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**SENT VIA E-MAIL**

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National Indian Gaming Commission

1441 L St., N.W., Suite 9100

Washington, DC 20005

Re: Comments on "Electronic One Touch Bingo System," 78 Fed. Reg. 37998 (June 25, 2013)

On behalf of the Santee Sioux Nation ("Tribe"), I thank you for the opportunity to provide comments on the National Indian Gaming Commission's (the "NIGC") proposal to recognize as Class II "server based electronic bingo system games that can be played utilizing only one touch of a button ('one touch bingo')." <sup>1</sup> The Tribe strongly supports the NIGC's proposal, which is fully consistent with the text of the Indian Gaming Regulatory Act ("IGRA"), the legislative history, the NIGC's regulations and applicable case law.

**The Santee Sioux Nation and the Ohiya Casino & Resort**

The Santee Sioux Nation is located in rural northeast Nebraska on the Santee Sioux Indian Reservation ("Santee Reservation") along the Missouri River and directly south of the State of Nebraska. The Tribe operates the Ohiya Casino & Resort, a Class II gaming facility/hotel/restaurant.

The State of Nebraska has not entered into a gaming compact with the Tribe; nor has the State entered into a gaming compact with any of the three other Indian tribes headquartered in Nebraska. It is highly unlikely that this will change absent a State constitutional amendment. As a result, all Indian gaming in Nebraska is currently Class II gaming. <sup>2</sup>

The States of South Dakota and Iowa both permit Class III gaming and have entered into Tribal-State Gaming Compacts with Indian tribes located in those states. The Santee Reservation's location means that it faces competition just across the border from Class III

<sup>1</sup> 78 Fed. Reg. 37998-38000 (June 25, 2013).

<sup>2</sup> However, the Department of the Interior has determined that it is lawful to conduct the following Class III games on its lands in Nebraska subject to certain restrictions: (1) keno, (2) parimutuel horse racing, and (3) lotteries. Letter from Aurene M. Martin, Principal Deputy Assistant Secretary-Indian Affairs, U.S. Dept. of Interior to Hon. Roger Trudell, Chairman, Santee Sioux Nation (June 29, 2004).

gaming. The Ohiya Casino does not offer any Class III games and this interpretation directly and deeply impacts the Tribe.

### **Reinterpretation of the Metlakatla Ordinance Disapproval**

The Santee Sioux Nation agrees with the Commission's proposal to reinterpret the position regarding one touch bingo as set forth in the Metlakatla Ordinance disapproval.<sup>3</sup> The Tribe further agrees that the arguments expressed in the Metlakatla ordinance disapproval letter ("Ordinance Letter") were incorrect as a matter of law.<sup>4</sup> The use of the one touch auto-daub feature in connection with a linked bingo game is consistent with the IGRA's definition of bingo and does not convert a Class II bingo game into a Class III facsimile.

1. The Use of OneTouch Auto-Daub is Consistent with the IGRA Definition of Bingo.

The three statutory requirements of bingo set forth in the IGRA are the sole legal requirements for a game to qualify as bingo.<sup>5</sup> Nevertheless, the Ordinance Letter asserted that the use of one touch auto-daub prevents a game from qualifying as Class II bingo, even if the game satisfies the IGRA requirements for bingo in all other respects. According to the Ordinance Letter, the "first person to cover" requirement in the IGRA definition of bingo requires competition between players and that there can be competition in a bingo game only if the players are permitted to "sleep" a bingo by not covering numbers or other designations that are drawn or electronically determined and displayed to the players that would result in a winning pattern. The Tribe agrees with the Commission that the IGRA definition of bingo does not support such a requirement.

Nothing about the phrase "first person to cover" or any other aspect of the IGRA definition of bingo suggests that the ability to sleep a bingo is a required element of the game. Indeed, in determining whether a game satisfied the statutory elements of bingo, the courts have evaluated what it means for a player to "cover" the numbers on a bingo card when electronic

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<sup>3</sup> The Metlakatla disapproval was issued in 2008 in response to a tribal ordinance amendment that sought to clarify that:

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.

78 Fed. Reg. at 37999. This type of auto-daub aid feature often is referred to as "one touch" since, once activated, further action by the player during the game is not required.

<sup>4</sup> The Ordinance Letter took the position that the use of the aid feature would convert a Class II bingo game into a Class III game, including two arguments to support this position: (1) the IGRA requirement that a bingo game must be won by the first person to cover the winning numbers requires competition, which is lacking in a bingo game played with one touch auto-daub; and (2) by "allowing the game system, rather than the player, to 'cover' the bingo card incorporates all characteristics of the game of bingo into an electronic machine and system, and thereby renders one touch bingo a Class III electronic facsimile of a game of chance." 78 Fed. Reg. at 37999.

<sup>5</sup> United States v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000); United States v. 103 Elec. Gambling Devices, 223 F.3d 1091 (9th Cir. 2000).



covering is used.<sup>6</sup> To the contrary, the court has emphasized that IGRA "merely require[s] that a player cover the numbers without specifying how they must be covered."<sup>7</sup> Thus, the manner in which players cover numbers on their card(s) is irrelevant.<sup>8</sup> Whether or not one touch auto-daub aid is utilized, the game is still won by the first person to cover the winning bingo pattern based on the sequence of bingo numbers for that game and the other cards in play. The first player is the one who covers the winning bingo pattern in the fewest quantity of bingo numbers drawn/determined for that game. Nothing about the auto-daub feature changes the quantity of bingo numbers necessary to be the first player with the winning bingo pattern. Even with auto-daub, the "cover" function is performed during the game's natural progression, only after each release of balls, and thus IGRA's sequencing requirement that the cover take place after the release of bingo numbers continues to be satisfied. Auto-daub cannot operate independent of the player, and it has no impact on the outcome of the game. The statutory requirements of bingo are satisfied so long as numbers are covered when similarly numbered objects are drawn or electronically determined. The one touch auto-daub aid feature merely assists the player with tracking and covering numbers so the player will not miss a win.<sup>9</sup>

The Ordinance Letter was fundamentally wrong that the element of competition in a bingo game is defined by the ability to "sleep" a bingo. Rather, the competition does not lie in the ability to sleep, but in the fact that each player is competing against the other players in the game to be the first to cover a game-winning pattern on his/her bingo card based on the results of a random ball draw or selection of bingo numbers. Whether or not a player wins depends on the cards in play by that player and other players and the unique sequence of bingo numbers drawn/determined for that game. This competition between the players is present whether or not a player is permitted to "sleep" a bingo.<sup>10</sup>

Quite simply, the use of the one touch auto-daub feature does not disturb the competition between players. The aid feature can only be used in the context of an actual bingo game where

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<sup>6</sup> "There is nothing in IGRA . . . 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." U.S. v. 103 Elec. Gambling Devices, No. 98-1984, 1998 WL 827586, at \*6 (N.D. Cal. Nov. 23, 1998), aff'd 223 F.3d 1091 (9th Cir. 2000).

<sup>7</sup> Id.

<sup>8</sup> The Ordinance Letter cited a 2003 opinion from the NIGC Office of General Counsel as support. However, such opinions are not final agency action. Instead, they constitute only the legal opinions of the NIGC's lawyers. As explained by the Tenth Circuit Court of Appeals in Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission, 327 F.3d 1019, 1043 (10th Cir. 2003):

[A]n agency's opinion letter is not binding, nor, unlike an NIGC regulation enacted pursuant to the rigors of the Administrative Procedure Act, is it entitled to any deference. Instead, the NIGC's opinion letter is at most persuasive authority; it is entitled only to that weight that its power to persuade compels.

In the 2003 opinion the Office of General Counsel opinion cites to no authority in making its argument that IGRA's language implies a specific kind of either physical or electronic participation and is otherwise unpersuasive.

<sup>9</sup> This is especially important when a player is playing multiple bingo cards, as is common in both Indian and non-Indian bingo halls.

<sup>10</sup> As correctly noted by the Commission, "[w]hether a player presses a button one time or two, the player is engaging with the machine, participating in the bingo game, and competing with fellow players on the electronically linked bingo system." 78 Fed. Reg. at 37999.



multiple players with unique bingo cards compete and play against a common ball draw. The players play against each other in exactly the same way as they do in any other bingo game. The only difference is that the aid assists the player with tracking and covering the numbers. For this reason, the Tribe agrees with the Commission that "the previous interpretation's requirement that the cover of the bingo card be done manually by the player through an additional pressing of a button is an additional requirement not mandated by the statute."<sup>11</sup>

The Ordinance Letter further suggested that it was based on how the game of bingo was "traditionally" played. However, the IGRA explicitly recognized that the game of bingo it authorized was not limited to the children's paper game, explicitly authorizing the use of technologic aids in connection. Accordingly, it is the statutory definition of bingo and not tradition that controls whether a game meets the definition of Class II bingo. While Congress was clear that tribal bingo was not limited by traditional notions of the game, it was equally clear that it intended for tribes to have "maximum flexibility" to use "modern" technology to conduct bingo games.<sup>12</sup> In this regard, it is relevant that this type of bingo aid feature predates passage of the IGRA in 1988.<sup>13</sup>

This very same feature is widely permitted today by the federal government on U.S. military reservations and in many other non-Indian bingo facilities. The Commission's proposed interpretation is consistent with Congress' intent that tribes have "maximum flexibility" to use such "modern" technology to play bingo games, and in its statutory authorization for tribes to use such aids. As the Commission noted, it "should give consideration to an interpretation of bingo that embraces rather than stifles technological advancements in gaming."<sup>14</sup>

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<sup>11</sup> 78 Fed. Reg. at 37999.

<sup>12</sup> S. Rep. No. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079.

<sup>13</sup> For example, an auto-daub aid feature for bingo was patented in 1986. As described in *Electronic Card and Board Game*, U.S. Patent No. 4,624,462 (Nov. 25, 1986):

The primary objective of the invention is to provide an electronic card and board game which relieves the player from the tedious and error-prone operation of manual marking matches on the game card. In particular, it is the objective of the invention to provide a completely automated bingo game in which the player does not have even to touch or watch the game card or the game board at any time during successive rounds of the game, whereas the caller has only to push a single button to control the game. It is the further objective of the invention to provide a design of the game board which facilitates a broad and easy selection of the game cards and games being played with the help of the same game board. An additional objective of the invention is to preclude unauthorized or untimely change of the game card by the player.

In fact, fully electromechanical linked aids to the game of bingo featuring full auto-daub were developed as early as 1956 which allowed a player to "either participate in illuminating the numbers or sit back and watch his board operate automatically" and ensured that the "player does not have to watch or exert himself play a board to be assured of winning if in fact the board before him comes up with a winning combination." U.S. Patent No. 2,760,619 (Aug. 28, 1956). See also, e.g., *Electrically Operated Bingo Game Apparatus*, U.S. Patent No. 3,671,041 (June 20, 1972). Moreover, linked electronic gaming systems were well-known before 1988. See, e.g., *Video Consultants of Nebraska, Inc. v. Douglas*, 367 N.W.2d 697, 699 (Neb. 1985) ("Each location consists of one or more lottery game terminals connected to an agent terminal.")

<sup>14</sup> 78 Fed. Reg. at 38000.



2. The One Touch Auto-Daub Feature Would Not Transform the Game of Bingo into a Class III Facsimile.

The use of the one touch auto-daub feature does not transform a game from Class II bingo into a Class III facsimile; and the Commission's proposal is fully consistent with the statute and regulations. The IGRA provides that Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance," 25 U.S.C. § 2703(7)(B)(ii), however, the term "facsimile" is not defined in the IGRA. The Commission has defined facsimile to mean:

*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.<sup>15</sup>

Thus, the definition provides that a bingo game can be played in an "electronic or electromechanical format" without becoming a facsimile as long as the format requires the players to play with or against each other rather than with or against a machine.<sup>16</sup>

The Ordinance Letter failed to recognize that a format that requires players to play with or against each other necessarily is one that does not incorporate or replicate all of the features of the bingo game. The most fundamental aspect of the game – players competing against each other with different bingo cards against a common ball draw – is not electronic or automatic. The game is, in fact, a live bingo game that is taking place across a linked network of actual players. This remains the case whether or not auto-daub is used. The fundamental characteristics of the game are preserved, unaltered by the game's electronic format.<sup>17</sup>

The NIGC's existing definition of facsimile is consistent with legislative history and case law. The legislative history indicates that Congress did not intend the facsimile prohibition to restrict the use of electronics to play games that meet the IGRA definition of bingo. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and not with or against other players. As now recognized by the Commission, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. §

<sup>15</sup> 25 C.F.R. § 502.8 (emphasis added).

<sup>16</sup> The one touch auto-daub aid feature would, in the context of an electronically linked bingo game, assist the player and the playing of the game by tracking and covering bingo numbers for the player. As such, it falls squarely within the Commission's definition of electronic, computer, or other technologic aids found at 25 C.F.R. § 502.7.

<sup>17</sup> The NIGC explained: "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 broaden participation, but instead permits a player to play alone with or against a machine rather than with or against other players." 67 Fed. Reg. 41166, 41171 (June 17, 2002) (emphasis added).

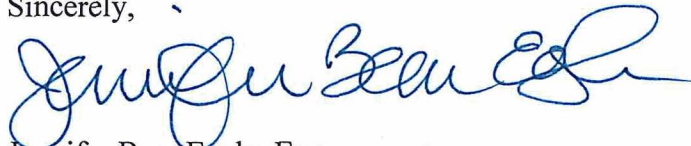
2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."<sup>18</sup>

No additional participation is required to prevent the game from becoming a facsimile. Instead, the NIGC definition of facsimile correctly recognizes that, regardless of the number of electronic aids used in a bingo game, the game does not become a facsimile if "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."<sup>19</sup> As long as there are players playing against each other, the game is not a facsimile.

### Conclusion

The Santee Sioux Nation is pleased that the Commission has decided to clarify that a game that is otherwise Class II bingo is not converted into a Class III game through the addition of a one-touch auto daub feature. Congress provided a bright line test to distinguish electronically aided Class II games from Class III games. That line is not based on the number of player "touches" required to interact with the game. Rather, Class II bingo includes any game that meets the three statutory requirements set forth by Congress. Such games may be played with any form of electronic, computer, or other technologic aid, so long as the aid does not permit a single player to play alone with or against the machine. The Santee Sioux Nation strongly supports the NIGC's proposal.

Sincerely, .



Jennifer Bear Eagle, Esq.

JBE/tjs

cc: Thelma Thomas, Ohya Casino  
Hon. Roger Trudell, Chairman, Santee Sioux Nation

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<sup>18</sup> A good example of a facsimile of a game of chance is video poker, when played in self-contained game terminals. Such a game, although it uses poker graphics and terminology, is a wholly electronic game that does not permit competition among players.

<sup>19</sup> 25 C.F.R. § 502.8.