

Elk Valley Rancheria, California



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July 17, 2013

VIA E-MAIL AND POSTAL SERVICE

reg.review@nigc.gov

Michael Hoenig
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005

Re: Electronic One Touch Bingo System; Public Comment

Dear Mr. Hoenig:

The Elk Valley Rancheria, California, a federally recognized Indian tribe (the "Tribe"), reviewed the Request for Public Comment regarding Electronic One Touch Bingo System published on June 25, 2013 in the *Federal Register*.

The Tribe understands that the National Indian Gaming Commission ("NIGC") intends to reinterpret previous NIGC interpretations regarding the classification of server based electronic bingo system games, including the use of "one touch bingo."


The Tribe is aware that some states, e.g., California, have wrongly attempted to utilize the NIGC's former position to re-classify one touch bingo games as Class III gaming devices.

The Tribe reviewed the June 4, 2008 letter from the former Chairman of the NIGC disapproving the Metlakatla Indian Community's proposed gaming ordinance.

Nothing in IGRA requires a "two-touch" system or renders a "one-touch" system as not constituting Class II gaming. The Metlakatla disapproval was simply the Chairman of the NIGC's opinion based upon his interpretation of IGRA and applies only to the Metlakatla Indian Community.

While the Tribe understands that the NIGC under then-Chairman Hogen adopted such a position, the subsequently adopted NIGC technical standards in October 2008 did not include any such requirement. The Tribe is of the position that the more recent action by the full NIGC





(not just the Chairman) both more accurately demonstrates the NIGC's position and supports the Tribe's position that nothing in IGRA requires two-touch bingo games.

The Tribe's position is also supported by the NIGC's press release (PR-98-2008) regarding the Metlakatla Indian Community's withdrawal of its appeal of then-Chairman Hogen's decision. There, the NIGC's former Chairman acknowledged that federal court resolution was needed to address the former Chairman's position because there is no definitive statement in the IGRA consistent with then-Chairman Hogen's position(s). Obviously, then-Chairman Hogen's position is not clearly supported by IGRA.

IGRA defines class II gaming 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,....”.

25 U.S.C. §2703(7)(A).

Federal courts have already addressed the prior NIGC position in a Ninth Circuit case that was decided in 2000. There, the Ninth Circuit said:

The Government's efforts to capture more completely the Platonic “essence” of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.

There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

U.S. v. 103 Electronic Gambling Devices, 223 F.3d 1091, 2000 (9th Cir. 2000). There, the federal government sought forfeiture of purported Class III gaming devices and the manufacturer claimed that the games constituted “bingo” under the IGRA and should be classified as Class II gaming. In fact, the opinion opens with: “This case poses the question, what is bingo?” The opinion ultimately concludes that the game at issue is “bingo” and dispenses with the very arguments articulated by the former NIGC Chairman in his Metlakatla Indian Community gaming ordinance disapproval.

The Tribe supports the NIGC’s proposed interpretation as the NIGC’s prior position as described in the Metlakatla Decision was not consistent with the Indian Gaming Regulatory Act or various federal court cases addressing the issue.

The NIGC’s proposed position is consistent with IGRA and federal court cases. Further, it will address apparent confusion between some states and tribes regarding the appropriate classification of electronic one touch bingo games, i.e., Class II v. Class III.

The Tribe is pleased that the NIGC is proactively addressing this issue. Thank you in advance for your consideration of the Elk Valley Rancheria, California’s comments.

Sincerely,



Dale A. Miller
Chairman

cc: Elk Valley Tribal Council
Elk Valley Tribal Gaming Commission
GM, Elk Valley Casino
COO-CFO
General Counsel

