



August 7, 2013

Daniel J. Tucker
Chairman

Ricci LaBrake
Vice Chairman

Candelita Billingsly
Secretary

LaShunna Davidson
Treasurer

Orlando Sandoval
Council Member

Jamie D. LaBrake
Council Member

Henry R. Murphy
Council Member

Tracie L. Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005

Re: Comments – One Touch Bingo Decision Reinterpretation

Dear Chairwoman Stevens:

As you are aware, Class II gaming is an important economic development tool for many tribes throughout Indian Country. But in the past, tribes were limited in the variety of Bingo games offered patrons due to the National Indian Gaming Commission's ("NIGC") erroneous interpretation of what is a Class II game. Recently, however, the NIGC proposed to reinterpret its decision, finding that "one touch" Bingo games are indeed Class II. This proposal is in line with the determination made by the Gaming Commission of the Sycuan Band of the Kumeyaay Nation after an in depth hearing on the topic.

In response to the NIGC's request for input on the proposed reinterpretation, the Sycuan Gaming Commission reviewed all testimony received and information learned from its hearing on one touch Bingo games and prepared comments for submission. The resulting submission, which is attached to this letter, includes testimony from the hearing and is supportive of the NIGC's reinterpretation of its earlier decision. The Tribal Council of the Sycuan Band of the Kumeyaay Nation is fully supportive of the Sycuan Gaming Commission's submission and, on behalf of the Tribal Council, I urge the NIGC to adopt the proposed reinterpretation.

Thank you very much for listening to Indian Country and taking an approach to Class II gaming that is supported by both the law and common sense.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Tucker", written over a horizontal line.

Sycuan Tribal Chairman

Daniel J. Tucker



Sycuan Gaming Commission

Queenette M. Pettiford
Chairwoman

Bernice Hyde
Commissioner

Charlene Worrell-Eckel
Commissioner

Shu Brown
Commissioner

Yvonne Adkins-Payne
Executive Director

August 05, 2013

Tracie L. Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005

Re: Comments – Reinterpretation of Electronic One Touch Bingo System Decision

Dear Chairwoman Stevens & Commissioners:

The following comments are submitted to the National Indian Gaming Commission (“NIGC”) by the Sycuan Band Kumeyaay Nation Gaming Commission (the “Commission”). The Commission is the governmental agency responsible for the regulation of all Class II gaming activities on Sycuan Tribal Lands.

Introduction

Through this submission the Commission intends to give historical and legal context supporting the reinterpretation of an National Indian Gaming Commission (“NIGC”) decision regarding the classification of server based electronic bingo system games that can be played utilizing only one touch of a button (“one touch bingo decision”). The reinterpretation of the one touch bingo decision recognizes the unique history and status Class II games have within the framework of the Indian Gaming Regulatory Act (“IGRA”) and the importance these games hold for all of tribal government gaming. At the time IGRA became law, the game commonly known as Bingo had been played on Indian lands for many years as a means of economic development. Class II gaming has rightly been called the “corner stone” of all Indian gaming.

In June 2009, the Commission held a fact finding hearing that received testimony on the history of Tribal bingo, Tribal regulation of Class II gaming, the history of the IGRA, economic development spurred by Class II gaming and a survey of the legal history of Class II gaming since IGRA (“Sycuan Hearing”). The Commission acknowledges the significant insights gained from the Sycuan Hearing and submits crucial parts of the hearing record made before the Commission. The Commission specifically incorporates the referenced testimony taken at the Sycuan Hearing into this submission and it specifically wants the referenced testimony to be part of the NIGC record for the reinterpretation of the one touch bingo decision. References to the testimony are made throughout this submission.

Background

On February 25, 1987, the U.S. Supreme Court issued its decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (*Cabazon*). *Cabazon* is the Supreme Court precedent that recognized the sovereign authority of Indian tribes to offer bingo and other forms of gaming on Indian land free of state regulation.

The *Cabazon* case involved Tribal high stakes bingo games and card rooms open to the general public. These games were conducted pursuant to tribal ordinances that had been approved by the Secretary of the Interior. The U.S. Supreme Court determined that California's statutes regulating bingo and card games were not criminal/prohibitory in nature, but rather, these statutes were civil/regulatory and, therefore, did not apply to activities on Indian Reservations. Further, the U.S. Supreme Court found that the application of state and county ordinances as to the gaming activities on the Indian Reservations had been preempted as a matter of Federal law.

The U.S. Supreme Court's decision in *Cabazon* stands for the principle that Tribes had the authority to conduct gaming activities on reservations unfettered by any state or county regulation, unless such games were criminally prohibited under state law. The decision recognized the important Federal principles of tribal self-governance and self-determination and found that these Federal principles preempted the application of California civil statutes.

At the same time that the *Cabazon* case was litigated, there was widespread growth of Indian bingo halls in many parts of the country, as there had been a number of favorable lower court decisions prior to *Cabazon*. The growth of Indian gaming increasingly came under congressional scrutiny during the 99th and 100th Congresses and was the subject of numerous congressional hearings. Following the U.S. Supreme Court's decision in *Cabazon*, Congress enacted the IGRA in 1988 to provide a comprehensive federal regulatory scheme for Indian gaming.

The IGRA specifically designates Tribal governments as the primary regulator of Class II games. Class II gaming serves as an essential touchstone for the protection and implementation of tribal sovereignty. Congress concluded that Tribes are to have maximum flexibility in determining what constitutes a Class II game. The Federal Courts have consistently supported these propositions. Of particular importance is the 9th Circuit decision in the *Megamania* case [*U.S.A. v. 162 Megamania*

Gaming Devices, 231 F.3d 713 (2000)], which held that the three statutory requirements in 25 U.S.C. §2703 are the sole legal requirements for bingo.

Economic Development and Sovereignty

The most important finding embodied in IGRA is that “a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.” To date, Indian gaming has been the most successful economic development tool available to Tribes. It continues to be the economic base that supports Tribal sovereignty and stability at all levels of Indian communities. At the Sycuan Hearing, Chief Tom Gamble of the Miami Tribe of Oklahoma noted that Class II gaming has proven to be the first and only economic development tool that has ever worked for the Tribes. Tribes and the surrounding areas have experienced an economic boom from the revenues generated by Class II gaming¹. Chief Gamble’s view was strongly supported by a panel of local officials from northeast Oklahoma that testified at a hearing held by the House Resources Committee in Miami Oklahoma in 2008.

The enactment of Tribal rules and regulations are a necessary step in the protection of sovereignty. The Commission believes that the adoption of rules by a tribal gaming commission pursuant to an approved gaming ordinance containing the process and requirements for the approval of Class II bingo games played with electronic equipment is a fundamental exercise of tribal governmental authority.

At the Sycuan Hearing, Dean Katherine Rand of the University of North Dakota² observed that:

“Indian gaming, of course, is public gaming...it is conducted by tribal governments and it is driven by the public interest, not by profits. Tribes are uniquely obligated to regulate gaming in a way that best serves the public interest. The second goal of tribal regulation should be to facilitate tribal institution building. One of the largely unrecognized successes of Indian gaming, at least outside of Indian Country, is the role that it has played in tribal government institution building. Class II gaming provides an avenue for tribes to raise revenue and to underwrite or extend tribal government functionality and responsiveness, even when Class III gaming is unavailable or is constrained by state law and state politics.”

The role of Class II gaming is becoming increasingly important, particularly for tribes who have been unable to secure an effective Class III compact despite its best efforts. There are many instances of Class III compacts expiring, being renegotiated or otherwise potentially being modified where Class II games are the only option many tribes have.

Dean Rand at the Sycuan Hearing articulates the position Tribes find themselves in when a compact is not an option and choose to use Class II:³

¹ The testimony for the Tribal Leader Panel is attached in Appendix A

² The testimony for the History of the Indian Gaming Regulatory Act is attached in Appendix B

“First, as the [Sycuan] Commission is aware, tribes may operate Class II games in states that do not allow, or refuse to negotiate, casino-style gaming. Today, nearly every state permits bingo, opening the door to Class II gaming in those states. Even in states that allow casino-style gaming, a tribe may use Class II gaming to increase, for example, the number of gaming machines allowed under a Class III compact. Second, because no tribal-state compact is required, Class II gaming allows tribes to make decisions free of state politics about effective regulation, appropriate use of revenue, appropriate economic development and growth, and other exercises of sovereign authority, including the preservation of cultural traditions or tribal norms.”

The economic development derived from Class II goes well beyond the revenue produced. Dean Rand stated that,⁴

“Class II gaming has become increasingly important and increasingly controversial because it has inspired technological enhancement and innovation that greatly enhances the profitability of Class II gaming and, therefore, its impact on tribal economic development. Thus, Congress included IGRA’s Class II ‘technological aid’ provision to ensure that tribes have that maximum flexibility to utilize bingo for tribal economic development.”

Statutory Framework – IGRA

A review of IGRA was completed with knowledge that the NIGC until 2009 had actively pursued a policy designed to limit the play of Class II bingo.⁵ Attorney Judy Shapiro noted at the Sycuan Hearing:⁶

“Through a series of advisory opinions; the Office of General Counsel said, you can have this game, Game A, Game B, Game C, as a Class II game, but if and only if, the following limitations are observed: the number of touches, the size of the card, the configuration of the card, certain delays, and certain specifications about how many releases.... All of these distinctions are not part of the statute. They are arbitrary and capricious conditions to what the statute provides.”

At the Sycuan Hearing a panel of experts in the history of bingo strongly agreed that efforts to define bingo as a game with little flexibility or limited options for play is contrary to its history (testimony of Gordon Sjodin at the Sycuan Hearing⁷). In general, the game of bingo in the 1970’s was played with hard cards and a verbal ball call, though electronic aids to bingo date back to the

³ id

⁴ id

⁵ The Gaming Commission understands that the NIGC has since dropped its efforts to redefine Class II bingo through Classification regulations or changes to the facsimile regulation and it has been advised by tribal attorneys and consultants that is doubtful, under the Obama administration, that such efforts will be renewed; however, there remains an ever-present possibility that future NIGC leaders could renew these efforts

⁶ The testimony for the History of Class II Litigation is attached in Appendix C

⁷ The entire testimony for the History of Bingo Panel is attached in Appendix D

1950s. By the early 1990s, the demand for fun games played at higher speeds for larger prizes helped create bingo played entirely in video form, like the Megamania games and bingo card minders. Class II bingo played today stands on the shoulders of those technological innovations. Bingo is a dynamic game that since its inception has been evolving. In order for bingo to remain viable, it must meet the demands, tastes, and preferences of consumers or risk becoming static and unprofitable (testimony of Eric Casey at the Sycuan Hearing⁸).

Dean Rand and Frank Ducheneaux testified at the Sycuan Hearing that:⁹

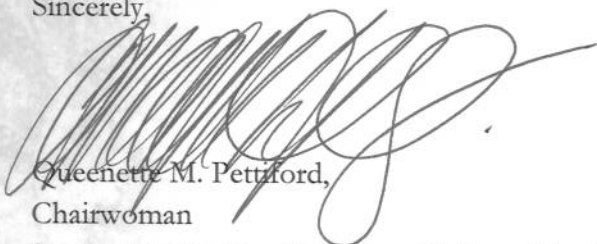
“The report [Senate Report] states that ‘Consistent with tribal rights that were recognized and affirmed in the Cabazon decision, the Committee intends, and this is in the definition section, ‘that the tribes have maximum flexibility,’ as Frank indicated, to utilize games such as bingo for tribal economic development. The Committee specifically rejects an inference that tribes should restrict Class II games to existing games 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.”

Conclusion:

The Commission recognizes the importance of Class II bingo games played with electronic equipment as an exercise of sovereign governmental power as the primary regulator of all classes of gaming within their jurisdiction. The Commission acknowledges that Class II gaming is rightly called the “corner stone” of all Indian gaming and is vital to the continued self-determination and economic self-sufficiency of all tribal governmental gaming. At the time IGRA became law, the game commonly known as bingo had been played on Indian lands for decades as a means of economic development.

The reinterpretation of the one touch bingo decision by the NIGC underscores the continuing importance of Class II as an essential vehicle for tribal self-governance and self-determination. The Commission endorses the proposed reinterpretation of the one touch bingo decision and urges the NIGC to adopt this reinterpretation.

Sincerely,



Queenette M. Pettiford,
Chairwoman

Sycuan Band of the Kumeyaay Nation - Gaming Commission

⁸ id

⁹ Appendix B