Gaming Commission

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Tracie Stevens, Chairperson
Daniel Little, Associate Commissioner
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

Dear Chairperson Stevens and Commissioner Little:

Below please find comments on behalf of the Sault Ste. Marie Tribe of Chippewa Indians Gaming Commission on the National Indian Gaming Commission's 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')." 78 Fed. Reg. at 37998. As detailed below, the Sault Tribe Gaming Commission strongly supports the N.I.G.C.'s proposal, which is fully consistent with the text of the Indian Gaming Regulatory Act ("IGRA"), the legislative history, the N.I.G.C.'s regulations and applicable case law.

The Sault Tribe Gaming Commission agrees with the N.I.G.C.'s proposal "to reinterpret the position regarding one touch bingo as set forth in the Metlakatla Ordinance disapproval."78 Fed. Reg. at 37999. 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.

Id. 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.

The former N.I.G.C. Chairman took the position in the Metlakatla ordinance disapproval ("Ordinance Letter") that the use of the aid feature described above 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 "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.

As detailed below, the Sault Tribe Gaming Commission agrees with the N.I.G.C. that the two arguments expressed in the Ordinance Letter were incorrect as a matter of law. Contrary to the views set forth in that earlier letter, 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 One Touch Auto-Daub is Consistent with the IGRA Definition of Bingo.

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 (10thCir. 2000); United States v. 103 Elec. Gambling Devices, 223 F.3d 1091 (9th Cir. 2000). Nevertheless, 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 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 Sault Tribe Gaming Commission agrees with the N.I.G.C. that the IGRA definition of bingo does not support such a requirement.

In fact, 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 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.[1]

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[1] 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

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.[2]

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. Rather, the competition lies not 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. As correctly noted by the N.I.G.C., "[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.

In other words, the use of the one touch auto-daub feature does nothing to disturb the competition between players. The aid feature can only be used in the context of an actual bingo game where 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, much like the agents the N.I.G.C. Office of General Counsel has consistently opined are permissible. See, e.g., Nat'l Indian Gaming Comm'n, National Indian Bingo Game Classification Op. (Nov. 14, 2000), available athttp://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/bingo/na

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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.

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

tionalindianbingo111400.pdf).[3] For this reason, the Sault Tribe Gaming Commission agrees with the N.I.G.C. 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." 78 Fed. Reg. at 37999.

The Ordinance Letter 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, and explicitly authorized the use of technologic aids in connection therewith. Accordingly, it is the statutory definition of bingo and not tradition that controls whether a game meets the definition of Class II bingo. As explained by the Ninth Circuit:

> 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?
>
> Further, IGRA includes within its definition of bingo "pull-tabs, . . . punch boards, tip jars, [and] instant bingo . . . [if played in the same location as the game commonly known as bingo]," 25 U.S.C. § 2703(7)(A)(i), none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. . . . Instant bingo, for example, is as the Fifth Circuit explained in Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. *See id.* at 192-93.
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> Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C.

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[3] Further, the one touch aid feature requires the player to take an affirmative action to begin play and cannot operate unless at least two players have purchased bingo cards for that game.

> § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

103 Electronic Gambling Devices, 223 F.3d at 1096. Seealso162 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, as previously discussed.").[4]

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. S. Rep. No. 100-446, at 9 (1988), reprinted in1988 U.S.C.C.A.N. 3071, 3079. In this regard, it is relevant that this type of bingo aid feature predates passage of the IGRA in 1988.[5]

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[1] In the preamble to its 1992 definition regulations, the NIGC stated:

> [One] commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.
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> [Another] 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 (April 9, 1992).

It also is relevant that this very same bingo aid feature is widely permitted today by the federal government on U.S. military reservations and in many other non-Indian bingo facilities. The N.I.G.C.'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 N.I.G.C. correctly noted, it "should give consideration to an interpretation of bingo that embraces rather than stifles technological advancements in gaming." 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. As explained by the N.I.G.C.: "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 N.I.G.C.'s position is fully consistent with the statute and regulations.

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[5] 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, 1072). 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.")

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 N.I.G.C. 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.

25 C.F.R. § 502.8 (emphasis added). 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.[6]

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. Stated another way, the fundamental characteristics of the game are preserved, unaltered by the game's electronic format. As explained by the N.I.G.C.:

> 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. 41,166, 41,171 (June 17, 2002) (emphasis added).

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[6] 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 N.I.G.C.'s definition of electronic, computer, or other technologic aids found at 25 C.F.R. § 502.7.

The N.I.G.C.'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. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphases added).

Thus, as now recognized by the N.I.G.C., 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. § 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."[7]

The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. See103 Electronic Gambling Devices, 223 F.3d at 1100; 162 MegaMania Gambling Devices, 231 F.3d at 724.[8] 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.

Thus, no additional participation is required to prevent the game from becoming a facsimile. Instead, the N.I.G.C. 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." 25 C.F.R. § 502.8 (emphasis added). As long as there are players playing against each other, the game is not a facsimile.

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[7] 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.

[8] The 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, seeSpokane 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. SeeSycuan 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).

Conclusion

The Sault Tribe Gaming Commission is pleased that the N.I.G.C. 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.

Sincerely,

Kenneth J. Ermatinger

Kenneth J. Ermatinger
Executive Director