



March 22, 2001

Mr. Frank Banyai
Mr. Mike Macke
Cadillac Jack, Inc.
1804-I Montreal Ct.
Tucker, GA 30084

Re: Wild Ball Bingo (electronic version) classification opinion

Gentlemen:

You have asked whether the National Indian Gaming Commission regards the electronic or "network" version of "Wild Ball Bingo" as a Class II or Class III game under the Indian Gaming Regulatory Act (IGRA).

In considering the question, we reviewed the following: a description for the game that was included with your letter of May 18, 1998; a letter opinion dated June 23, 1998, addressed to Cadillac Jack, Inc., by an attorney in Newport Beach, California; a contract document that would be used by the vendor when placing the game in a tribal facility, and our own previous opinion as to the table game of the same name. Based on the description of the game as set forth in these documents, we conclude that the game may be played as a Class II game, as further discussed herein.

Background

The NIGC General Counsel approved Wild Ball Bingo, as a table game, for play as a Class II game in 1996. At that time the game was described as follows:

"Wild Ball Bingo" is played on a table approximately 16 feet in length and five feet in width. Sixteen player stations are marked on a felt table cover, and each station contains three blank squares that represent the player's card. The table layout also has two sets of circles above each player's card for buy-ins and commissions. The three buy-in circles indicate the buy-in fee for the game in which the player chooses to participate. The first buy-in circle is mandatory; the second and third buy-in circles are optional....

Before play begins, a player selects three number plaques from a box of plaques numbered "1" through "29" and places them on his or her card. The player thus constructs a card for each game.

When all buy-ins have been made, a bingo blower or a similar device for selecting numbers containing 30 numbers is activated. One of the balls is designated as the "Wild Ball." When a ball is selected, the caller specifies the numbers, and the players, using plastic discs provided for such purposes, cover the corresponding number on their card. If the "Wild Ball" is selected, the players may cover any number on their card.

The first player to cover all three numbers on their card and declare "bingo" is the winner. Winners are paid from other buy-ins only.... If the player has only covered the first buy-in level, the player only collects the first level buy-in from the other players. If the winner has covered the first two levels, the player collects the first two level buy-ins from the other players who have participated at that level. If the player has participated in all three buy-in levels, the player receives all three buy-in amounts from each of the other players. If two or more players cover all three numbers at the same time, the prize is split between the winning players at that level. If players remain at the second or third level buy-ins, play resumes until a new bingo is called by one of the remaining players.

A jackpot feature can be added to the game which allows a jackpot to build from amounts placed on a special jackpot circle located by each player station. Those who choose to participate in the jackpot are entitled to play for two jackpot bingo prizes. The first player to cover all three numbers in the exact sequence within the first three numbers drawn wins the super jackpot. A consolation jackpot is won by the first player to cover all three numbers in any sequence within the first three numbers drawn."

Game description for the electronic version

The electronic version of Wild Ball Bingo provides an electronic play station (EPS) with a screen showing up to four representations of cards similar to those used in the table game. The electronic version differs in several respects from the table game. The electronic game has four numbers to cover, rather than three. It offers only two playing levels, rather than three. In the electronic version the player selects the numbers for the "card" electronically and may use a "quick pick" option to select the numbers for each card. This feature is said to be the only random number generator associated with the game.

Credits are purchased externally to the machine at a Point of Sale station (POS) and players are given a debit card and a PIN to record those credits at the EPS. Each EPS is interconnected with others and may be located at one or more locations in the same bingo hall or at separate bingo halls. If located at different halls, the EPS are networked via telephone connections. Player credits are stored or accumulated on each player's debit card only and are not stored within the EPS.

During play, numbers are generated either by an actual bingo blower or through a chip on which numbers that were selected previously by a bingo blower are recorded.¹ The numbers, however

¹ The description of the game set forth in the June 23, 1998, legal opinion letter indicates that calls occur at intervals of five seconds. To maintain real-time consistency of calls during each game and to provide for additional security, the calls will be imputed into the central computer and used in "near real-time." Although a format with real time calls can be utilized, advance calls, as described, are preferred by the vendor to ensure the reliability of the game.

originated, are transmitted to all players' screens simultaneously in the exact order as the bingo balls are drawn through use of the bingo blower. No shuffling or randomization of calls occurs in the computer. Players "daub" their matching numbers by touching the screen before them. As in the table game, when a player has covered all numbers, a "bingo" has occurred and that player wins whatever pot or pots the player has selected. If a player does not daub the numbers that are called the player will not receive Bingo and no prize will be awarded to that player. If two or more players cover all four numbers at the same time, the prize is split between or among the winning players at that level.

Players pay a buy-in fee to the operator of the game to qualify to play the game at each primary level of play. Depending on the terms of the current agreement between the vendor and tribal gaming operator, 20% to 30% of this buy-in serves as a commission to the operator or is used to pay fees to operate the network and the cash management system. The remaining 70% to 80% goes to the player pool selected and the operator will have no interest in any actual primary prize money in connection with the game. The total primary prize pool at both the first and second levels will be won in each game by the player or players who have properly declared a bingo. If more than one player covers all numbers on the same call, the win is shared. A player who fails to cover a called number is given five seconds after there has been a "bingo" to correct the error; failure to do so will result in a missed opportunity to win.

The game also incorporates a secondary or progressive prize level that can be selected by the player by paying an additional fee set by the operator. The progressive jackpot pays players a specified sum from the progressive pool for covering the numbers in the exact order drawn. Consolation prizes are paid for covering all numbers on the first four calls, with or without a "Wild Ball," or for obtaining three of the four numbers called. This payment is in addition to the amount won in the first or second level bingo games. If there are no progressive winners during a game, then the progressive prizes are forfeited as to that game and are left in the progressive prize pool. As with the primary games, the operator will collect a commission or fee from the progressive prize level buy-in fee and some of the monies collected will be used to pay a network operation fee and a cash management fee. The only source of funds for the progressive prize level is the buy-in fee. The progressive jackpot is "seeded" by money put in by the house and recouped from player bets as soon as the jackpot is large enough.²

Applicable Law and Regulation

IGRA defines Class II gaming in relevant part to include:

- (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

² According to the vendor, to recover this initial seed money, the operator will divide the progressive prize level buy-ins into various parts. A portion will be used to refund the initial seed and to fund future progressive prizes, a portion will be used to fund current progressive prizes, and a portion will be used to pay fees for the operation of the game including a house fee.

(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[.]

25 U.S.C. § 2703(7)(A). Games that are not within the definition of Class II games are Class III. See 25 U.S.C. § 2703(8).³

NIGC regulations similarly define Class II gaming to include:

(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 objects, 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[.]

25 C.F.R. § 502.3.

In addition, if technological aids are used, the following definition applies:

Electronic, computer or other technologic aid means a device such as a computer, telephone, cable, television, satellite or bingo blower that when used --

(a) Is not a game of chance but merely assists a player or the playing of a game;

(b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and

(c) Is operated according to applicable Federal communications law.

25 C.F.R. § 502.7.

³ A separate category of games known as class I, not at issue here, includes social games played for prizes of minimal value and traditional forms of Indian gaming at tribal ceremonies or celebrations. See 25 U.S.C. § 2703(6).

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Class II gaming specifically does not include "electronic or electromechanical facsimiles of any game of chance or slot machine of any kind." 25 U.S.C. § 2703(7)(B)(ii).

Electronic or electromechanical facsimile means any gambling device as defined in the Johnson Act at 15 U.S.C. § 1171(a)(2) or (3). 25 C.F.R. § 502.8.

The Johnson Act defines a gambling device in pertinent part as follows:

- (1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
- (2) any other machine or mechanical device (including but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.

15 U.S.C. § 1711(a).

Analysis

Under the game description provided by the vendor, players using a card bearing numbers that appears on a video screen win a prize when the first player or group of players covers a predetermined pattern of numbers on their electronic card after the winning numbers have been drawn. A bingo blower selects the winning numbers. As in paper bingo, a player daubs or "covers" the numbers that appear on the player's card as those numbers are announced at the Wild Ball Bingo EPS. When a player is able to successfully cover all four numbers on the electronic card, thereby achieving the predetermined "blackout" pattern, the player's winning bingo is recorded.

Played in this fashion, the game meets the minimum statutory requirements for Class II bingo which are set forth at 25 U.S.C. § 2703(7)(A) and, therefore, would qualify as Class II bingo under IGRA unless some critical feature of the game serves to place the game in the Class III category. Four possibilities that could exclude the game from Class II should be considered: the non-traditional design of the game as a bingo game, the secondary progressive jackpot feature, a house-banked aspect, and whether the game is an "electronic facsimile," and therefore a Johnson Act gambling device, or merely a permitted "technological aid" to the play of bingo.

Non-traditional design

Although the traditional bingo game may use a card with a grid containing more than four numbers, a minimum array is not specified in the IGRA definition.⁴ As the United States Court of Appeals for the Ninth Circuit noted in a recent decision on a similar game:

Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or hometowns might discover, IGRA's three explicit criteria, we hold, constitute the sole legal requirements for a game to count as Class II bingo....

Moreover, § 2703(7)(A)(i)'s definition of Class II bingo includes "other games similar to bingo," § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

U.S. v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1096 (9th Cir. 2000).

In light of this case and our own review of the statute and application of our regulations, the fact that the card contains only four numbers rather than a more extensive grid of numbers does not place the game outside the "bingo" definition found in IGRA.

Progressive prize pool

As noted, the game includes the award of secondary prizes from a progressive pool. Under the game description supplied by the vendor, these are either prize enhancements paid to the winner or winners who first cover the designated pattern or are consolation prizes paid to players covering three of the four numbers on their cards at the time the basic game concludes. Such consolation prizes are not uncommon in the play of paper bingo in bingo halls. Furthermore, as indicated in the earlier opinion on the table game version of Wild Ball Bingo, the NIGC has specifically recognized that such prizes and games do not alter the game's classification. As the NIGC noted in the preamble to the final rule on the definition of bingo and other games, the NIGC addressed this issue in drafting the rule:

Several commentators suggested that the Commission had erroneously excluded [from the definition of bingo] guaranteed bingo prizes, progressive cover-all prizes, and jackpot bingo from Class II. By eliminating the concept of the house as a stakeholder as discussed in the preamble to the proposed rule, the Commission has clarified that bingo games with guaranteed bingo prizes, progressive prizes, and jackpot bingo are Class II bingo games.

⁴ A card must bear "numbers or designations" and the player is to cover "a previously designated arrangement of numbers or designations when objects similarly numbered or designated" are selected. This would seem to eliminate the possibility of playing a game with a card that contained fewer than three numbers or designations or in which the purpose of the game was to cover only one number or designation. One number or designation would not be an "arrangement of numbers or designations." At least two of three numbers or designations on a card would be necessary to establish an "arrangement."

57 Fed. Reg. 12,387 (April 9, 1992). The preamble to the final rule further states:

The Commission believes that Congress' intent was to include jackpot or progressive bingo in Class II as long as: (1) there is eventually a winner (in other words, the house never takes a jackpot), and (2) in each game there is at least a winner of a consolation prize.

Id. at 12,382. In light of this discussion, it is clear that the Commission accepts the concept of consolation prizes being awarded.

Accordingly, the award of secondary prizes in the progressive pool does not render the electronic version of Wild Ball Bingo a Class III game.

House-banked aspects

Another issue for consideration is whether the payment of a house fee or commission to the tribal operator makes the game a house-banked game. House-banked games are defined as Class III games by regulations of the NIGC. See 25 C.F.R. §§ 502.4(a) and 502.11. Under the definition set forth in the applicable regulation, to constitute a house-banked game, the house must be able to "win." In a house-banked game, the house, which is the banker, competes against all players, collecting from losers and paying winners.

In electronic Wild Ball Bingo, the house is not a participant in the game. In contrast to a game such as blackjack, in which the house plays a hand and the success of the house depends on the success of the players, Wild Ball Bingo merely collects a fee. The fact that a tribal gaming operation collects a percentage of each payment, as in Wild Ball Bingo, does not make the house a player. Moreover, "the mere fact that the house nets a percentage of the players' fees for playing certainly cannot define a 'house-banking' game." See U.S. v. 103 Electronic Gambling Devices, 223 F. 3d at 1099.

"Electronic Facsimile" or "Technological Aid"

Finally, the issue of whether the Wild Ball Bingo EPS constitutes an "electronic facsimile" of the game or merely a "technological aid" to the play of bingo warrants discussion. As noted previously, Class II games cannot include electronic or electromechanical facsimiles of any game of chance or slot machines of any kind. See 25 U.S.C. § 2703(7)(B)(ii). Like the game terminal considered by the courts in U.S. v. 103 Electronic Gambling Devices, supra, and U.S. v. 162 Megamania Gambling Devices, 231 F.3d 713 (10th Cir. 2000), the EPS is not an "electronic or electromechanical facsimile" of the game of Wild Ball Bingo. As the United States Court of Appeals for the Ninth Circuit noted in describing MegaMania, "the terminal is merely an electronic aid to human players of bingo, something like electronic mail with a graphic user interface." U.S. v. 103 Electronic Gambling Devices, 223 F.3d at 1100.

Similarly, the EPS is not a gambling device defined by the Johnson Act. See 15 U.S.C. § 1711(a). As the court notes in U.S. v. 103 Electronic Gambling Devices:

The test of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids. The statute provides that bingo using "electronic, computer, or other technologic aids" is Class II gaming, and therefore permitted in Indian country. 25 U.S.C. § 2703(7)(A)(i). Reading the Johnson Act to forbid such aids would render the quoted language a nullity.... By deeming aids to bingo Class II gaming in the text of IGRA...Congress specifically authorized the use of such aids as long as the Class II provisions of IGRA are complied with. See 25 U.S.C. § 2710 (a)-(c).

In short, while complete, self-contained electronic or mechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA...mere technologic aids such as the MegaMania terminal are not.

U.S. v. 103 Electronic Gambling Devices, 223 F.3d at 1101-1102.

The EPS for Wild Ball Bingo is substantially similar to the terminal used in MegaMania. In our view, under the recent case law, with which the Commission agrees, this EPS qualifies as a technological aid to the play of bingo.

Conclusion

Electronic Wild Ball Bingo, like its table game counterpart, is a Class II game under IGRA.

We emphasize that an important consideration to our opinion of the game is the real-time or near real-time selection of the winning numbers in the bingo blower draw compared to the display of those numbers. It is significant also that players are playing against each other in real time as the numbers are drawn and called — the essence of a bingo game — with this real time format and not against a machine or the system of linked machines.

While the vendor materials note consistency of play of the game and increased security as aspects that favor storing the results of the bingo blower draw on a computer chip or disc for a short time before they are revealed, only consistency of play seems to be achieved by this format. In our view, security may be diminished if the results of the bingo draw can be known in advance of the play. The longer those results are available, the greater the risk that they may be obtained by players who may then construct a winning card.

This opinion is advisory in nature only, and may be superseded, reversed, revised, or reconsidered by a subsequent General Counsel, NIGC Chairman, or the Commission as a whole. Furthermore, if the game or play thereof fails to conform with, or differs from, the foregoing description and conditions, such differences might materially alter our conclusion.

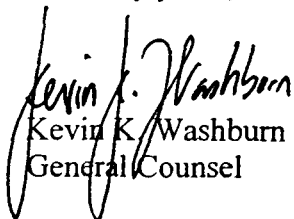
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Finally, by issuing this opinion, we do not speak on behalf of the Department of Justice or the United States Attorneys who share enforcement responsibilities with the NIGC over gambling devices.

Sincerely yours,


Kevin K. Washburn
General Counsel

William Grant
Senior Staff Attorney