June 4, 2008

Mayor Karl S. Cook Jr.
Metlakatla Indian Community
Post Office Box 8
Metlakatla, AK 99926

Dear Mayor Cook:

This letter responds to your request to the National Indian Gaming Commission (NIGC) for the review and approval of an amendment to the Metlakatla Indian Community Tribal Gaming Ordinance ("the amendment"), received in this office on May 29, 2008. The amendment was approved by the Metlakatla Tribal Council on May 28, 2008, via Resolution No. 08-24.

Regretfully, this letter constitutes a disapproval of the amendment. I have disapproved the amendment because it does not comply with the Indian Gaming Regulatory Act ("IGRA"). Specifically, the amendment defines as Class II a "one touch," fully electronic, fully automated game based on bingo that does not meet the definition of bingo under IGRA, does not meet the definition of a "game similar to bingo" under IGRA, and is a facsimile of a game of chance. This game is therefore Class III and cannot be operated without a compact.

Applicable Law

The IGRA defines Class II gaming in relevant part to include:

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
>
> . . .

> (B) The term "class II gaming" does not include –
>
>> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
>>
>> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7)(A)-(B). Games that are not within the definition of Class II games are Class III. *See* 25 U.S.C. § 2703(8).

NIGC regulations similarly define class II gaming to include:

> (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 objects, 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 card;
>
> (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[.]

25 C.F.R. § 502.3.

The regulations likewise define other games similar to bingo:

> Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC 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.

25 C.F.R. § 502.9

IGRA also provides that class II games may utilize "electronic, computer or other technologic aids." 25 U.S.C. § 2703(7). NIGC regulations define a 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." 25 C.F.R. § 502.7(a).

Further, the regulations provide examples of aids:

> Examples of electronic, computer or other technologic aids include pull tabs dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.

25 C.F.R. § 502.7(c).

NIGC regulations define electronic or electromechanical facsimile as follows:

> Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8.

Analysis

The Metlakatla Indian Community ("Tribe") has not entered a compact with the State of Alaska, nor has the Secretary of the Interior issued procedures that would allow the Tribe to conduct Class III gaming.

If approved, the amendment would authorize the play of Class II gaming, defined in relevant part as follows:

> Class II gaming includes an electronic, computer or other technologic aid to the game of bingo that, as part of an electronically linked bingo system, assists the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player.

Amended Metlakatla Gaming Ordinance, § 4.2.

Given this, I understand that the amendment is intended to authorize fully electronic, fully automated, multi-player bingo games. The players' only responsibility in this type of game is touching a button once to start the game. The gaming equipment thereafter automatically performs all other functions, including drawing numbers, covering the numbers on each player's card, and awarding any prizes earned based upon patterns achieved. In other words, the gaming equipment performs those functions traditionally performed by the operator, such as drawing the numbers, and those traditionally performed by the players, such as covering numbers called and claiming a prize. I conclude that a game so designed does not meet IGRA's statutory definition of Class II bingo, does not meet the NIGC's definition of Class II "game similar to bingo," and is, in fact, a Class III facsimile of a game of chance.

Bingo

By definition, the game of bingo under IGRA has certain specific, essential elements. These include playing the game for prizes, monetary or otherwise, using cards bearing numbers or other designations. 25 U.S.C. § 2703(7)(A)(i)(I). These statutory elements also include ways in which the game is played. IGRA requires players to *cover* a previously designated arrangement of numbers or designations when such objects similarly numbered or designated are drawn. 25 U.S.C. § 2703(7)(A)(i)(II) (emphasis added). It also requires that the game be won by the *first person covering* a previously designated arrangement of numbers or designations on such cards. 25 U.S.C.
§ 2703(7)(A)(i)(III) (emphasis added).

Inherent in the language "first person covering," is an element of competition. IGRA's language is not "a person," not "any person," not "every person," but the "*first* person"—players must compete to be that "first person". Thus, the statutory language requires the game to have multiple players, and it requires them to compete with one another to be the first to cover or "daub" a particular pattern. In my view, the fully electronic, fully automated game described in the Tribe's amended ordinance does not meet this part of IGRA's statutory definition.

This reading of the "first person covering" language to require competition is not new. It is a fair description of the "game of chance commonly known as bingo," 25 U.S.C. § 2703(7)(A)(i), and it is consistent with advisory game classification opinions issued by the NIGC Office of General Counsel (OGC). For example, the OGC has opined:

> Bingo requires participation of some degree. Merely hitting a start button and having numbers covered would not comply with the degree of participation that the statutory language – "the first person to cover" – implies. Likewise, an automatic daub, in which the player need not have any response to the numbers that are called, would not be acceptable.

Letter from Penny J. Coleman to Clifton Lind, "Reel Time Bingo game classification opinion" at 8. (Sept. 23, 2003).

This view is also consistent with the long-standing practice in the conduct of bingo games, specifically in the notion of "sleeping" a bingo. This describes the situation in which a player fails to cover one or more numbers on her card (or cards), with the result that she fails to cover a winning pattern before another player does. She would have won the game but for the fact that she was not paying attention or, for some other reason, did not cover the numbers on her card when they were called. "Sleeping" can also refer to a situation where a player has a winning combination on her card(s) but fails recognize this and shout "bingo" to claim her win and her prize. The result is that another player who achieves a winning pattern and does claim her prize wins instead.

The possibility of sleeping a bingo, then, is an embodiment of the competition in the game and of the language in IGRA's definition of bingo that the winner is the "first person to cover." A small mistake or oversight can cost one player the game and enable another, more attentive player to win. Put somewhat less formally, competition is inherent in the game of bingo as defined in IGRA because "if you snooze, you lose."

The fully automated, fully electronic game described in the Tribe's amended ordinance lacks this element of competition. Though I understand that the game requires multiple players, I do not see how the players are competing against one another to be the first to cover a previously designated winning pattern. The game as described eliminates the element of competition that is a statutory requirement for bingo. The game starts – and ends – with the push of a button. It is not possible to sleep a bingo or fail to claim a prize. Indeed, I question in most cases whether the players are even aware of the existence of other players in the game, much less their participation, if all that happens is that a button is pressed, a video screen displays numbers drawn, matches them to a card, and informs the player of any wins.

That said, IGRA's definition of bingo, particularly the repeated use of the word "cover" in the second and third statutory elements of the game, 25 U.S.C. § 2703(7)(A)(i)(II) – (III), identifies another necessary element of the game – a requirement that the players actually and actively participate in the play of the game. The fully electronic, fully automated game described in the Tribe's amended ordinance eliminates this fundamental characteristic of bingo and does not meet this statutory requirement.

Again, this reading of IGRA's "cover" language to include active player participation is a fair description of the "game of chance commonly known as bingo," 25 U.S.C. § 2703(7)(A)(i), and is consistent with the views previously expressed by the Office of General Counsel. In its Mystery Bingo opinion, the OGC opined that:

> 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 the winning players. *If the player has no involvement in covering the numbers, then the player is not participating in the game.*

Letter from Penny J. Coleman to Robert A. Luciano "Mystery Bingo game classification opinion" at 12. (Sept. 26, 2003) (emphasis added).

Case law says the same. In *U.S. v. 162 MegaMania Gambling Devices*, 231 F. 3d 713 (10th Cir. 2000), the Tenth Circuit held that MegaMania was a Class II game. The court reached this conclusion after an analysis of the play of the game and whether it met the statutory criteria for bingo. The opinion was heavily dependent on the facts—the characteristics of the game and the manner in which it was played. *Id.* at 725 ("[o]ur holding in this case therefore is limited to the MegaMania form of bingo currently at issue").

In MegaMania, numbers were drawn by a bingo blower and released three at a time. If a player wanted to continue playing the game after the first three numbers were drawn, the player paid additional money to stay in the game for the release of the next three balls. Ball draws occured approximately every ten seconds, and the game was won by the first person to cover a five-space straight line on an electronic bingo card. *Id. at 716.*

Intrinsic to the play of MegaMania were the successive rounds that a player had to engage in to win the game. The game could not be won after a single ball release. The Court's ruling—limited as it was to the facts—recognized an inherent characteristic of bingo: that the game requires a player to participate in a process of numbers being revealed. MegaMania could be won after two successive ball draws, each draw providing three numbered balls.

Most importantly, the Tenth Circuit, quoting an earlier case from the Ninth Circuit concerning MegaMania, *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1100 (9th Cir. 2000), stated "unlike a slot machine, MegaMania is . . . being played outside the terminal; the terminal merely permits a person to connect to a network of players comprising each Megamania game, and without a network of at least 12 other players playing at terminals, an individual terminal is useless." *162 MegaMania Gambling Devices*, 231 F. 3d at 723. Put slightly differently, the MegaMania terminals may facilitate the play of bingo but may not substitute for or eliminate the players' participation in the game.

Here, by contrast, a wholly electronic, wholly automated game eliminates player participation from bingo. It is the machine, and not the player, that is playing the game. IGRA's statutory requirement of player participation is not met, and, accordingly, I must disapprove the amendment.

Other Games Similar to Bingo

Similarly, I cannot approve the ordinance on the theory that the game described by the Tribe's proposed amendment is a Class II "game similar to bingo." 25 U.S.C. § 2703(7)(A)(i). Just as the proposed game does not meet IGRA's definition of bingo because it eliminates competition among players, it does not meet the NIGC's definition of "game similar to bingo" either.

Though IGRA does not define "other games similar to bingo," the Commission has done so. Initially, it defined the term to mean any game that met all the requirements for bingo and was not a house-banking game. 57 Fed Reg. 12,382 (April 9, 1992). In 2002, the Commission revised the definition, which now states:

> [A]ny game played in the same location as bingo (as defined in 25 USC 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.

25 C.F.R. § 502.9.

In the preamble comment to the 2002 revision, the Commission explained that under the previous definition, "other games similar to bingo" were games that met the same precise statutory criteria set for bingo. 67 Fed. Reg. 41,166 (June 17, 2002). Such a definition would be illogical, the Commission said, because a game that met each of the statutory requirements of bingo simply would be bingo, making a class of games similar to bingo unnecessary. Instead, the Commission said, games similar to bingo should be understood to be games:

> that are bingo-like, but that do not fit the precise statutory definition of bingo . . . . "[O]ther 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.

67 Fed. Reg. 41,171 (June 17, 2002). Whatever elements of bingo a "game similar to bingo" may or may not meet, § 502.9 explicitly states that a game similar to bingo must permit players to compete against one another. As explained just above, the proposed game eliminates competition among players. The proposed game thus cannot be a Class II game similar to bingo. I must disapprove the amended ordinance accordingly.

Facsimile

Finally, the Tribe's submission suggests that the analysis above is not correct insofar as the equipment envisioned by the amended ordinance is a permissible technologic aid to the play of Class II bingo. I disagree. A wholly electronic, fully automated implementation of the game described by the Tribe's amended ordinance is a Class III "facsimile of any game of chance." As such, it cannot be an "electronic, computer or other technologic aid," which, by definition "is not an electronic or electromechanical facsimile." 25 C.F.R. § 502.7(a)(2).

In enacting IGRA, Congress had a vision of two distinct kinds of gaming – bingo and similar games on the one hand and casino gaming on the other. For example, in the House and Senate floor debates on IGRA, several proponents of the legislation described this distinction as that between "bingo" and "casino gaming." 134 Cong. Rec. H8157. While "casino gaming" was not defined per se, those who spoke associated the term with gambling halls filled with slot machines, venues separate and distinct from the bingo halls of the 1980s.

The distinction was not an arbitrary one. Congress perceived, rightly or wrongly, that there were complexities and regulatory difficulties associated with slot machines and casino gaming that did not exist for bingo. 134 Cong. Rec. H8157, 134 Cong. Rec. S12643. Some argued that only states – then the only governments experienced with the conduct and regulation of casino gaming – were up to the task of regulating casino gaming, and thus under IGRA, casino gaming is Class III and requires a tribal-state compact for play.

Much has changed, of course, since 1988, not the least of which is the sophistication and excellence of the tribes' own gaming regulation. Tribes spend hundreds of millions of dollars annually regulating their gaming, both directly, through their own commissions, and indirectly, by funding the regulation done by states and the NIGC. Nonetheless, the distinctions and classifications established in IGRA in 1988 still bind the Commission to identify and clarify the place at which Congress intended to separate Class II from Class III.

In this same vein, Congress also understood that the future of both kinds of gaming held technologic advances. In 1988, tribal bingo looked to telecommunications technology to connect bingo halls across the nation. This allowed operators to maximize the number of bingo cards sold per game and permitted the award of high-stakes prizes that otherwise would not be possible. This was the same technology that Congress favorably referenced in the report which accompanied the bill that became IGRA:

> The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.... The Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take.

S. Rep. No. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. at 3079.

Similarly, in 1988 the dominant form of casino gaming was the play of slot machines. By that time, slot machines had already become computerized, though they maintained their mechanical reels. Machines with mechanical reels, though, were rapidly being supplemented and replaced by machines with video displays that replicated, and then expanded upon, the look and feel of the mechanical reel machines. Today, this technology is starting to give way to more sophisticated "server based" technology that will permit greater centralization of operations and perhaps more secure monitoring of the operation and play of that equipment.

Congress anticipated that bingo and casino gaming would both develop further and that the technology employed in both kinds of gaming would evolve. Knowing this, Congress nonetheless intended a continued separation of the two. One cannot assume that only the play of bingo would be fostered by technology. Rather, it must be assumed that "slot machines of any kind" and their future cousins, "electronic facsimiles of games of chance" would also evolve. It is not difficult to understand that at some point there would be a tendency for the technologies to converge. Notwithstanding that convergence, identifying a separation point remains essential to the structure – uncompacted Class II gaming and compacted Class III gaming – that IGRA established. Thus, Congress observed the following limitation on the "maximum flexibility" in the use of technology:

> Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with Federal communications law.

S. Rep. No. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. at 3079. Not only, then, does the use of technology have to maintain the fundamental characteristics of bingo to remain Class II, the technologically aided bingo game must be different from those electronic facsimiles of games of chance, whose technology would also evolve:

> [S]uch technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

Id.

The point at which a technologically aided Class II game becomes a Class III facsimile of any game of chance is that point at which electronic gaming equipment incorporates all of the characteristics of a game. For example, consider pull tabs. As traditionally played, that game is played with two-ply paper cards. *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F. 3d 633, 635 (D.C. Cir. 1994) (*Cabazon II*). Cards are purchased from the operator, which sells them from a set known as the "deal," and a typical deal contains up to 100,000 cards. When the top layer or "tab" of a card is removed, the bottom layer reveals symbols in winning or losing patterns. The typical card will have three tabs, each an opportunity to win, and a pre-determined number of winning cards are randomly spaced within the deal. *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F. 3d 1019, 1024 (10th Cir. 2003).

In *Cabazon II*, the D.C. Circuit considered a wholly electronic, wholly automatic version of pull tabs, one that involved no physical, tangible cards. Rather, the pull tabs were generated by a computer and displayed on a video screen. The court had no difficulty in finding that the game was a Class III facsimile:

> Because class II gaming does not include "electronic or electromechanical facsimiles of any game of chance," (25 U.S.C. § 2703(7)(B)(ii)), this … alone demonstrates that the video game is not in the class II category. "By definition, a device that preserves the fundamental characteristics of a game is a facsimile of the game." *Sycuan Band of Mission Indians v. Roach*, (S.D. Cal. 1992). As commonly understood, facsimiles are exact copies or duplicates. Although there may be room for a broader interpretation of "facsimile," the video version of pull-tabs falls within the core meaning of electronic facsimile. It exactly replicates the paper version of the game, and if that is not sufficient to make it a facsimile, we doubt, as did Judge Lamberth, that anything could qualify.

Cabazon II, 14 F.3d, at 636. In short, the court concluded that IGRA's "exclusion of electronic facsimiles removes games from the class II category when those games are wholly incorporated into an electronic or electromechanical version." *Id. Accord, Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542-43 (9th Cir. 1994); *See also*, *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) ("By deeming aids to bingo class II gaming in the text of IGRA, … Congress specifically authorized the use of such aids as long as the class II provisions of IGRA are complied with ….")(internal citations omitted).

By contrast, in *Diamond Game v. Reno*, 230 F.3d 365, 370 (D.C. Cir. 2000), the machine in question, the Lucky Tab II, sold and dispensed paper pull tabs from a roll. The machine also read and displayed the results of each tab, presenting those results in such a way as to resemble a three-reel slot machine. Nonetheless, the paper tabs could be played and redeemed manually. The D.C. Circuit held, therefore, that the Lucky Tab II dispenser was not an electronic facsimile containing all characteristics of pull tabs and thus was not a Class III device, no matter how many bells and whistles it might have. The "game is in the paper rolls," the Court held, and the Lucky Tab II is "little more than a high-tech dealer."

Here, the gaming equipment contemplated by the Tribe's amended ordinance incorporates the entire game by definition. There is an "electronically linked bingo system" that covers, "without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player." *Amended Metlakatla Gaming Ordinance*, § 4.2. Nothing, as it were, is left outside of the electronics. The game is fully electronic and automatic in its play. The player merely has to press a button, and the game then proceeds automatically to its end from there. The game contemplated is thus a Class III facsimile and not a Class II technologic aid.

One could argue that this conclusion is incorrect given the applicable NIGC definition of "Electronic or electromechanical facsimile:"

> a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, *except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.*

25 C.F.R. § 502.8 (emphasis added). In short, this argument goes, a Class III facsimile only exists when a player plays alone against a machine and not when a there are multiple players in a game. In other words, if there are multiple players in a game that meets the elements in IGRA's definition of bingo, there cannot be a facsimile. But I disagree with this argument.

Given the discussion above, I find that reading § 502.8 in this way would be inconsistent with the meaning of "facsimile" in IGRA. It would allow as Class II the use of gaming equipment that wholly incorporates and replicates all of the elements and features of a game of chance. I do not, and the full Commission does not, have the authority to shoehorn into Class II a facsimile that IGRA establishes as Class III. Therefore, as it is applied to bingo, I interpret the "except when" language of § 502.8 to require some – even minimal – participation in the game by the players above and beyond the mere pressing of a button to begin the game.[1]

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[1] I note that the Indian canon of construction does not require a different result here or elsewhere in this decision. It is well settled, of course, that statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit. *See, e.g.*, *County of Yakima* v. *Confederated Tribes and Bands of*

Accordingly, I must disapprove the proposed amendment.

Conclusion

For all of the reasons detailed above, I find that the proposed amendment to § 4.2 of the Tribe's gaming ordinance is inconsistent with IGRA and NIGC regulations and I therefore disapprove it.

The Tribe may appeal this disapproval under 25 C.F.R. Part 524 within 30 days after service of this letter by filing an appeal to the NIGC. Please note that failure to file an appeal within the 30-day period shall result in a waiver of the opportunity to appeal.

Sincerely,

Philip N. Hogen
Chairman

cc: Joseph H. Webster, Esq.

Yakima Nation, 502 U.S. 251, 269 (1992). Assuming for the sake of argument that "bingo" and "facsimile" as used in IGRA are ambiguous, the Indian canon of construction cannot itself, in light of IGRA's multiple purposes, be determinative of what does and does not fall within Class II or Class III gaming. *Shakopee Mdewakanton Sioux Community v. Hope*, 16 F.3d 261, 264-65 (8th Cir. 1994) (upholding NIGC classification of Keno as Class III game, notwithstanding tribal argument that a different classification would be more consistent with IGRA's purpose of fostering tribal economic development and self-sufficiency).