



Miami Tribe of Oklahoma

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The Honorable Tracie L. Stevens, Chairwoman
The Honorable Daniel J. Little, Associate Commissioner
National Indian Gaming Commission
1441 L. Street N.W., Suite 9100
Washington D.C. 20005

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

**RE: Comments on “one touch bingo” system classification. 78 Fed Reg. 37998
(June 25, 2013)**

Dear Chairwoman Stevens and Commissioner Little:

Thank you for the opportunity to provide comments on the Commission’s proposed reinterpretation of the classification of certain server-based electronic bingo games commonly referred to as “one touch bingo”. 78 Fed. Reg. 37998. We applaud the Commission’s willingness to address this important issue and we strongly support the Commission’s proposed reinterpretation.

We also applaud the Commission’s approach; its publication of the proposed interpretation and its use of the consultation process to develop a full and complete administrative record. The conclusions ultimately reached by the Commission as a result of this process will, for the first time, have general application to all gaming operations in Indian Country.

While the Commission characterizes this process as a “reinterpretation” of the one touch bingo issue, we submit that this constitutes the first time the Commission has issued a formal interpretation regarding the proper classification of one touch bingo that is applicable to all gaming tribes. In 2008, the former NIGC Chairman issued a decision disapproving a Gaming Ordinance submitted by the Metlakatla Indian Community in which he concluded that the use of an auto-daub (one touch) feature on an electronic aid to bingo would convert a Class II bingo game to a Class III facsimile of an electronic game of chance. The former Chairman’s decision was issued in the context of an Ordinance review process, the effect of which is circumscribed by 25 U.S.C. §2710 (B)(1) & (2), and upon an agency record that was limited both in scope and to the particular ordinance under review.

Moreover, the Commission’s one touch interpretation constitutes the first time that this policy determination will have been made in a manner that is consistent with the

Administration's Tribal Consultation Order, Executive Order 13175 (Fed. Reg. Vol. 74, No. 215,) in which President Clinton ordered all federal agencies to adhere to certain criteria when formulating and implementing policies that have tribal implications. Section 3(c) of the Executive Order specifically provides:

When undertaking to formulate and implement policies that have tribal implications, agencies shall:

1. encourage Indian tribes to develop their own policies to achieve program objectives;
2. where possible, defer to Indian tribes to establish standards; and
3. in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

The classification of one touch bingo is exactly the type of policy question that should be addressed through the Tribal Consultation Policy. It is unquestionably a "policy that has tribal implications" in that it "refers to regulations, legislative comments or proposed legislation, and *other policy statements or actions that have substantial direct effects on one or more Indian tribes*, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes." EO 13175, section 1 (Emphasis added). The collaboration inherent in the consultation process will inform the Commission's decision and will result in the development of a full and complete agency record that will permit the Commission to make a fully-informed policy decision on the classification of one touch bingo that can appropriately have general applicability to all gaming tribes.

The one touch bingo issue has a substantial direct effect on the Miami Tribe of Oklahoma (MTOK). Class II bingo systems are an integral part of the MTOK's gaming operation, comprising the overwhelming majority of the games offered at both of the Tribe's gaming facilities, and are vital to our tribal economy. Success in a highly competitive gaming market is dependent on our ability to offer Class II games that embrace modern technology and meet player demands. Class II gaming systems that employ the one touch feature are examples of such modern technology. Electronic bingo devices are used in non-Indian (typically charitable) bingo games across the country and most utilize an "auto daub" or one touch feature. The feature has become, for the most part, commonplace in electronic bingo systems. This technology has developed and expanded outside Indian country despite many state bingo statutes containing language comparable to IGRA; language that requires a player to "cover" the numbers on a bingo card as similarly numbered objects are drawn. State regulatory agencies recognize that the use of a one touch feature does not change the fundamental characteristics of the game of bingo, nor render an electronic bingo device a facsimile of a game of chance or a

slot machine. Tribal games, including ours, are stifled in the use of this broadly-accepted technology and, as such, are placed at a distinct competitive disadvantage. The Commission's proposed reinterpretation presents an opportunity for Tribes to fairly compete in the market place, to use widely accepted technology, and to generate revenue necessary and critical to our tribal programs and services.

The Commission's proposed reinterpretation also is consistent with the IGRA and its legislative history. IGRA requires Class II bingo to meet three specific requirements and nothing more. *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1093 (9th Cir. 2000). One touch bingo meets each of these requirements. See, 25 U.S.C. §2703 (7)(A)(i)-(III). The game is played for prizes on a card bearing numbers or other designations. The holder of the card, with the assistance of the computer (or technological aid), covers the numbers or other designations when objects similarly numbered or designated are sequentially drawn or electronically determined. And finally, the game is won by the first person to cover the pre-designated winning bingo pattern. The use of the one touch feature in no way alters the fundamental statutory requirements of the game of bingo.

The legislative history of IGRA and the preamble to the Commission's regulations demonstrate that the statutory requirements for class II bingo are not to be interpreted or augmented in a way that would stifle rather than expand participation in the games. Indeed, the statute was passed with the express understanding and hope that technologic advancements would be used to expand and enhance player participation. S. Rep. No. 100-448 at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 ("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."); Commentary to 25 C.F.R. 502.8 (Definition of Bingo), 57 Fed. Reg. 12387, see also *Spokane Indian Tribe v. United States*, 972 F.2d 1090, 1093 (9th Cir. 1992). The Commission's proposed reinterpretation respects this legislative history and recognizes that one touch bingo constitutes a bingo game employing the type of technological advancements that were clearly anticipated and expected when Congress deliberated and passed IGRA.

In the Metlakatla ordinance decision, the Chairman, relying in part on an Office of General Counsel legal opinion, concluded that for an electronic bingo game to be classified as a class II game, a player must manually cover (through the push of a button or otherwise) the numbers on the cards as they are electronically drawn or otherwise determined.¹ The Chairman concluded that the single push of a button by the player (the "one touch") to activate the game was not sufficient to satisfy the requirement that the player "cover" the numbers and moreover, it eliminated the "competitive" nature of the game. However, the plain language of IGRA provides no support for such a conclusion. Rather, IGRA makes it clear that the purpose of a technological aid is to "assist a player or the playing of a game." 25 U.S.C. §2703(7)(A)(i).

The Ninth Circuit Court of Appeals also rejected the notion that IGRA required the manual covering of bingo numbers. In *U.S. v. 103 Electronic Gambling Devices*, No.98-1984,

¹ Office of General Counsel legal opinions are not final agency action and are not binding or entitled to any deference. *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1043 (10th Cir. 2003).

(N.D. Cal. Nov. 23, 1998), aff'd 223 F.3d 1091 (9th Cir. 2000) the court concluded “[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 found that IGRA “merely require[s] that a player cover the numbers without specifying how they must be covered.” *Id.* In one touch bingo, the player covers the numbers or other designations with the assistance of a technological aid—the gaming system. The technological aid assists the player in competing to be the first person to cover the pre-designated pattern. The one touch feature does not change the sequence of the numbers drawn nor the requirements for winning the game. The player is still required to activate each game, thereby engaging the player in the game and placing the player in competition with the other players on the system to be the first person to achieve a winning bingo pattern. Thus, in its proposed reinterpretation, the Commission properly concludes that the “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. 78 at 37999. In addition, the Commission also properly concludes that “[p]layer participation in an electronically linked one touch bingo game still exists and players are actively and actually participating in the game. Whether 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...” *Id.*

Nor, as determined by the Chairman in the Metlakatla decision, does use of the one touch feature transform a class II bingo system into a class III electronic facsimile of the game of bingo. The Commission defines “electronic or electromechanical facsimile as 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 the machine.”

25 C.F.R §502.8. The Commission’s own regulations make clear that a bingo game can be played in an electronic or electromechanical format without becoming a facsimile if the electronic format broadens participation in the game and requires the players to play against each other rather than against the machine. Courts have recognized the same distinction between a technological aid to bingo and a facsimile, holding that an electronic computer or technological aid must possess at least two characteristics: the aid must operate to broaden the participation levels of players in a common game; and the aid must allow a participant to play with or against other players rather than with or against a machine. *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000). If the technological aid possesses these two characteristics, it is not a facsimile. *Id.* at 724; *103 Electronic Gambling Devices*, 223 F.3d at 1100.

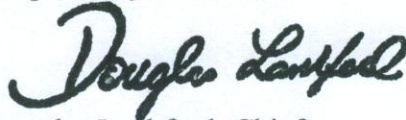
The Commission’s proposed reinterpretation properly recognizes that use of the one touch feature does not change these essential characteristics of a technological aid so as to transform a class II bingo game into a facsimile. Moreover, use of the one touch feature is not an electronic facsimile that replicates or incorporates all of the characteristics of a bingo game. The

fundamental characteristics of a bingo game are preserved. The game is a linked bingo game in which participation is broadened by the ability of multiple players to compete for a prize through a server-based communications network. The winner is determined, not by a pay table in the machine, but by the first person on the network to achieve a winning bingo pattern from a set of numbers available to all players. Players compete with each other, not with the machine, and therefore, the game is not a facsimile.

CONCLUSION

The MTOK supports the Commission's proposed classification of one touch bingo as Class II gaming employing a technologic aid. The interpretation is consistent with the IGRA, the legislative history of IGRA, the Commission's regulations and decisional law. The proposed reinterpretation is based on a process that is consistent with the Administration's Tribal Consultation Order, will generate an agency record that is necessary and appropriate for an interpretation that will have general application to gaming tribes, and properly rejects the flawed analysis of the Metlakatla Ordinance decision. We therefore, strongly support the Commission's reinterpretation and look forward to its formal adoption.

Respectfully Submitted,

A handwritten signature in black ink that reads "Douglas Lankford". The signature is written in a cursive, flowing style.

Douglas Lankford, Chief
Miami Tribe of Oklahoma