



FORT SILL - CHIRICAHUA - WARM SPRINGS - APACHE TRIBE

PHONE: (580) 588-2298 / 2314 • FAX: (580) 588-3133
TOLL FREE: 1-877-826-0726
ROUTE 2, BOX 121 • APACHE, OKLAHOMA 73006

August 26, 2013

Via electronic mail

Chairwoman Tracie L. Stevens
1441 L Street NW, Suite 9100
Washington, DC 20005
reg.review@nigc.gov

Re: Commentary On Proposed Reinterpretation Of 25 C.F.R. Part 502

Dear Chairwoman Stevens:

The Fort Sill Apache Tribe of Oklahoma ("the Tribe") expresses its appreciation for the chance to participate in this consultation and written comment period on the National Indian Gaming Commission's ("NIGC") proposal to reinterpret the 25 C.F.R. Part 502 regulations regarding one-touch bingo. The Tribe operates the Apache Casino Hotel in Lawton, Oklahoma, which has been instrumental to the Tribe's economic development and its growth as a self-sufficient tribal government. The Tribe has taken steps to build on this success by opening another gaming facility in New Mexico, on ancestral lands from which the federal government forcibly removed the Tribe in the 1800s

The Tribe is pleased to provide the following comments on the proposed reinterpretation.

Support For The NIGC's Analysis

The Tribe fully supports the NIGC's determination that one-touch bingo is consistent with IGRA's definitions of Class II bingo. Indeed, the Tribe specifically applauds the agency's decision to eliminate from the interpretation of the definition of "bingo" elements nowhere present in IGRA. *United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1096 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000). Congress alone has the authority to narrow the statutory definition of the class of games Indian tribes may conduct without a tribal-state compact, and thereby alter the "finely-tuned balance" IGRA struck between states and tribes. *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998). By conforming the NIGC's interpretation to the full breadth of IGRA's statutory definition, the agency restores this congressionally defined balance.

The NIGC's previously proposed restrictions on Class II gaming threatened billions of dollars of quantifiable losses to gaming tribes and deprived tribes of leverage in negotiating new compacts. In addition, under those restrictions many small tribal facilities would not have been able to survive because of their inability to compete with nearby Class III-type

MOUNTAIN SPIRIT DANCER

Mountain Spirit Dancer represents the Mountain Spirit Ceremony which is used by the Chiricahua and Warm Springs Apache. It was given to the Apaches by the Mountain Spirits for blessing, protection, curing and warding off diseases. The Ceremony is still used today.

games. The NIGC's previously proposed rulemaking also threatened tribal sovereignty by transferring tribal regulatory power to classify games to private laboratories, whose "certification" of games as Class II would displace tribal governments as the primary regulator. Moreover, the previous classification standards and facsimile definition, if adopted and enforced, would have given rise to significant litigation.

The NIGC's proposed return to a plain reading of the statutory language ameliorates these threats to tribal sovereignty and economic well being.

Technological Promise Of NIGC's Position

The NIGC's proposed position on one-touch bingo also helps fulfill IGRA's drafters' vision that Indian tribes may employ the latest technologies in conducting their Class II operations. The Senate Report on IGRA "specifically reject[ed] any inference that tribes should restrict class II games to . . . current technology." S. Rep. No. 446, 100th Cong., 2d. Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079. Rather, Congress "intend[ed] 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*." *Id.* (emphasis added).

The NIGC's proposed position empowers Indian tribes operating Class II gaming facilities to avail themselves of at least two key technological developments essential to commercial viability: (1) the emergence of highly interactive gaming machines, and (2) the potential of gaming on mobile devices.

Gaming devices offered by Indian tribes under Class III compacts and by other state-authorized brick-and-mortar gaming facilities have become increasingly elaborate. For instance, slot machine manufacturer IGT boasts of its offering of "[b]ig brand names like Monopoly, Cluedo and Star Trek with stunning audio and visual content attract players to our online slots and optimized math models keep the player on the edge of their seat ensuring an extended customer lifetime value." See <http://www.igt.com/us-en/interactive/products/igt-casino/slots.aspx>. Restricting Class II tribes to conventional daubing-based bingo games effectively renders them unable to compete with widely available gaming machine options permitting players to take part in state-of-the-art, highly interactive games.

With over 100 million Americans owning smartphones, it is hard to deny that the future of gaming is mobile. See http://www.comscore.com/Insights/Press_Releases/2012/3/comScore_Reports_January_2012_U.S._Mobile_Subscriber_Market_Share. One-touch bingo game play best lends itself to the "on the go" nature of mobile gaming. On the other hand, a game requiring continuous "daubing" is potentially incompatible with the intermittent and short sessions that typically mark mobile device usage. A player with spare moments to connect for one-touch bingo plays in between sending emails and checking social media sites might well be unable to undertake a full-scale bingo session involving repeated daubing.

The NIGC's approval of Class II one-touch bingo is thus consistent with IGRA's intent to give all gaming tribes the opportunity to take advantage of the latest technologies for conducting Class II games.

Alternative Support For The NIGC's Position

Although the NIGC has decided that it need not apply the 25 C.F.R. § 502.8 exception to find that one-touch bingo is a Class II game, the exception in § 502.8 presents an alternative basis for such a finding. The upshot of § 502.8 is that a bingo game cannot be a Class III "facsimile" if it "broadens participation by allowing multiple players to play with or against each other rather than with or against a machine."

One-touch bingo games no doubt "broaden[] participation" compared to conventional bingo games. One-touch bingo permits players to compete in a single bingo game despite being positioned on disbursed machines within a single casino, machines in separate casinos on a single reservation, machines on separate reservations, and even, potentially, mobile devices in various locations in Indian country. Moreover, one-touch games further broaden participation by allowing physically handicapped persons who may lack the motor skills or coordination to play conventional bingo to compete on an even playing field alongside all other players.

Thus, even if one-touch bingo were a "facsimile" of a bingo game, it would be permissible as a game that "broadens participation" compared to conventional bingo.

The Positive Economic Impact Of The NIGC's Position

In addition, the NIGC's reinterpretation of its Class II bingo regulations will help to sustain the economic well being of Indian tribes' gaming operations. There is little controversy that Class II gaming machines simulating the play of ink-and-paper bingo are less economically viable than their one-touch counterparts.

A comprehensive economic analysis by Alan Meister, Ph.D., confirmed that a machine without an "auto daub" feature, like those that would have been required under regulations proposed in May 2006, would yield **fifty-seven percent (57%) less revenue** than modern one-touch machines. Alan Meister, Ph.D., *The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations*, Nov. 3, 2006 ("Meister Report"), at 32-33 (available at <http://www.nigc.gov/Portals/0/NIGC%20Uploads/lawsregulations/proposedamendments/MeisterReport2FINAL2108.pdf>). The Meister Report concluded that the NIGC's decision of whether to authorize Indian tribes to offer the full array of Class II technology meant a difference of:

- \$142.7 million in machine revenue;
- \$9.6 million in nongaming revenue;
- \$49.6 million to \$74.5 million in extra revenue sharing costs **in Oklahoma alone**; and
- 458 tribal member jobs.

Id. at iii.

For the Fort Sill Apache Tribe, in particular, the NIGC's change in position would permit it to offer these highly popular one-touch bingo games without interference from the governments of Oklahoma and New Mexico, respectively. Oklahoma has been particularly responsive to the

pronouncements of the NIGC and has not attempted to interfere with its tribes' offerings of NIGC-approved Class II games.

The Tribe's ability to offer gaming machines with commercial appeal similar to Class III machines gives the Tribe significant leverage in any gaming compact discussions. Quite simply, if the Tribe can employ the latest in Class II gaming technology without ceding any control—or paying any revenue—to the state, the state has a considerable incentive to cooperate toward a mutually acceptable gaming compact.

Conclusion

The Tribe commends the Commission for taking a fresh look at a regulatory interpretation that had strayed from IGRA's text and that hamstrung those the statute was meant to empower. The NIGC's proposed reinterpretation realigns its position with congressional intent and expands the opportunities for tribes to compete in an ever-changing gaming market without being compelled to relinquish their sovereignty to state governments.

The Tribe looks forward to continuing to work with the Commission on this and other issues crucial to the economic viability of tribal gaming operations.

Sincerely



Jeff Haozous
Chairman
Fort Sill Apache Tribe of Oklahoma

cc: Fort Sill Apache Business Committee
Fort Sill Apache EDA Board of Trustees