation policy. After several months of consultation with tribes, the Commission's official tribal consultation policy was adopted and published in the **Federal Register** on March 31, 2004. See 69 FR 16973. The Commission purposely established this policy in order to have consultation policy guidelines in place for pre-rulemaking tribal consultation on the Class II classification standards and other planned Commission rulemaking initiatives.

The Commission's tribal consultation policy calls for the Commission, to the extent practicable and permitted by law, to engage in regular, timely, and meaningful government-to-government consultation with Indian tribes when formulating proposed new or revised administrative regulations that may substantially affect the operation or regulation of gaming on Indian lands. To fulfill this policy commitment to consult with tribes on these proposed Class II regulations, the Commission devised a three-part plan to afford tribes a reasonable and practicable opportunity to consult with the Commission and to provide early input in formulation of the regulations, before they were published as proposed rules in the **Federal Register** and the actual rulemaking process began.

First, the Commission endeavored to consult in person at least twice with each gaming tribe between May 2003 and March 2006 regarding development of these proposed regulations. During this time period, the Commission sent out over 500 separate invitations to individual tribes to consult with the Commission and provide input. Many tribes accepted one or more of the Commission's invitations to consult during this pre-rulemaking period and participated in separate government-to-government consultation meetings with the Commission regarding the proposed regulations and other matters. While some tribes declined the Commission's invitation(s) to consult, between May 2003 and March 2006, the Commission conducted over 300 separate government-to-government consultation meetings with individual tribes and their leaders or representatives regarding development and formulation of these proposed regulations.

Second, the Commission established a joint Federal-Tribal advisory committee on March 31, 2004, composed of both Commission and tribal representatives to assist the Commission in formulating these proposed Class II gaming regulations. In January 2004, the Commission requested all gaming tribes across the country to nominate tribal representatives to serve on this advisory committee. From the tribal nominations received, the Commission selected the following seven tribal representatives on March 31, 2004, to serve on the committee: Norm Des Rosiers, Gaming Commissioner, Viejas Band of Kumeyaay Indians; Joseph Carlini, Gaming Commission Executive Director, Agua Caliente Band of Cahuilla Indians; Kenneth Ermatinger, Gaming Commission Executive Director, Sault Ste. Marie Tribe of Chippewa Indians of Michigan; Jamie Hummingbird, Gaming Commission Director, Cherokee Nation, Oklahoma; Mark Garrow, Gaming Commission Inspections Manager, St. Regis Mohawk Tribe; Melvin Daniels, General Manager, Muckleshoot Indian Bingo, Muckleshoot Indian Tribe; Charles Lombardo, Sr. Vice-President for Gaming Operations, Seminole Tribe of Florida.

To date, the advisory committee has held six (6) meetings: May 13, 2004 in Washington, DC; August 2–3, 2004, Washington, DC; September 13–14, 2004, Cherokee, North Carolina; December 1–3, 2004, Oklahoma City, Oklahoma; January 12–13, 2005, Palm Springs, California; and March 11, 2005, Chicago, Illinois. During these meetings, all of which were open to the public, the committee discussed the various characteristics of Class II and Class III games of chance, their play, and related gaming technology and methods. In addition, the committee also discussed, reviewed, critiqued and commented on four (4) different, successive preliminary working drafts of the proposed Class II classification standards, which were prepared by the Commission representatives on the committee.

The seven tribal committee representatives provided early tribal input and valuable insight, advice, and assistance to the Commission in developing each of the respective working drafts, as well as the current proposed regulations. Although there were many instances of accord, there were also many times during the development of the proposed regulations that the tribal committee representatives strongly disagreed with decisions made by the Commission.

In particular, tribal representatives strongly advocated no change to the current regulation definition of "electronic or electromechanical facsimile" of games of chance. While understanding the tribal representatives' position on this issues, the Commission is bound by Congress's intent, as expressed in IGRA, to promulgate rules that clearly distinguish technologically-aided Class II games from Class III "electronic or electromechanical facsimiles of any game of chance" or "slot machines of any kind." Accordingly, the Commission concluded that it could not accept some of the tribal representatives' recommendation in formulating the proposed rule.

The Commission's establishment of the joint Federal-Tribal advisory committee was the subject of a legal challenge while the Commission was preparing the proposed rule for publication. On March 10, 2005, nearly one year after the Commission established the committee, the Confederated Salish and Kootenai Tribes of the Flathead Nation and the Santa Rosa Rancheria Indian Community filed suit against the Commission alleging that several of the committee members were not eligible to participate on the committee. Following a hearing in federal court at which the request for temporary restraining order was denied, the Commission determined that it should proceed to publish the proposed rule for comment while the legal standing of the committee was further litigated. The Commission also sought clarification from those tribes that nominated the Committee members concerning the member's role as an official representative of the Tribe. As a result of this clarification, and, out of an abundance of caution, the Commission regretfully requested that two members of the Committee step down.

The third component of the Commission's effort to consult with tribes during the development of these proposed regulations was to make the various preliminary working drafts of the proposed regulations available to all tribes and their leaders for review and comment independent of the joint Federal-Tribal advisory committee. All four preliminary drafts were published on the Commission's website. In addition, the third and fourth preliminary drafts were successively mailed to each tribe inviting written comment. Many tribes and the public submitted written comments on these respective working drafts. The tribal comments were shared with the members of the advisory committee for their review and carefully considered by the Commission in formulating these proposed regulations.

In addition to forming the Advisory Committee, scheduling and conducting individual tribal consultation meetings and Advisory Committee meetings, and requesting and considering written tribal comments on preliminary drafts of the proposed regulations, the Commission also facilitated further pre-rulemaking consultation with tribes by

other means. In particular, the Commission attended and addressed several different assemblies of tribal leaders and tribal gaming operators and regulators at meetings and conferences between January 2003 and March 2006 organized by state and regional tribal gaming associations, the National Indian Gaming Association, and the National Congress of American Indians. At these meetings and conferences, the Commission advised tribal leaders of its intention and plan to develop these regulations and provided periodic updates regarding the progress and status of the regulations development. The Commission also made itself available at these meetings to answer any questions from tribal leaders regarding the proposed regulations.

In addition, the Commission also met individually with several tribes and their leaders in its Washington, DC, offices, at each tribe's request, to discuss these proposed regulations and their formulation and implementation.

Through each of these various means, the Commission actively endeavored to provide all tribes with a reasonable and practical opportunity over the past twenty-two months to meet and consult with the Commission on a government-to-government basis and provide early and meaningful tribal input regarding the formulation and implementation of these proposed regulations. This proposed change to the definition of "electronic or electromechanical facsimile" was part of the process outlined above.

By April of 2005, the Commission was prepared to send the fifth draft to the **Federal Register** for publication as a proposed rule. However, the Department of Justice (DOJ) contacted the Commission and expressed concern that the draft regulations might not be consistent with the Johnson Act. The Commission spent five months meeting with DOJ to resolve its concerns. As a result of these meetings, the DOJ drafted amendments to the Johnson Act. Following several consultation sessions with Tribes, the DOJ sent the draft amendments to the Office of Management and Budget earlier this year. So much time has elapsed that it is not likely that the proposed legislation will pass during the 109th Congress. The need to regulate Class II technologic aids has not diminished and the Commission is compelled to proceed with these regulations. The proposed regulations differ from the fifth draft that was provided to the public in April of 2005. From a procedural standpoint, as previously explained, the definition of "electronic or electromechanical facsimile" has been placed in regulations separate from the classification standards. The changes to that draft are a result of the Commission addressing the concerns of DOJ that these regulations clearly distinguish between Class II and Class III games. The only change to these definitions is the addition of the word "fundamental."

Purpose and Scope

The definition for "electronic or electromechanical facsimile" has been misconstrued by some as allowing for bingo facsimiles. Under IGRA, a facsimile is Class III. The proposed change to the definition for the term "electronic or electromechanical facsimile" will clarify that facsimiles of bingo are not permissible Class II games under IGRA.

Changes to the Definition of "Electronic or Electromechanical Facsimile" in Part 502

a: "Electronic or Electromechanical Facsimile"

The Commission proposes to revise the definition for "electronic or electromechanical facsimile" contained in § 502.8. Some have misinterpreted the 2002 revision and argued that facsimiles of bingo were properly classified as Class II. The revision makes clear that all games including bingo, lotto and "other games similar to bingo," when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game. In making this change, the Commission also wishes to emphasize that even bingo, lotto, and "other games similar to bingo" are "electronic or electromechanical facsimiles" of a game of chance when the format for the game either has players playing against a machine rather than broadening participation among multiple players, or fully incorporates the fundamental characteristics of these games electronically and requires no competitive action or decision making.

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of $100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The Commission has determined that this proposed rule does not impose an unfunded mandate on state, local, or tribal governments or on the private sector of more than $100 million per year. Thus, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.* The Commission has determined that this proposed rule may have a unique effect on tribal governments, as this rule applies to tribal governments, whenever they undertake the ownership, operation, regulation, or licensing of gaming facilities on Indian lands as defined by the Indian Gaming Regulatory Act. Thus, in accordance with section 203 of the Unfunded Mandates Reform Act, the Commission implemented a small government agency plan that provides tribal governments with adequate notice, opportunity for meaningful consultation, and information, advice, and education on compliance.

The Commission's plan includes the formation of a Tribal Advisory Committee and request for input from tribal leaders through government-to-government consultations and through written comments to draft regulations that are provided to the tribes. Section 204(b) of the Unfunded Mandates Reform Act exempts from the Federal Advisory Committee Act (5 U.S.C. App.) meetings with tribal elected officials (or their designees) for the purpose of exchanging views, information, and advice concerning the implementation of intergovernmental responsibilities or administration. In selecting Committee members, consideration was placed on the applicant's experience in this area, as well as the size of the tribe the nominee represented, geographic location of the gaming operation, and the size and type of gaming conducted. The Commission attempted to assemble a committee that incorporates diversity and is representative of tribal gaming interests. The Commission will meet with the Advisory Committee to discuss the public comments that are received as a result of the publication of this proposed rule and make

recommendations regarding the final rule. The Commission also plans to continue its policy of providing technical assistance, through its field offices, to tribes to assist in complying with classification issues.

Takings

In accordance with Executive Order 12630, the Commission has determined that this proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of General Counsel has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

Paperwork Reduction Act

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and is therefore not subject to review by the OMB.

National Environmental Policy Act

The Commission has determined that this proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

List of Subjects in 25 CFR Part 502

Gambling, Indian-lands, Indian-tribal government, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, the Commission proposes to amend its regulations in 25 CFR part 502 to read as follows:

PART 502—DEFINITIONS OF THIS CHAPTER

1. The authority citation for part 502 continues to read as follows:

Authority: 25 U.S.C. 2071 *et seq.*

2. Revise § 502.8 to read as follows:

§ 502.8 Electronic or electromechanical facsimile.

(a) *Electronic or electromechanical facsimile* means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.

(b) Bingo, lotto, and other games similar to bingo are facsimiles when:

(1) The electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or

(2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.

Dated: May 18, 2006.

Philip N. Hogen,

Chairman.

Cloyce V. Choney,

Commissioner.

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