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VIA E-MAIL (reg.review@nigc.gov) ONLY

National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

Re: COMMENTS OF THE CAHUILLA BAND OF INDIANS ON THE NIGC'S PROPOSAL TO REINTERPRET THE STATUS OF "ONE-TOUCH" ELECTRONIC, COMPUTER OR OTHER TECHNOLOGIC AIDS TO CLASS II BINGO GAMES

Dear Sir or Madam:

Forman & Associates, Attorneys at Law, is legal counsel to the Cahuilla Band of Indians ("Tribe"). Our client has requested that we submit the Tribe's comments on the NIGC's proposal to reinterpret the status of "One-Touch" aids to Class II Bingo games on the Tribe's behalf.

INTRODUCTION

In a June 4, 2008 letter from then-NIGC Chairman Phil Hogen to the Metlakatla Indian Community disapproving an amendment to that Tribe's gaming ordinance that would have permitted use of an "auto-daub" or "one-touch" feature in an electronically aided bingo game, former NIGC Chairman Phil Hogen took the position that in order to be considered a permissible electronic, computer or other technologic aid to Class II bingo, the device must require a player to press a button or a touch-screen at least twice during a game, and that the NIGC would regard an aid that utilized a "one-touch" or "auto-daub" feature would be considered to be a Class III gaming device for which a compact would be required.

The NIGC has announced its intention to reinterpret Chairman Hogen's 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")[,]" and has solicited comments on its proposed reinterpretation. For the reasons set forth below, the Cahuilla Band of Indians hereby **supports** the NIGC's proposed reinterpretation of former Chairman Hogen's erroneous interpretation of what IGRA defines as "bingo" or "games similar to bingo."

COMMENTS

I. REINTERPRETATION OF THE CONCLUSIONS EXPRESSED BY CHAIRMAN HOGEN IN HIS JUNE 4, 2008 LETTER IS APPROPRIATE BECAUSE THOSE CONCLUSIONS WERE IN EXCESS OF CHAIRMAN HOGEN'S STATUTORY AUTHORITY, ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW.

Under IGRA, Indian tribes are the primary regulators of Class II gaming. 25 U.S.C. § 2710(a)-(b). Thus, oversight by the NIGC is limited, and decisions on the proper classification of aids to Class II bingo games are, in the first instance, left to tribal gaming agencies. In this context, IGRA significantly restricts the grounds on which the Chairman may disapprove a tribal gaming ordinance or amendment.

Specifically, 25 U.S.C. § 2710(b)(2) provides that "[t]he Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of Class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that [certain specific matters are addressed[1]]." Further, 25 U.S.C. § 2710(e) provides that, "... by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section." The NIGC's implementing regulations, 25 C.F.R. Part 522, contain the same limitation.

The listed requirements found in 25 U.S.C. § 2710(b) and the NIGC's implementing regulations at 25 C.F.R. Part 522 do not include game classification issues or definitions of permitted electronic aids to Class II games. Consequently, Chairman Hogen exceeded his statutory authority in disapproving an amendment to the Metlakatla Indian Community's Gaming Ordinance on grounds other than those permitted by IGRA or the NIGC's own regulations. *See, Hartman v. Kickapoo Tribe Gaming Commission* (D. Kan. 2001) 176 F. Supp. 2d 1168, 1179-80 *affd*, 319 F.3d 1230 (10th Cir. 2003):

> the court rejects plaintiff's contention that every ordinance must be approved or disapproved by the NIGC. An amendment to an ordinance does not require NIGC approval if it addressed issues not raised in the IGRA or the NIGC's regulations . . . The only provisions required for such ordinances are those listed in 25 U.S.C. § 2710(b)(2), as incorporated through 25 U.S.C. § 2710(d)(1)(A) and in 25 C.F.R. Part 522.

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[1] These matters are limited to provisions addressing the Tribe's sole proprietary interest in the gaming operation, use of net gaming revenues, annual independent audits, protection of the environment and public health and safety, and licensing and background investigations. 25 U.S.C. § 2710(b)(2).

Accordingly, even if there were no other reasons to reinterpret Chairman Hogen's decision, his consideration of factors unauthorized by – and contrary to – express statutory language warrants reinterpretation of his decision.

II. IGRA DOES NOT REQUIRE THAT TECHNOLOGIC AIDS TO CLASS II BINGO REQUIRE ANY SPECIFIC MINIMUM NUMBER OF "TOUCHES" OR ANY MINIMUM TIME FOR GAME PLAY, AS LONG AS THE GAME BEING PLAYED MEETS THE STATUTORY DEFINITION OF "BINGO" OR A "GAME SIMILAR TO BINGO."

IGRA establishes the parameters within which gaming lawfully may take place on Indian lands. A tribe may engage in Class II gaming on its lands without a tribal-state compact if the State permits such gaming for any purpose and the tribal governing body adopts an ordinance permitting such gaming, which ordinance is approved by the Chairman of the NIGC. 25 U.S.C. § 2710(b).

As defined in IGRA, 25 U.S.C. Sec. 2703(7)(A),

> The term "Class II gaming" means –
>
> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and . . .
>
> (B) The term "Class II gaming" does not include –
>
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7)(A) - (B).

If a game of chance (that is not a Class I game) is not a Class II game, it is defined as Class III and may only be played if and as permitted by an approved tribal-state compact or a set of Secretarial procedures that is in effect. 25 U.S.C. §§ 2703(8), 2710(d).

In addition to the statutory definition, the NIGC has promulgated regulations that give further guidance in determining what constitutes Class II gaming. These regulations, found at 25 C.F.R. §502.3, track IGRA's statutory definition and define Class II gaming as:

> (a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:
>
> > (1) Play for prizes with cards bearing numbers or other designations;
> >
> > (2) Cover numbers or designations when object, similarly numbered or designated, are drawn or electronically determined; and
> >
> > (3) Win the game by being the first person to cover a designated pattern on such cards;
>
> (b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo.

25 C.F.R. § 502.3.

The NIGC revised its definitions of technologic aids, facsimiles and other games similar to bingo in a final rule published on June 17, 2002. 67 Fed. Reg. 41,166 (June 17, 2002). The regulations include the following definitions:

> (a) *Electronic, computer or other technologic aid* means any machine or device that:
>
> > (1) Assists a player or the playing of a game;
> >
> > (2) Is not an electronic or electromechanical facsimile; and

(3) Is operated in accordance with applicable Federal communications law.

(b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

(1) Broaden the participation levels in a common game;

(2) Facilitate communication between and among gaming sites; or

(3) Allow a player to play a game with or against other players rather than with or against a machine.

(c) Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.

25 C.F.R. § 502.7.

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.

Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC § 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

25 C.F.R. § 502.9.

These regulations were adopted to replace prior, more restrictive definitions, in large measure to bring the Commission's rules into line with federal court decisions that interpreted IGRA adversely to the NIGC's stated position. As stated by the NIGC in the preamble to its

revised definition, "The uncomfortable result is that the Commission cannot faithfully apply its own [previous] regulations and reach decisions that conform with the decisions of the courts." 67 Fed. Reg. 41,166, 41,168 (June 17, 2002).

IGRA expressly permits the game of bingo to be played with "electronic, computer, or other technologic aids." 25 U.S.C. § 2703(7)(A)(i), and the NIGC has promulgated regulations that broadly define such aids to include electronic player stations, electronic cards and linked bingo systems. 25 C.F.R. § 502.7. In addition, the NIGC's regulations expressly state that permitted aids include "any machine or device that: (I) assists a player or the playing of a game . . ." 25 C.F.R. § 502.7(a)(1).

An electronic, computer or other technologic aid that assists the player and the playing of the game by tracking and covering bingo numbers for the player falls squarely within the Commission's own definition of electronic, computer, or other technologic aids found at 25 C.F.R. § 502.7. Significantly, Chairman Hogen did not appear to dispute that the use of an auto-daub or "one-touch" feature falls within the NIGC's own broad definition of "aid." Rather, Chairman Hogen appeared to contend that (1) the auto-daub feature is inconsistent with the statutory definition of bingo or game similar to bingo; and (2) the use of this feature as part of a linked electronic bingo system makes it a Class III "facsimile." As detailed below, both of these contentions were – and are – wrong.

(a) A One-Touch Aid is Consistent with IGRA Definition of Bingo.

According to Chairman Hogen's letter, the use of an auto-daub feature prevents a game from qualifying as bingo, even if it satisfies IGRA's requirements for bingo in all other respects. Under the guise of purporting to interpret IGRA, Chairman Hogen impermissibly elevated his own opinion that "sleeping" is essential to "traditional" bingo play to a level equal to what the federal courts have held are the only three statutory components in IGRA's definition of bingo.

According to Chairman Hogen:

> The possibility of sleeping a bingo, then, is an embodiment of the competition in the game and of the language in IGRA's definition of bingo that the winner is the "first person to cover." A small mistake or oversight can cost one player the game and enable another, more attentive player to win. Put somewhat less formally, competition is inherent in the game of bingo as defined in IGRA because "if you snooze, you lose."

He went on to elaborate:

> Though I understand that the game requires multiple players, I do not see how the players are competing against one another to be

> the first to cover a previously designated winning pattern. The game as described eliminates the element of competition that is a statutory requirement for bingo. The game starts – and ends – with the push of a button. It is not possible to sleep a bingo or fail to claim a prize.

Stated otherwise, Chairman Hogen thus took the position that the "first person to cover" requirement in 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. However, nothing about the phrase "first person to cover" or any other aspect of IGRA definition of bingo even suggests – much less compels – the conclusion 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 Electronic Gambling Devices* (N.D. Cal. Nov. 23, 1998) No. 98-1984, 1998 WL 827586, at *6, *aff'd* 223 F.3d 1091 (9th Cir. 2000). In dismissing 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.[2]

As has been held by the courts, IGRA's three statutory elements of bingo are the *only* game elements legally required for a tribally-operated game to qualify as bingo. *United States v.*

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[2] Other than his "view" and a 2003 opinion from his own Office of General Counsel, Chairman Hogen neither offered nor had legal authority to support his contention that IGRA requires the ability to sleep a bingo. However, as the NIGC itself has asserted, and the courts have found, Office of General Counsel opinions are not final agency action, and thus lack any force of law. *See, Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission* (10th Cir. 2003) 327 F.3d 1019, 1043:

> [An 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 this case, the Office of General Counsel opinion cited by Chairman Hogen cited to no authority in making its argument that IGRA's language implies a specific kind of either physical or electronic participation. Given the brevity of its analysis and the fact that it conflicts with relevant court precedent and previous NIGC opinion letters (*e.g.,* November 14, 2000 Advisory Opinion that using agents to daub cards constitutes a permissible aid to Class II bingo; July 26, 1995 Advisory Opinion that agents may be used to daub cards in MegaBingo games), the previous assertions by the Office of General Counsel should not be given any weight. Further, the Chairman improperly failed to apply the Indian canon of construction in his interpretation of IGRA and the Commission's own regulations. *See, e.g., Choate v. Trapp*, 224 U.S. 665 (1912).

162 MegaMania Gambling Devices (10th Cir. 2000) 231 F.3d 713; *United States v. 103 Electronic Gambling Devices* (9th Cir. 2000) 223 F.3d 1091. Neither Chairman Hogen nor the NIGC itself lawfully may add requirements to the three criteria enacted by Congress and deemed sufficient by federal courts to constitute bingo as permitted by IGRA.

Whether or not an auto-daub aid is utilized, the game aided by electronic, computer or other technologic equipment is 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 bingo numbers drawn/determined for that game. Nothing about the one-touch (auto-daub) feature changes the quantity of bingo numbers necessary to be the first player to have or cover the winning bingo pattern. Even with one-touch, the "cover" function is performed during the game's natural progression only after each release of balls, and thus IGRA's sequencing requirement continues to be satisfied. One-touch cannot operate independent of the player, and it does not and cannot affect 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 feature merely aids the player with tracking and covering numbers so the player will not miss a win.

Chairman Hogen's belief that the essential element of competition in a bingo game is the ability to sleep a bingo simply lacked any factual or legal basis. Rather, as defined by IGRA, the competition lies not in the ability to sleep a winning bingo pattern, 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.

When a bingo game played with one-touch electronic, computer or other technologic aid is compared with the three statutory elements of bingo set forth in IGRA, there simply is no basis for the conclusion that the game is not bingo and that the equipment may not be used to aid in the play of the game.

First, the game is played for prizes, including monetary prizes, with cards bearing numbers or other designations. The one-touch feature does not change the fact that the game itself is played for money with cards – albeit perfectly permissible electronic cards – bearing numbers or other designations.

Second, the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined. Covering takes place when the numbers or other designations are electronically determined and electronically displayed to the player. IGRA does not suggest, much less require, that a player must be able to sleep a bingo in order for a game to come within the statutory definition of bingo.

The player performs the "cover" function through the use of an electronic aid: the equipment through which the player participates in the game. Although the player is assisted, the covering action is still that of the player, who initiates the one-touch feature by pushing a button on the equipment at the beginning of the bingo game. In other words, the equipment is acting on the player's behalf, not independent of the player. As the NIGC's Office of General Counsel previously has acknowledged, IGRA does not prevent players from using an agent to cover their cards, the actions of the agent being deemed to be those of the player/principal. In short, the use of the auto-daub feature does not mean, as asserted by Chairman Hogen, that it is "the machine, and not the player, that is playing the game."[3]

Third, the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards. The equipment at issue merely assists the player with tracking and covering the bingo numbers. It is in no way inconsistent with the requirement that the game be won by the first player to cover the winning pattern. The game is won by the first person to cover the pre-designated winning pattern, without regard to use of the auto-daub feature.

Chairman Hogen's letter suggested that his understanding of the limits on what constitutes bingo was based on how the game was "traditionally" played. However, IGRA explicitly recognizes that the game of bingo authorized therein is not limited to the children's paper game, and it explicitly authorizes the use of technologic aids in connection therewith. Accordingly, the statutory definition of bingo – not Chairman Hogen's concept of "tradition" – is what determines whether a game meets IGRA's 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.
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> 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

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[3] It is noteworthy that "[r]adically inconsistent interpretations of a statute by an agency, relied upon in good faith by the public, do not command the usual measure of deference to agency action." *Pfaff v. U.S. Dep't of Hous. and Urban Dev.* (9th Cir. 1996) 88 F.3d 739, 748 (citing *Cardoza-Fonseca*, 480 U.S. at 446, n.30 ("[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view."); *see also, e.g., Natural Res. Def. Council v. U.S. EPA* (9th Cir. 2008) 526 F.3d 591 (vacating EPA rule because it was inconsistent and conflicted with EPA's prior interpretation of the statute).

> 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. § 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. *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, as previously discussed.").[4]

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[4] 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 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

While Congress was clear that tribal bingo is not to be 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 in 1988 U.S.C.C.A.N. 3071, 3079. In this regard, it is relevant that the type of bingo aid feature described in the Amendment predates passage of IGRA in 1988.[5] Moreover, one-touch electronic bingo systems had been used for many years before June, 2008.

The fact that the use of one-touch electronic/computerized bingo systems is expressly permitted by the federal government (in non-tribal contexts) and many states also refutes Chairman Hogen's contention that the use of an auto-daub feature converts an otherwise perfectly acceptable technologic aid to a Class II bingo game into a Class III electronic facsimile or gaming device. Submitted herewith as Exhibit 1 is a copy of a June 24, 2008 letter from Gaming Laboratories International ("GLI") to Hobbs Straus Dean & Walker, LLP, reporting on non-tribal jurisdictions in the United States that currently allow the use of auto-daub aids to the game of bingo.

Chairman Hogen's interpretation of IGRA as precluding tribes from using a technologic aid to bingo that commonly is authorized for use in non-tribal bingo games conducted on military bases and under state or local jurisdiction would be contrary to Congress' intent that

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> believes that Congress did not intend other criteria to be used in classifying games in class II

57 Fed. Reg. at 12,382, 12,387 (April 9, 1992).

[5] For example, an auto-daub aid feature for bingo was patented in 1986. As described in U.S. Patent 4,624,462:

> 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. Such aids 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, 8/28/56. Such auto-daub features increased speed and enjoyment of play and had the added benefit of ensuring honest and accurate play. Moreover, linked electronic gaming systems were well-known before 1988. *See, e.g., Video Consultants of Nebraska v. Douglas* (Neb. 1985) 367 N.W.2d 697, 699 ("Each location consists of one or more lottery game terminals connected to an agent terminal.")

tribes have "maximum flexibility" to use "modern" technology to play bingo games, and in its statutory authorization for tribes to use such aids. As such, it plainly was incorrect, and the NIGC should correct that error.

Finally, Chairman Hogen argued that the use of the auto-daub feature prevents the game from being a "game similar to bingo." The Cahuilla Band of Indians obviously disagrees with this assertion. However, that issue was not before Chairman Hogen, and thus his opinion on the question should be rejected as neither persuasive nor dispositive.

III. THE ONE-TOUCH FEATURE DOES NOT TRANSFORM THE GAME OF BINGO INTO A CLASS III FACSIMILE.

According to Chairman Hogen, "[a] wholly electronic, fully automated implementation of the game described by the [Metlakatla] Tribe's amended ordinance is a Class III 'facsimile of any game of chance.'" However, he could have reached this conclusion only by misreading the NIGC's own regulations and misunderstanding that Tribe's Amendment to its Gaming Ordinance.

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 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. Thus, the NIGC's own regulations allow a bingo game to be played in a fully "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.

Chairman Hogen's June 4, 2008 letter took issue with the NIGC's own regulation and asserted that it could not permit a facsimile to be used in the play of a Class II game unless it requires some "participation in the game by the players above and beyond the mere pressing of a button to begin the game."[6] Chairman Hogen apparently believed that unless some undefined

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[6] "The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates." *Sameena Inc. v. United States Air Force* (9th Cir. 1998) 147 F.3d 1148, 1153; *see also, e.g., Portland General Elec. Co. v. Bonneville Power Admin.* (9th Cir. 2007) 501 F.3d 1009, 1035-36 (holding that the Bonneville Power Administration is bound by its own regulations until it adopts new ones, FERC or a court disapproves of its existing regulations, or Congress changes the law).

additional participation is required, the NIGC's own definition would permit "the use of gaming equipment that wholly incorporates and replicates all of the elements and features of a game of chance."

Setting aside, for the moment, the impropriety of Chairman Hogen's disregard for the NIGC's own regulation, the flaw in his position is 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 in a single, self-contained unit. 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.[7] 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, and thus the fundamental characteristic that makes the game bingo is preserved, unaltered by the use of an electronic format. As explained by the NIGC:

> 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).[8]

The NIGC's existing definition of facsimile is consistent with IGRA's legislative history and the case law that since has interpreted the statute. The legislative history indicates that Congress did not intend the facsimile prohibition to restrict the use of electronics to play games that meet IGRA's 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:

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[7] In contrast, this likely would not be the case if the other players in the game were computer generated virtual players. Similarly, a bingo game that permitted only a single player to play against the ball draw might be said to be a facsimile.

[8] Contrary to the NIGC's clear direction in a formal rulemaking that a manual component to the game of bingo is not necessary, Chairman Hogen's letter would have added an additional manual component to the game by grafting a "sleep" requirement onto IGRA's definition of bingo. The letter cited to no action by Congress or the courts suggesting that such a radical change is either necessary or authorized. Significantly, neither the Justice Department nor the NIGC has brought an enforcement action to challenge the Class II status of a game in the years since the NIGC revised its definition regulations in 2002.

> 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.

Contrary to Chairman Hogen's assertion, therefore, 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."[9]

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. *See, 103 Electronic Gambling*

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[9] A good example of a facsimile of a game of chance is video poker, as commonly 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. Unlike a true poker game, in video poker the game takes place solely within the device, and the player is playing against the machine. Similarly, a wholly electronic bingo game that permitted only a single player to play against the ball draw would be a facsimile.

Devices, 223 F.3d at 1100; *162 MegaMania Gambling Devices*, 231 F.3d at 724.[10] The auto-daub aid feature does not change this.

Thus, Chairman Hogen was wrong when he asserted that some additional participation is required to prevent the game from becoming a facsimile of bingo. Instead, the NIGC's actual 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. As long as there are players playing against each other, the game is not a facsimile, it is bingo, a Class II game.

However, even assuming that Chairman Hogen was correct that some additional ("even minimal") participation in the game is required, the auto-daub feature does not lessen participation in the game. Rather, it merely aids in the tracking and covering of bingo numbers for a player participating in an electronically linked bingo game. It does nothing to lessen the competition among players to be the first to obtain a winning pattern, nor does it do anything to lessen other aspects of player participation such as the selection of a bingo card or cards by the player, deciding the number of cards to play, deciding how much to bet in a particular game and collecting any winnings. For these reasons, the use of the auto-daub feature is consistent even with Chairman Hogen's overly restrictive test.

Chairman Hogen's position, that the plain language of the agency's own regulatory definition of facsimile is wrong, was and is unsupportable as a matter of law. Although it is true that an agency's interpretation of its own regulations is entitled to some deference, that is only

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[10] 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, *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 Svcuan 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.] 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.

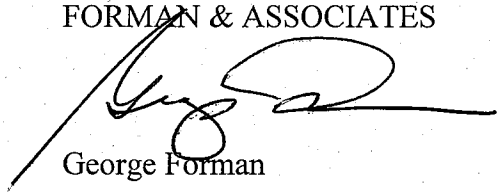
true when that interpretation is not "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins* (1997) 519 U.S. 452, 461 (citation omitted). Moreover, when the current interpretation runs counter to the intent at the time of regulation's promulgation, *Auer* deference is unwarranted. *Gonzalez v. Oregon* (2006) 546 U.S. 243, 258 (citing *Thomas Jefferson Univ. v. Shalala* (1999) 512 U.S. 504, 512). *Auer* deference is only warranted when the regulation itself is ambiguous and open to interpretation. As the Supreme Court has made clear, when the language of a regulation is clear, an agency cannot effectively amend the regulation under the guise of "interpretation." *See, Christensen v. Harris County* (2000) 529 U.S. 576, 588 (holding that "[t]o defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.").[11] As such, Chairman Hogen's disregard of the plain language of the NIGC's current definition under the guise of interpretation should not be given any deference.

CONCLUSION

For the reasons set forth above, the Cahuilla Band of Indians urges the NIGC to proceed with its reinterpretation of former Chairman Hogen's decision exactly as proposed.

Respectfully Submitted,

FORMAN & ASSOCIATES



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[11] We note as well that although it is true that agencies may choose to make new law through adjudication rather than rulemaking, reliance on adjudication may amount to an abuse of discretion in some situations. *See Pfaff*, 88 F.3d at 748 (citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974)). As the Ninth Circuit made clear, [s]uch a situation may present itself where the new standard, adopted by adjudication, departs radically from the agency's previous interpretation of the law, where the public has relied substantially and in good faith on the previous interpretation, where fines or damages are involved, and where the new standard is very broad and general in scope and prospective in application." *Id.*