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Via e-mail to reg.review@nigc.gov

Tracie Stevens, Chairperson
Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, DC 20005

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

Dear Chairperson Stevens and Commissioner Little:

I am writing on behalf of the Lytton Rancheria of California (“Tribe”) to comment on the National Indian Gaming Commission’s (“NIGC”) proposal to classify as Class II, “server based electronic bingo system games that can be played utilizing only one touch of a button (“one touch bingo”).” 78 Fed. Reg. at 37998. The Tribe strongly supports the NIGC’s proposed classification, 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.

Class II gaming is extremely important for the Tribe. The Lytton Rancheria has struggled for decades to lift itself out of the destitute conditions that resulted from the termination of its federally-recognized status and its government-to-government relationship with the United States in the 1950s. Lytton has established a successful Class II gaming operation, which generates revenue for tribal programs including education and health care. In addition, the gaming operation employs hundreds of people from the surrounding area and generates revenues for the local community for governmental and other services.

Due to the importance of Class II gaming to the Tribe, it has closely reviewed the NIGC’s proposal “to reinterpret the position regarding one touch bingo as set forth in the Metlakatla Ordinance disapproval.” 78 Fed. Reg. at 37999 (“Ordinance Letter”).¹ The Tribe agrees with the NIGC that the arguments expressed in the Ordinance Letter were incorrect as a matter of law.

¹ The former NIGC Chairman took the position in the Ordinance Letter that the use of an auto-daub feature (often referred to as “one touch” since, once activated, further action by the player during the game is not required) would convert a Class II bingo game into a Class III game. The Ordinance Letter included 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

1. The Use of One Touch Auto Daub is Consistent with the IGRA Definition of Bingo

The Ordinance Letter asserted that the use of one touch auto-daub prevents a game from qualifying as Class II bingo, even if it satisfies all of the IGRA requirements for bingo because it prevents players from “sleeping” a bingo win. According to the Ordinance Letter, the IGRA’s requirement that a game be won by the “first person covering a previously designated arrangement...” requires competition between players and there can be competition in a bingo game only if players are permitted to “sleep” a bingo. The Tribe agrees with the NIGC that the IGRA definition of bingo does not support such a requirement.

As has been held by the federal courts, the three statutory requirements of bingo set forth in the IGRA are the sole legal requirements for a game to qualify as bingo. 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). 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.² 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 one touch auto-daub feature merely assists the player with tracking and covering numbers so the player will not miss a win.³

Further, the Ordinance Letter was fundamentally wrong that the element of competition in a bingo game is defined by the ability to “sleep” a bingo. Competition lies not in the ability to “sleep,” but in the fact that each player is competing against other players 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. The use of the one touch auto-daub feature does nothing to disturb the competition between players.⁴ The feature merely assists the player with tracking and covering the numbers, much like the agents the NIGC Office of General Counsel has

“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.

² 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 covering is used. 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). In rejecting the argument that MegaMania failed to satisfy the definition of bingo because of its electronic daub feature, the court stated that “[t]here 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.” Id. To the contrary, the court emphasized that IGRA “merely require[s] that a player cover the numbers without specifying how they must be covered.” Id. Thus, the manner in which players cover numbers on their card(s) is irrelevant.

³ This is especially important when a player is playing multiple bingo cards, as is common in both Indian and non-Indian bingo halls.

⁴ As correctly noted by the NIGC, “[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.

consistently opined are permissible. See, e.g., Nat'l Indian Gaming Comm'n, National Indian Bingo Game Classification Op. (Nov. 14, 2000).

2. The IGRA Does not Limit Tribes to “Traditional Bingo”

In the Ordinance Letter, the NIGC suggested that its decision was based on how the game of bingo was “traditionally” played. However, the IGRA explicitly recognizes that the game of bingo it authorizes is not limited to the children’s paper game, and explicitly authorizes the use of technologic aids in connection therewith. Both the NIGC⁵ and the courts⁶ have confirmed that games played under the IGRA are not limited to “traditional” bingo.

It is equally clear that Congress it intended tribes to have maximum flexibility to use modern technology to conduct bingo games. S. Rep. No. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079. In this regard, it is relevant that the auto-daub feature predates passage of the IGRA.⁷ It also is relevant that this very same bingo aid feature is widely

⁵ In the preamble to its 1992 definition regulations, the NIGC stated:

[One] commenter questioned whether the definition of bingo in the IGRA limits the presentation of bingo to its classic form. The Commission does not believe Congress intended to limit bingo to its classic form. If it had, it could have spelled out further requirements such as cards having the letters “B” “I” “N” “G” “O” across the top, with numbers 1-15 in the first column, etc. In defining class II to include games similar to bingo, Congress intended to include more than “bingo in its classic form” in that class.

... Congress enumerated the games that fall within class II except for games similar to bingo. For games similar to bingo, the Commission added a definition that includes the three criteria for bingo and, in addition, requires that the game not be a house banking game as defined in the regulations. The Commission believes that Congress did not intend other criteria to be used in classifying games in class II.

Definitions under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12,382, 12,383, 12,387 (Apr. 9, 1992).

⁶ See 103 Electronic Gambling Devices, 223 F.3d at 1096. See also 162 MegaMania Gambling Devices, 231 F.3d at 723. (“While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game..”).

⁷ 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.

permitted today by the federal government on U.S. military reservations and in many other non-Indian bingo facilities.

3. The One Touch Auto Daub Feature Does 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. As explained by the NIGC: “the previous interpretation concluded ‘as it is applied to bingo, ... the “except when” language of 502.8 [] require[s] some – even minimal participation in the game by the players above and beyond the mere pressing of a button to begin the game.’ We find this interpretation in error because whether a game constitutes bingo or not cannot be reduced to the number of times a button is pushed. Rather, as set out above, we must look to whether the statutory elements of the game are met.” 78 Fed. Reg. at 38000. The NIGC’s position 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 by the statute. The NIGC’s definition of a facsimile permits a bingo game to 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. 25 C.F.R. § 502.7.⁸ The one touch auto-daub feature assists the player and the playing of the game by tracking and covering bingo numbers for the player. As such, it falls squarely within the NIGC’s definition of electronic, computer, or other technologic aids.

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

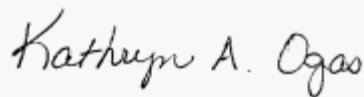
In fact, fully electromechanical linked aids to the game of bingo featuring full auto-daub were developed as early as 1956 which allowed a player to “either participate in illuminating the numbers or sit back and watch his board operate automatically” and ensured that the “player does not have to watch 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.”)

⁸ 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 explained in the Senate Report: “The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of participation, or current technology. 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.” S. Rep. No. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphases added).

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. Stated another way, the fundamental characteristics of the game are preserved, unaltered by the game’s electronic format. Thus, 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 only becomes a facsimile if the technology permits the player to play with or against a machine rather than with or against other players.⁹ The addition of a one touch auto-daub aid feature does not change the fact that players are competing against each other in a common game.

The Lytton Rancheria is pleased that the NIGC has decided to clarify that a game that is otherwise Class II bingo is not covered into a Class III game thorough the addition of a one touch auto daub feature and appreciates the opportunity to provide these comments.

Sincerely,



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of California

⁹The applicable test for distinguishing between aids and facsimiles was explained by the Tenth Circuit:

Courts reviewing the legislative history of the Gaming Act have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the “aid” must operate to broaden the participation levels of participants in a common game, see Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) **the “aid” is distinguishable from a “facsimile” where a single participant plays with or against a machine rather than with or against other players.** Cabazon Band of Mission Indians v. National Indian Gaming Comm’n, 14 F.3d 633, 636-37 (D.C. Cir.), cert. denied, 512 U.S. 1221 (1994) (Cabazon III). Courts have adopted a plain-meaning interpretation of the term “facsimile” and recognized a facsimile of a game is one that replicates the characteristics of the underlying game. See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994) (“the first dictionary definition of ‘facsimile’ is ‘an exact and detailed copy of something.’ “ (quoting Webster’s Third New Int’l Dictionary 813 (1976))), cert. denied, 516 U.S. 912 (1995); Cabazon II, 827 F. Supp. at 32 (same); Cabazon III, 14 F.3d at 636 (stating “[a]s commonly understood, facsimiles are exact copies, or duplicates.”).

162 MegaMania Gambling Devices, 231 F.3d at 724 (emphasis added).