



# POARCH BAND OF CREEK INDIANS

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August 22, 2013

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

Re: **Proposed Classification Reinterpretation of One-Touch Bingo Games**

Dear Chairwoman Stevens and Commissioner Little,

The Poarch Band of Creek Indians (“Tribe”) thanks you for this opportunity to comment on the National Indian Gaming Commission’s (“NIGC” or “Commission”) proposed reinterpretation regarding the classification of server based electronic bingo system games that can be played utilizing only one touch of a button (“one-touch bingo”), published in the Federal Register on June 25, 2013 (hereafter the “Federal Register Notice”).<sup>1</sup> We have always viewed as suspect the legal rationale contained in the June 4, 2008 letter to the Metlakatla Indian Community mentioned in the Federal Register Notice (hereafter the “Metlakatla Letter”) suggesting that one-touch bingo falls outside the category of Class II gaming, a rationale that has also found its way into a number of NIGC Office of General Counsel advisory opinion letters.<sup>2</sup> We therefore appreciate the Commission’s willingness to clarify its position on the matter, and to restore consistency of the agency’s guidance with the Indian Gaming Regulatory Act (“IGRA”), Congressional intent, case law, and existing regulations.

As you are well aware, Class II gaming is vitally important to the Tribe. Despite years of good-faith efforts, the Tribe remains unable to secure a tribal-state compact for the operation of Class III gaming and therefore operates only Class II games, pursuant to IGRA. We therefore support the Commission’s proposed action and agree that the statutory definition of bingo should be interpreted in a manner that is consistent with applicable law, as well as with Congress’s intent of promoting self-governance, economic development, and technical innovation through Class II gaming.<sup>3</sup> The Commission’s proposed clarification would allow the Poarch Band of Creek Indians and other tribes to conduct their Class II gaming activities with greater certainty regarding what games are allowed.

<sup>1</sup> 78 Fed. Reg. 37998, 37998-37800 (June 25, 2013).

<sup>2</sup> *Id.* To the extent these letters’ analysis contravenes or seeks to overturn existing regulatory provisions and agency guidance adopted through notice and comment procedures, they violate the Administrative Procedure Act and should be withdrawn or otherwise disregarded. In any case, they set forth only the opinion of the Chairperson or General Counsel acting alone; they do not represent action of the Commission and therefore are of less force than the regulations themselves and federal circuit court opinions interpreting them (and IGRA’s statutory provisions).

<sup>3</sup> See 78 Fed. Reg. 37998, 37800 (June 25, 2013) (citing S. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. at 3079).

In the 2008 Metlakatla Letter, then NIGC Chairperson Phil Hogen tried to add criteria to the game of bingo beyond those Congress set forth in IGRA, and to rewrite the definition of “electronic or electromechanical facsimile” in 25 C.F.R. § 502.8. Taken together, these actions constitute an attempt to change the rules for determining what is Class II bingo, as opposed to Class III facsimiles of games of chance or slot machines. But Chairman Hogen’s statements reflect a misunderstanding of how one-touch bingo is played, and moreover, a misinterpretation of IGRA, existing regulations and case law – all to the detriment of Indian Country. As noted in the Federal Register Notice and discussed more fully below, IGRA does not require that a player press a button more than once to play a game of bingo, or that only one person can win the game.<sup>4</sup> Nor does one-touch bingo incorporate all the characteristics of bingo, or otherwise somehow transform the game into a Class III facsimile of bingo. And although the NIGC Chairperson has the authority to approve or disapprove amendments to a tribal gaming ordinance (like the Metlakatla Indian Community’s),<sup>5</sup> and like other agency heads may in certain instances interpret statutory and regulatory language,<sup>6</sup> the Chairperson cannot rewrite the law. Chairman Hogen lacked authority to amend the rules currently set forth in 25 C.F.R. § 502 – rules that are consistent with IGRA’s language, Congressional intent, and court opinions – and under which one-touch bingo is a Class II game.

### ***The Indian Gaming Regulatory Act, Congressional Intent, and NIGC Regulations***

As explained in the Federal Register Notice, IGRA sets forth only three requirements of a game of bingo: (1) the game is played for prizes (including monetary prizes) with cards bearing numbers or other designations; (2) the holder of the card covers these numbers or designations when objects similarly numbered or designated are drawn or electronically determined; and (3) the game is won by the first person covering a previously designated arrangement of numbers or designations on the cards.<sup>7</sup> IGRA also recognizes that “electronic, computer, or other technologic aids” (hereafter referred to collectively as “technologic aids” for simplicity) can be used in connection with the play of Class II games like bingo.<sup>8</sup>

The NIGC’s regulations, adopted in 2002, define a technologic aid as “any machine or device” that “[a]ssists a player or the playing of a game” and “[i]s not an electronic or electromechanical facsimile.”<sup>9</sup> The regulations further provide that 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

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<sup>4</sup> 78 Fed. Reg. 37998, 37999-38000.

<sup>5</sup> See 25 U.S.C. §§ IGRA 2710(b)(2) and (e).

<sup>6</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (explaining lessened standard of judicial deference to non-binding agency officials’ interpretations).

<sup>7</sup> 78 Fed. Reg. 37999 (citing 25 U.S.C. § 2703(7)(A)(i)(I)-(III)). See also *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1096 (9th Cir. 2000) (“IGRA’s three explicit criteria . . . constitute the sole legal requirements for a game to count as class II bingo”).

<sup>8</sup> 25 U.S.C. § 2703(7)(A)(i) (“The term ‘class II gaming’ means . . . the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith”).

<sup>9</sup> 25 C.F.R. § 502.7(a)(1) and (2). The device must also operate in accordance with applicable federal communications law. 25 C.F.R. § 502.7(a)(3).

player to play a game with or against other players rather than with or against a machine.<sup>10</sup> And the regulations contain a non-exclusive list of examples of technologic aids.<sup>11</sup>

The 2002 regulations also define “electronic or electromechanical facsimiles” (which are Class III games under IGRA) as “game[s] played in an electronic or electromechanical format that replicate[] a game a chance by incorporating all of the characteristics of the game[,]” but there is an express exception for electronic or electromechanical formats that “broaden[] participation by allowing multiple players to play with or against each other rather than with or against a machine” in bingo, lotto, and other games similar to bingo.<sup>12</sup> Notably, the preamble to the 2002 regulations states that “IGRA permits the play of bingo . . . and other games similar to bingo in an electronic or electromechanical format, even a *wholly* electronic format[,]” and that “[a] manual component to the game is not necessary.”<sup>13</sup>

In his 2008 letter, Chairman Hogen attempted to include within the definition of bingo criteria that do not exist: namely, a requirement that players press a button more than once to play the game (a “participation” requirement),<sup>14</sup> and a requirement that only one person can win the game (a “competition” requirement).<sup>15</sup> Neither requirement is found in IGRA or the NIGC’s implementing regulations, and courts have consistently held that requirements outside of IGRA’s three explicit criteria for bingo should not be added.<sup>16</sup>

### ***There Is No “Participation” Requirement in IGRA***

As the Commission now proposes to clarify, Chairman Hogen was wrong to graft a “participation” or “manual” element onto IGRA’s definition of bingo.<sup>17</sup> IGRA contains no such

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<sup>10</sup> 25 C.F.R. § 502.7(b). When adopting the regulations, the Commission explained that if equipment or an electronic format broadens player participation, this fact “should be viewed as a strong indication that the machine or device is a technologic aid.” 67 Fed. Reg. 41166, 41170 (June 17, 2002).

<sup>11</sup> 25 C.F.R. § 502.7(c). These include dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games. *Id.*

<sup>12</sup> 25 C.F.R. § 502.8. “Other games similar to bingo” are games that (1) are played in the same location as bingo, (2) constitute a variant on the game of bingo, (3) are not house banked games, and (4) permit players to compete against each other for a common prize or prizes. 25 C.F.R. § 502.9.

<sup>13</sup> 67 Fed. Reg. 41166, 41171 (June 17, 2002) (emphasis in original). Although an agency’s preamble guidance generally lacks the binding force of agency regulations, courts will consider it as evidence of the agency’s intent in adopting and the meaning of the regulations. *See, e.g., Howmet Corp. v. EPA*, 814 F.3d 544, 552 (D.C. Cir. 2010); *Las Vegas v. FAA*, 570 F.3d 1109, 1117 (9th Cir. 2009).

<sup>14</sup> *See* Metlakatla Letter at 4-5 (citing two advisory game classification opinions issued by the NIGC Office of Legal Counsel in September 2003 purporting to address “the degree of participation” supposedly “implic[d]” by IGRA’s “the first person to cover” language at 25 U.S.C. § 2703(7)(A)(i)(II)).

<sup>15</sup> *See* Metlakatla Letter at 4 (“Inherent in the language ‘first person covering,’ is an element of competition. . . . [P]layers must complete to be that ‘first person.’”).

<sup>16</sup> *See United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 723 (10th Cir. 2000) (rejecting the government’s argument that game speed, appearance, and stakes defeat classification as bingo so long as the three statutory criteria are satisfied); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000) (same).

<sup>17</sup> 78 Fed. Reg. 37998, 37999 (June 25, 2013) (“[T]he . . . 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.”); *id.* at 38000 (“[W]hether or not a game constitutes bingo or not cannot be reduced to the number of times a button is pushed. Rather, . . . we must look to whether the statutory elements of the game are met.”).

requirement. While players of traditional paper bingo would separately locate each number drawn and then place a marker on, or otherwise physically mark, each matching number on their card(s), technology has advanced such that players of today's electronic bingo games typically mark their card(s) either by pressing a button on the console or by touching the display itself. As discussed below, the courts have found such electronic daubing to be consistent with IGRA, and Chairman Hogen's interpretation is to the contrary and erroneous.

One-touch bingo – often referred to by the feature name of “auto-daub” – operates in a manner similar to reader/dauber-type devices commonly referred to as “bingo minders” that have been used in bingo halls for decades.<sup>18</sup> Incorporating such a feature into today's Class II bingo games is the natural progression of advancing technology, which Congress anticipated and encouraged Indian tribes to use in conducting Class II gaming.<sup>19</sup> Rather than having to submit a request to daub multiple times, this next generation of electronic daubing now allows a player to make only one such request during a game. But a player still must manually request auto-daub (by pushing the button to start the game).

Auto-daub simply serves as an aid to the player's participation in a common game by carrying out his or her request to daub subsequent releases of balls. It cannot play independently of the player, and it has no impact on the outcome of the game. Thus, as the Commission recognizes in the Federal Register Notice, players of electronically linked one-touch bingo games “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 on the electronically linked bingo system.”<sup>20</sup>

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Because the Commission has previously recognized that no manual component (beyond a person's initially marking a card or pushing a button) is required, *see* 67 Fed. Reg. 41166, 41171 (June 17, 2002), the proposed guidance is simply a clarification, and not a reinterpretation, of the Commission's position. To the extent the proposed guidance is a reinterpretation, it is of an interpretation set forth in the Metlakatla Letter (and certain NIGC Office of General Counsel advisory opinions) – not of an interpretation adopted by the Commission – and of an interpretation that is contrary to the case law, as the Commission now acknowledges. *See* 78 Fed. Reg. 37998, 37999-38000 (citing *162 Megamania Gambling Devices*, 231 F.3d at 721-22; *103 Electronic Gambling Devices*, 223 F.3d at 1098-99). Given the Commission's previous recognition that IGRA imposes no manual component requirement for bingo, the legality and effect of Chairman Hogen's contrary statements are dubious.

<sup>18</sup> The term “bingo minder” is used generically to refer to a family of devices used in bingo halls nationwide. Essentially, each player enters his bingo cards into the device, typically through the use of an identification number. Once game play begins, the device monitors the game's progression and covers matching numbers on each player's cards, often with no additional interaction by the player. The device is generally programmed to locate and display the player's best card, and to alert the player through a series of beeps of any winning pattern.

<sup>19</sup> *See* S. Rep. No. 100-446, reprinted in 1988 U.S.C.C.A.N. at 3079. This report states that

The [Senate Indian Affairs] Committee specifically rejects any inference that tribes should restrict class II games to existing game 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.

*Id.*

<sup>20</sup> 78 Fed. Reg. 37998, 37999 (June 25, 2013). The Federal Register Notice is consistent with the Commission's earlier recognition that IGRA does not require a manual component (beyond the pressing of a button) to the game of bingo. *See* 67 Fed. Reg. 41166, 41171 (June 17, 2002) (“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. . . . A manual component to the game is not necessary.”) (emphasis in original).

The courts agree. The Ninth Circuit Court of Appeals, for example, affirmed a U.S. district court decision which found that a game using electronic daubing qualified as a Class II bingo game and noted that “nothing in IGRA . . . requires a player to independently locate each called number on the player’s cards and manually ‘cover’ each number independently and separately.”<sup>21</sup> Rather, IGRA “merely require[s] that a player cover the numbers without specifying how they must be covered,” and the manner in which players mark (or “cover” the numbers on) their card(s) is irrelevant.<sup>22</sup> The incorporation of auto-daub does nothing to affect IGRA’s requirement that the holder of a card “cover numbers” when the numbers are drawn or electronically determined. Nor does it affect the sequencing of the game. The holder of the card still “covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined,” satisfying the requirements of IGRA.<sup>23</sup>

### ***There Is No “Competition” Requirement in IGRA***

Chairman Hogen was also wrong to impose a “competition” requirement – or a requirement that only one person can win the game – onto the game of bingo. As the Federal Register Notice recognizes, “the possibility that more than one player can simultaneously get ‘bingo’ does not conflict with IGRA’s requirement that the game be won by ‘the first person to cover.’”<sup>24</sup> Nothing in IGRA precludes the possibility of there being multiple winners in a bingo game. The federal circuit courts that have addressed the issue agree,<sup>25</sup> and the Commission now seeks to clarify, that “a machine that allows two [or more] simultaneous bingos in a game may still be a class II bingo machine.”<sup>26</sup> What matters under IGRA is whether the players who win the simultaneous bingos compete against each other (and not a machine) to win.<sup>27</sup>

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<sup>21</sup> *U.S. v. 103 Electronic Gambling Devices*, 1998 WL 827586, at \*6 (N.D. Cal. Nov. 23, 1998), *aff’d*, 223 F.3d 1091 (9th Cir. 2000).

<sup>22</sup> *Id.*

<sup>23</sup> 25 USC §2703(7)(A)(i)(II).

<sup>24</sup> 78 Fed. Reg. 37998, 37999 (June 25, 2013).

<sup>25</sup> *See U.S. v. 162 Megamania Gambling Devices*, 231 F.3d 713, 722 (10th Cir. 2000) (“[N]othing in [IGRA] or [its implementing] regulations prohibits more than one winner”); *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1098 (9th Cir. 2000) (holding the same and noting that “win” does not necessarily mean “beat” and that “[b]ecause ‘winning’ does not necessarily entail vanquishing one’s opponents, the meaning of ‘win’ in the statute is at worst ambiguous.”). To the extent IGRA’s “won by the first person covering” language or any other language is found to be ambiguous, any ambiguity must be resolved in tribes’ favor. *See, e.g., County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992); *Bryan v. Itasca County*, 426 U.S. 373, 293 (1976); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007). *See also* 67 Fed. Reg. 41166, 41166 (June 17, 2002) (noting that “several key terms were not specifically defined [in IGRA], and thus [are] subject to more than one interpretation”). Chairman Hogen focused on the “first person covering” part of the definition but ignored the “won by” language that precedes it. The “first person covering” language makes no sense without the preceding “won by,” and the language must be read together. The phrase’s ambiguity has been recognized by the Ninth Circuit, *see U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1098 (9th Cir. 2000) (noting that “win” does not necessarily mean “beat” and that “[b]ecause ‘winning’ does not necessarily entail vanquishing one’s opponents, the meaning of ‘win’ in the statute is at worst ambiguous.”) (emphasis in original), and any doubt regarding whether IGRA contains the competition element Chairman Hogen tried to impose must be resolved in tribes’ favor.

<sup>26</sup> 78 Fed. Reg. 37998, 37999-38000 (June 25, 2013) (citing *162 Megamania Gambling Devices*, 231 F.3d at 722; *103 Electronic Gambling Devices*, 223 F.3d 1098-99).

<sup>27</sup> As the Commission noted in 2002,

### ***Chairman Hogen's Letter Ignores NIGC Precedent***

Chairman Hogen's analysis in the Metlakatla Letter is contrary not only to case law and Congressional intent, but also to the NIGC's own regulations. The regulations explicitly exempt from the definition of "electronic or electromechanical facsimiles" electronic bingo games that "broaden[] participation by allowing multiple players to play with or against each other rather than with or against a machine."<sup>28</sup> Chairman Hogen ignored Commission precedent that the definition of electronic facsimiles should be narrowly construed<sup>29</sup> and instead suggested that one-touch bingo should be treated as an electronic facsimile because it "incorporates the entire game" of bingo.<sup>30</sup> But, as the Federal Register Notice recognizes, one-touch bingo does not incorporate all of the characteristics of bingo – in part because players still compete with each other – and bingo's being played with one touch of a button does not transform the game into a Class III electronic facsimile.<sup>31</sup> As explained above, auto-daub functions as a technologic aid for playing the game of bingo. It does not play independently of the players, who still compete with each

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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. . . . A manual component to the game is not necessary. What IGRA does not allow . . . is a wholly electronic version of the game that does not broaden participation, but instead permits a player to play alone or with or against a machine rather than with or against other players.

67 Fed. Reg. 41166, 41171 (June 17, 2002) (emphasis in original).

Chairman Hogen's Metlakatla Letter states that one-touch bingo does not qualify as a "game similar to bingo" under 25 C.F.R. § 502.9, because it "eliminates competition among players." Metlakatla Letter at 7. As explained above and in the Federal Register Notice, however, one-touch or auto-daub bingo technology does not eliminate competition among players; they still compete with other players, not the machine. *See* 78 Fed. Reg. 37998, 38000 (June 25, 2013). The same reasons the Commission invokes to correct Chairman Hogen's misinterpretation of "bingo" apply to his misinterpretation of "game similar to bingo."

<sup>28</sup> 25 C.F.R. § 502.8. *See also* 78 Fed. Reg. 37998, 378000 (June 25, 2013) (noting regulation and exception).

<sup>29</sup> *See* 67 Fed. Reg. 41166, 41170 (June 17, 2002). *See also id.* (broadening participation "is an important characteristic of an aid" and "is an important indicator as to whether a machine or device is a technologic aid," as opposed to an electronic facsimile).

<sup>30</sup> According to Chairman Hogen, "a technologically aided Class II game becomes a Class III facsimile . . . [if] electronic gaming equipment incorporates all the characteristics of a game," Metlakatla Letter at 9, and one-touch bingo "incorporates the entire game by definition[]" because "[n]othing, as it were, is left outside of the electronics. The game is fully electronic and automatic in its play. The player merely has to press a button, and the game then proceeds automatically to its end from there." *Id.* at 10.

<sup>31</sup> *See* 78 Fed. Reg. 37998, 37800 (June 25, 2013) ("Nor does the fact that a game of bingo can be played with one-touch of a button by itself transform the machine into a Class III electronic facsimile of the game of bingo. One-touch bingo does not incorporate all of the characteristics of bingo. The machine, for example, does not replicate the competitive element of bingo. Players still compete with other players, not the machine.").

While noting that it is unnecessary to apply the exception in 25 C.F.R. § 502.8 because one-touch bingo meets IGRA's statutory requirements for bingo and does not incorporate all the characteristics of bingo into the machine, the Federal Register Notice is correct to point out Chairman Hogen's error of suggesting that this exception would not otherwise apply to one-touch bingo. *See id.* Even a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game is not an "electronic or electronic facsimile" if it is a bingo game (or game similar to bingo) and "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. The regulations are quite clear on this point.

other (through a linked system) and not against the machine. This is the key distinction noted by Congress<sup>32</sup> and emphasized in prior NIGC guidance.<sup>33</sup>

The Tribe appreciates that the Commission will now focus on this distinction, the three explicit criteria in 25 U.S.C. § 2703(7)(A)(i), and the Commission's existing regulations to determine whether a game is a Class II bingo game or a Class III electronic facsimile. Under these rules, regardless of whether a player presses a button one time, two times, or more times, he or she is playing bingo if he or she is competing for a prize against fellow players on an electronically linked bingo system.

### ***The Indian Law Canon of Construction***

Chairman Hogen's letter also misconstrues the Indian law canon of construction, which requires that any statutory ambiguities – particularly in statutes passed for the benefit of Indians, as IGRA was – must be resolved in favor of tribes.<sup>34</sup> The Commission has recognized the ambiguity in IGRA's definition of bingo, explaining, "several key terms were not specifically defined [in IGRA], and thus [are] subject to more than one interpretation."<sup>35</sup> Courts have also noted that the ambiguity in the "won by the first person covering" language in 25 U.S.C. § 2703(7)(A)(i)(I) that is central to Chairman Hogen's interpretation of IGRA's "bingo" and "games similar to bingo" in the Metlakatla Letter,<sup>36</sup> and in the definition of Class II gaming.<sup>37</sup>

Chairman Hogen does not mention the Indian canon of construction until the end of the Metlakatla Letter (in a footnote),<sup>38</sup> and he misstates the doctrine's purpose. The doctrine is not supposed to be determinative of what something means, or, according to Chairman Hogen, "determinative of what does and does not fall within Class II or Class III gaming."<sup>39</sup> It does, however, require that any question or ambiguity about whether something falls within Class II or Class III gaming – or the definition of (what constitutes) Class II or Class III gaming – that ambiguity must be resolved in favor of tribes. Had Chairman Hogen applied the Indian canon of construction when interpreting "bingo" (and "games similar to bingo" and "electronic aid") in

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<sup>32</sup> See S. Rep. No. 100-446, reprinted in U.S.C.C.A.N. at 3079 (distinguishing technological aids that broaden participation 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").

<sup>33</sup> See 67 Fed. Reg. 41166, 41171 (June 17, 2002) (noting that "IGRA permits the play of bingo . . . in a wholly electronic format, provided that multiple players are playing with or against each other. . . . [i]nstead [of] . . . alone or with or against a machine").

<sup>34</sup> See, e.g., *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269 (1992); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *San Manuel Indian Bingo and Casino*, 475 F.3d 1306, 1311 (D.C. Cir. 2007).

<sup>35</sup> 67 Fed. Reg. 41166, 41166 (June 17, 2002).

<sup>36</sup> See *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1098 (9th Cir. 2000) (noting that "win" does not necessarily mean "beat" and that "[b]ecause 'winning' does not necessarily entail vanquishing one's opponents, the meaning of 'win' in the statute is at worst ambiguous.") (emphasis in original).

<sup>37</sup> See *Shakopee Mdewakanton Sioux Community v. Hope*, 16 F.3d 261, 264 (8th Cir. 1994). See also 67 Fed. Reg. 41166, 41168 (June 17, 2002) (citing *Shakopee* as recognizing ambiguity in the definition of class II).

<sup>38</sup> Metlakatla Letter pp. 10-11 (footnote 1).

<sup>39</sup> Metlakatla Letter n.1.

the Metlakatla Letter – as he should have, and as a court would be obligated to do when interpreting these terms – he would have reached different conclusions in his analysis.

The Tribe thanks you again for this opportunity to comment on the Commission's proposed clarification regarding the status of one-touch bingo under IGRA and believes that the clarification is consistent with principles of Indian self-determination. The clarification will also restore consistency between NIGC guidance and existing case law, and provide certainty regarding what are and are not Class II games. Please feel free to contact me if you have any questions or would like to discuss any of these issues further.

Sincerely,

A handwritten signature in black ink, appearing to read "Buford L. Rolin". The signature is fluid and cursive, with a large initial "B" and a distinct "L" and "R".

Buford L. Rolin  
Chairman  
Poarch Band of Creek Indians