

HOBBS, STRAUS, DEAN & WALKER, LLP

ATTORNEYS AT LAW
2120 L STREET, N.W. • SUITE 700 • WASHINGTON, D.C. 20037
TEL: 202.822.8282 • FAX: 202-296-8834
WWW.HSDWLAW.COM

MEMORANDUM ON CHARACTERISTICS OF CLASS II TECHNOLOGIC AIDS

TABLE OF CONTENTS

	<u>PAGE</u>
I. APPLICABLE STATUTORY AND REGULATORY PROVISIONS.	3
II. DESCRIPTION OF CLASS II GAMES UPHELD BY THE COURTS AND THE NIGC.	6
A. Mega Mania.	6
B. Lucky Tab II Pull-Tab Game.	8
C. Magical Irish.	8
D. Tab Force.	8
E. Wild Ball Bingo.	10
III. GENERAL CONSIDERATIONS.	11
A. Permitted Technologic Aids or Prohibited Facsimiles; Application of the Johnson Act.	11
B. Clarifying Definition for "Facsimile."	14
C. Clarifying Definition for "Technologic Aid."	15
D. Technologic Aids That Are Not Johnson Act Gaming Devices.	15
E. Requirement that Live Paper Bingo Be Played.	15
F. House Banked Games.	16
G. Response to Comments	17
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

<u>Cabazon Band of Mission Indians v. National Indian Gaming Com'n</u> , 14 F.3d 633 (D.C. Cir. 1994)	<i>passim</i>
<u>Chickasaw Nation v. United States</u> , 208 F.3d 871 (10th Cir. 2000), <u>aff'd</u> , 112 S.Ct. 528 (2001)	A9, A13
<u>Cheyenne-Arapaho Gaming Com'n, v. National Indian Gaming Com'n</u> , No. 01CV0632C(j) (N.D. Okla.)	A11
<u>Diamond Game Enterprises v. Reno</u> , 230 F.3d 365 (D.C. Cir. 2000)	<i>passim</i>
<u>Duncan v. Walker</u> , 121 S.Ct. 2120 (2001)	1
<u>Montana v. Blackfeet Tribe</u> , 471 U.S. 759 (1985)	A4
<u>Reiter v. Sonotone Corp.</u> , 442 U.S. 330 (1979)	1
<u>Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Com'n</u> , No. 00-CV-609-BU (N.D. Okla. Feb. 20, 2000) (Appeal Pending, No. 01-5066, 10th Cir.)	<i>passim</i>
<u>Spokane Indian Tribe v. United States</u> , 972 F.2d 1090 (9th Cir. 1992)	A14
<u>Sycuan Band of Mission Indians v. Roache</u> , 54 F.3d 535 (9th Cir. 1994), <u>cert. denied</u> , 516 U.S. 912 (1995)	12, A10, A11, A14
<u>United States v. 103 Electronic Gambling Devices</u> , No. C 98-1984 CRB 1998 U.S. Dist. LEXIS 19135, (N.D. Cal. Nov. 23, 1998)	15, A4
<u>United States v. 103 Electronic Gambling Devices</u> , 223 F.3d 1091 (9th Cir. 2000)	<i>passim</i>
<u>United States v. 162 MegaMania Gambling Devices</u> , No. 97-C-1040-K, 1998 U.S. Dist. LEXIS 17293 (N.D. Okla. Oct. 26, 1998)	15, A4
<u>United States v. 162 Megamania Gambling Devices</u> , 231 F.3d 713 (10th Cir. 2000)	<i>passim</i>
<u>United States v. Santee Sioux Tribe</u> , 174 F. Supp. 2d 1001 (D. Neb. 2001)(Appeal Noted 8th Cir.)	<i>passim</i>

STATUTES AND REGULATORY MATERIALS

5 U.S.C. § 500, <u>et seq.</u>	3
15 U.S.C. § 1171(a)	5

15 U.S.C. § 1171 (a)(2)	5
15 U.S.C. § 1171(a)(3)	5
15 U.S.C. § 1175	5
25 U.S.C. § 2703(7)	11
25 U.S.C. § 2703(7)(A)	4, A1, A3
25 U.S.C. § 2703(7)(A)(i)	1, A8
25 U.S.C. § 2703(7)(A)(i)(I)	A6
25 U.S.C. § 2703(7)(A)(i)(II)	17, A4
25 U.S.C. § 2703(7)(A)(i)(III)	15, A4, A5
25 U.S.C. § 2703(7)(B)	4
25 U.S.C. § 2703(8)	4
25 U.S.C. § 2710(d)	4
25 C.F.R. § 502	4
25 C.F.R. § 502.3	5, 16
25 C.F.R. § 502.4	16
25 C.F.R. § 502.7	5, 11
25 C.F.R. § 502.8	3, 5, 12
25 C.F.R. § 502.9	1, 16
25 C.F.R. § 502.11	16
57 Fed. Reg. 12,382 (April 9, 1992)	A5, A8, A13
57 Fed. Reg. 12,383 (April 9, 1992)	A8
57 Fed. Reg. 12,387 (April 9, 1992)	A8, A14
57 Fed. Reg. 12,388 (April 9, 1992)	16
64 Fed. Reg. 61,233-35 (Nov. 10, 1999)	2
66 Fed. Reg. 33,494 (June 22, 2001)	3
ALASKA STAT. § 05.15.690(35)	A8

CONN. GEN. STAT. § 7-169(a)	A6
28 DEL. C. § 1102(1)	A6
230 ILL. COMP. STAT. ANN. 20/1.1	A9
IOWA CODE § 99B.1(5)	A6
LA. REV. STAT. § 4:703	A9
MINN. STAT. § 349.12 (subd. 32)	A8
MISS. CODE ANN. § 97-33-53	A8
N.D. ADMIN. CODE § 99-01.3-04-01.2	A2
N.D. ADMIN. CODE § 99-01.3-04-03(24)	A2
OR. ADMIN. R. § 137-025-0160(7)	A2
PA. STAT. ANN. tit. 10, § 313	A8
WASH. ADMIN. CODE § 230-20-243	A2
<u>NIGC ADVISORY OPINIONS AND BULLETINS</u>	
NIGC Break the Bank Advisory Opinion (May 31, 2001)	A11
NIGC Evergreen Bingo Advisory Opinion (Nov. 2, 1999)	A8
NIGC Tab Force Advisory Opinion (June 8, 1999)	<i>passim</i>
NIGC Wild Ball Bingo (Electronic Version) Advisory Opinion (Mar. 27, 2001)	<i>passim</i>
NIGC Bulletin No. 95-2 (Oct. 24, 1995)	16
NIGC Bulletin No. 99-2 (Aug. 18, 1999)	A9
<u>MISCELLANEOUS</u>	
S. REP. NO. 100-446, at 9 (1988), <u>reprinted in</u> 1998 U.S.C.C.A.N. 3071, 3079	<i>passim</i>
WEBSTER'S II NEW RIVERSIDE DICTIONARY (1984)	A3
WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986)	A3

HOBBS, STRAUS, DEAN & WALKER, LLP

ATTORNEYS AT LAW

2120 L STREET, N.W. • SUITE 700 • WASHINGTON, D.C. 20037

TEL: 202.822.8282 • FAX: 202-296-8834

WWW.HSDWLAW.COM

Memorandum

March 11, 2002

TO: Class II Gaming Consortium

FROM: Hobbs, Straus, Dean & Walker, LLP

RE: Characteristics of Class II Technologic Aids.

An informal consortium of tribal government leaders, tribal regulatory agencies, tribal gaming operators and others interested in clarifying the status of the permissible scope of technologic aids to Class II gaming has asked us to provide legal analysis to define the characteristics that must be present for "aids" to bingo and pull-tabs¹ to qualify as lawful "electronic, computer, or other technologic aids" within the meaning of 25 U.S.C. § 2703(7)(A)(i), hereafter "technologic aids." For the reasons detailed below and in the attached Appendix A, it is our opinion, consistent with the Senate Report (quoted below at pages 12-13) accompanying the Indian Gaming Regulatory Act ("IGRA"), that there are a wide variety of devices that may lawfully be utilized as "technologic aids" to bingo and pull-tabs. The attached Appendix A sets forth Guidelines for bingo and pull-tab games played with Class II technologic aids. It is intended to provide a clear framework for evaluating such games.

1. You have not asked us to discuss the other Class II sub-games: lotto, punch boards, tip jars, instant bingo and other games similar to bingo. The NIGC has defined "games similar to bingo" as limited to games that meet the statutory requirements of bingo. 25 C.F.R. § 502.9. This definition is legally unsupportable, since it would not give any meaning or effect to the separate listing of "bingo" and "games similar to bingo" by Congress. See Duncan v. Walker, 121 S. Ct. 2120, 2125 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute."); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). The use of the internet and proxy play pose complex questions not fully addressed by the courts. These issues will not be addressed in this memorandum but will be the subject of a later study.

In the forthcoming Model Regulations, which you have also asked us to prepare, we will set forth the specific characteristics that must be present in order for a given game played with a technologic aid device to have Class II status. These regulations will be drafted to be used by tribal gaming commissions to determine the legality of existing Class II games and those that may be developed in the future. These will be proposed regulations and it is expected that tribal gaming commissions will tailor them to suit their own needs and circumstances and that certain elements may be changed to reflect experience. For ease of reference, we have also prepared a compilation of the most significant legal authorities cited in this memorandum, which is separately bound in a loose-leaf form that can be updated as new cases and rulings are made by the courts, tribal gaming commissions and the National Indian Gaming Commission ("NIGC" or "Commission").

Some of the views expressed in this memorandum are contrary to positions taken by the Department of Justice and/or the NIGC on the various issues identified. It is significant that recent court decisions have upheld an expansive reading of the statute that is consistent with the views expressed below. See United States v. 162 Megamania Gambling Devices, 231 F.3d 713 (10th Cir. 2000) (MegaMania); United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000) (MegaMania); Diamond Game Enterprises v. Reno, 230 F.3d 365 (D.C. Cir. 2000) (Lucky Tab II); Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission, No. 00-CV-609-BU (N.D. Okla. Feb. 20, 2000)(Magical Irish) (Appeal Pending, No. 01-5066, 10th Cir.); and United States v. Santee Sioux Tribe, 174 F. Supp. 2d 1001 (D. Neb. 2001) (Lucky Tab II) (Appeal Noted 8th Cir.).

The brief filed by the United States on October 1, 2001, in the Seneca-Cayuga Case in the United States Court of Appeals for the Tenth Circuit is particularly significant. In that brief, the Justice Department advances a newly restrictive view of the kind of technologic aids available to Class II games under the IGRA.² If the Justice Department's position were to be upheld by the Tenth Circuit, this would be directly contrary to the conclusions reached in this memorandum and various rulings of the NIGC. While we think it unlikely that the same court that rejected the Justice Department's position in United States v. 162 Megamania Gambling Devices would uphold it now, there is certainly some risk that it will or that the Supreme Court would take the case on *certiorari* and reach conclusions contrary to those set forth in this memorandum. This is an unusual situation in which the Commission and the Justice Department have taken opposing legal positions. The ambiguity and confusion generated by this conflict further demonstrates the need for tribes to step forward with clear and consistent standards.

The position taken by the Justice Department in United States v. Santee Sioux Tribe is also noteworthy. Despite the fact that the NIGC had urged the Tribe to replace the games it had previously been operating with Lucky Tab II pull-tab dispensers (174 F. Supp. 2d at 1003), the Justice Department continued to argue in court that the Lucky Tab II game does not have Class II status. The District Court rejected the Justice Department's position. However, the Department of Justice has noted an appeal to the Eighth Circuit, seeking to persuade that court to act in conflict with the existing precedent in the D.C. Circuit, thus laying the ground work for a *certiorari* petition to the United States Supreme Court.

2. In that brief, the Justice Department expressly disavows its former view, embodied in a 1996 Memorandum from the Office of Legal Counsel of the Department of Justice, that there are circumstances in which a technologic aid may be lawful, even if the aid is a "gambling device under the Johnson Act." See Brief for the Federal Appellant at 25 n.2.

On November 10, 1999 (64 Fed. Reg. 61,234), the NIGC announced a proposed rule that would establish a procedure for NIGC classification of games. While many tribes submitted strong objections to the proposed rule, it is not possible to know at this time what form the rule will ultimately take, when and if it is ultimately published. While this rule is procedural rather than substantive it would effectively make it far more difficult for a tribe to install a new Class II game utilizing "technologic aids."³

Further, on June 22, 2001 (66 Fed. Reg. 33,494), the NIGC proposed a rulemaking that would delete its present definition of the word "facsimile" from its governing regulations. 25 C.F.R. § 502.8 (The present definition provides that "any [Johnson Act] gambling device" is a prohibited "facsimile.") This action would recognize that a given "technologic aid" could be lawful under the IGRA, even if it was also a gambling device under the Johnson Act. We understand that the Department of Justice disagrees with this proposed rule and has expressed a contrary position in its brief to the Tenth Circuit in the Magical Irish case discussed above. The present status of the proposed rule is unclear. If it were promulgated, it would provide additional support for the conclusions reached in this memorandum about the interrelationship of the Johnson Act and the IGRA, i.e., that a "technologic aid" does not lose its Class II status because it may also be a "gambling device" under the Johnson Act.

In preparing this Memorandum and Guidelines, we have reviewed the relevant provisions of the IGRA, its legislative history, regulations of the NIGC and its relevant decisions and opinions. We have reviewed various federal court decisions and decisions of tribal gaming commissions interpreting the provisions of the IGRA and, to the extent necessary for our analysis, relevant state statutory and case law. Finally, we have considered the comments of various interested parties. We have made no independent investigation of the facts set forth below. With respect to various games discussed, we have relied on the facts set forth in the court cases or administrative actions discussed below, which have ruled on the legality of those games, as well as on promotional materials provided by the vendors of those games.

I. APPLICABLE STATUTORY AND REGULATORY PROVISIONS.

Under the IGRA,

[t]he term "class II gaming" means —

3. Under the proposed rule, a tribe would have to submit the proposed game to the NIGC, requesting the Chairman's classification decision before any new game may be installed. If the Chairman rules that the game is not a Class II device, then the tribe may appeal within the Commission. Existing games would be permitted to continue operation, so long as they are submitted for classification review and have not been determined to be a Class III game. (64 Fed. Reg. 61,235 (Nov. 10, 1999)). Even a determination that a given game is Class II would apply only to specific machines, listed by serial number that are certified to be "identical in every respect to the game which was classified by the Chairman." *Id.* at § 504.9. (Under present law, the Chairman of the Commission has the authority to challenge any game installed by a Tribe, but only if he makes a rational determination that a violation has occurred, under the applicable standards of the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.*) And even if the game were cleared by the NIGC, that clearance would not be binding as against the Justice Department. As noted above, the Justice Department challenges the Class II status of Lucky Tab II pull-tab dispensers operated by the Santee Sioux Tribe, despite the fact that the NIGC had urged the Tribe to replace other games it had been operating with these devices.

(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

(ii) card games that

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(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 does not fit within the definition of Class II, it is defined as Class III and may only be played as permitted by a tribal-state compact or procedures issued by the Secretary of the Interior. See 25 U.S.C. § 2703(8), § 2710(d).

In addition to the statutory definition, the NIGC has promulgated regulations defining Class II gaming that basically paraphrase the statute. The regulations at 25 C.F.R. § 502 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 [sic], 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. Electronic, computer or other technologic aids, for which the statute lacks a definition, are defined by the regulations as:

a device such as a computer, telephone, cable, television, satellite or bingo blower and 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.

Electronic or electromechanical facsimile, another term not defined in the statute, is defined by regulation as "any gambling device as defined in 15 U.S.C. § 1171(a)(2) or (3)[the Johnson Act]." 25 C.F.R. § 502.8. The Johnson Act is a broadly worded federal law that prohibits the possession of gambling devices on Indian reservations. See 15 U.S.C. § 1175. The Johnson Act defines gambling device as:

- (1) any so-called "slot machine" ... ; 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 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

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

15 U.S.C. § 1171(a).

II. DESCRIPTION OF CLASS II GAMES UPHeld BY THE COURTS AND THE NIGC.

The various characteristics that must be present for a bingo or pull-tab game played with an aid device to qualify as Class II under the IGRA are discussed in Appendix A. Rather than focus on the legality of any particular game, this section sets forth the relevant facts of the MegaMania, Lucky Tab II and Magical Irish games that have been upheld in the court decisions upon which our analysis relies. This section also highlights the critical features of the Tab Force and Wild Ball Bingo games that led to favorable NIGC advisory opinions, since these characteristics are essential to the subsequent analysis.

Judicial Clearance

A. MegaMania.

The play of MegaMania is described in an advisory opinion of the Acting General Counsel of the NIGC dated July 23, 1997, and in the opinions of the Ninth and Tenth Circuit Courts of Appeals, United States v. 162 Megamania Gambling Devices, 231 F.3d 713 (10th Cir. 2000); United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000). According to those sources, MegaMania is an electronic bingo game played on an electronic bingo system. The system, which allows players to participate in a bingo game not only among players within a bingo hall on a reservation but also among players at halls on several other reservations in the United States, is made up of four parts: (1) a means of drawing bingo numbers, (2) a main server or central host which communicates the information on bets and on the bingo balls drawn to each reservation bingo hall server, (3) a server located at each bingo hall which holds a selection of bingo cards, and communicates information on the balls drawn and bets to the electronic player station, and (4) an electronic player station ("EPS") where the bingo player plays the game on an electronic screen which displays bingo cards, and informs the player as to the balls being drawn and the prize being played for. All four parts of the system are located on Indian lands.

MegaMania is played as follows: The bingo player opens an account with a cashier and purchases from a cashier credits to play on an EPS. The player receives in return a ticket with an account number and a statement of the credit amount purchased. To initiate play, the player takes the voucher to any EPS and enters on the screen the account number. If a specified

minimum number of cards are in play, the game will then activate. Another screen will appear which displays eight bingo cards, a display of the bingo balls drawn, a list of prizes, and credits remaining to the player. The screen also displays a "daub" button.

Each card costs 25 cents. The player can put one to eight cards into play. The player also has a choice of bingo cards. If he wants to change the card displayed, he touches the screen and a new card appears. Each hall server has a few thousand cards available for play.

The balls are drawn three at a time. As the balls are drawn, the numbers are keyed into a computer which communicates that data to the main server and then to the servers at the remote locations. After each round of three balls, an additional 25 cents per card is charged if the player wishes to continue. This is referred to as the "ante up" feature.

If a number called matches a number on the electronic card (or cards) displayed on the EPS, the daub button will flash. The player presses this button and the numbers will be electronically daubed on the screen. If the player fails to press the daub button and he misses a winning ball, the player "sleeps" the bingo. He will not win automatically. The game goes on until a bingo is claimed by a player daubing a winning ball.

As explained in MegaMania's promotional literature, there are three ways to win MegaMania:

Players compete for three progressive jackpots: The 4-ball Jackpot is awarded when any player(s) daub a straight-line Bingo in the first four balls called. This jackpot starts at \$10,000 and grows from a percentage of sales each game it is not claimed. The 5-9 ball Jackpot is awarded for a Bingo in 5, 6, 7, 8 or 9 drawn balls and resets to \$100 each time it is claimed, growing each game it is not claimed to a maximum of \$1,199.95. The "must-go" prize is awarded for any Bingo in ten or more called balls. The must-go resets to \$25 each time it is claimed and grows as a percentage of sales. Multiple winners share these jackpot prizes equally.

MegaMania also features exciting "CornerMania" prizes, rewarding players for matching two, three and four corners during each game. The largest CornerMania prizes are \$775, for matching three corners in the first round (balls 1-3), and \$1,175, for having all four corners daubed on a card in the first six balls drawn. [The CornerMania prizes decrease in later rounds.]

Another way players can win prizes is "Lucky Leftovers." Since the game always displays three balls each round, when a game ends with a Bingo on the 1st or 2nd ball of the three balls, the remaining ball(s) after the win ball are called leftovers and displayed with red numbers. A Lucky Leftover prize is awarded for any card in play at the end of the game that would have had a bingo on a leftover ball. In other traditional Bingo games this type is usually called a "hard luck" prize.

A CornerMania prize must be awarded in every game. In games which end without any corner prizes being won, additional "Bonus Balls" are called and displayed until at least one of the cards that was still in play at the end of the game is awarded a corner prize. Players' accounts are *not* charged when Bonus Balls are being called.

Once the player's initial credits purchased from the cashier run out, he may purchase additional credits by inserting money into the bill acceptor on the EPS. To end play, the player hits the exit button and the EPS prints a ticket that displays the amount of credits or winnings the player has accumulated. The player takes this slip to the cashier for payment.

B. Lucky Tab II Pull-Tab Game.

A description of the Lucky Tab II game was provided by the Court of Appeals for the District of Columbia Circuit in Diamond Game:

At issue in this case is the proper classification of a gambling device known as the Lucky Tab II, an electromechanical dispenser of paper pull-tabs. The machine dispenses pull-tabs from a roll containing approximately 7500 tabs. About 100 rolls comprise a deal, within which winning pull-tabs are randomly distributed. The machine cuts the pull-tab from the roll and drops it into a tray. A bar code scanner inside the machine automatically reads the tab and then displays its contents on a video screen. A placard on the machine informs players that "video images may vary from actual images on pull-tabs. Each tab must be opened to verify." To collect prizes, players must present the actual winning tab to a clerk. In many bingo halls, players purchase pull-tabs either from a Lucky Tab II or from clerks; in such cases, machines and clerks cut pull-tabs from rolls that are part of the same deal.

230 F.3d at 367-68. A pull-tab is purchased from a Lucky Tab II device by inserting money into a bill acceptor, which is located on the device.

C. Magical Irish.

Based upon the transcript of the proceedings in Seneca-Cayuga, the "Magical Irish" game involves a dispenser of paper pull-tabs and a physically separate video display. When a pull-tab is dispensed (after the insertion of money by the player), a scanner reads the bar code on the pull-tab and transmits the information to the video display (which is adjacent to the dispenser). The player has the option of viewing the results on the video display or the player may simply take the pull-tab from the dispenser and present it to the cashier for payment if it shows a winning combination. If the player elects to view the results on the video display, the outcome of the pull-tab can be visually depicted in a variety of casino themes. However, the player must take the paper pull-tab to a cashier for validation and payment since no cash or credit is issued by the video display or the dispenser. We understand that the game is functionally the same as Lucky Tab II, except that Magical Irish separates the video display and pull-tab dispenser into two separate units.

Administrative clearance

D. Tab Force.

As described in the NIGC Advisory Opinion (June 8, 1999), the Tab Force game⁴ is played as follows:

4. The advisory opinion concludes that both the Tab Force and similar Multi-Tab game are Class II. For simplicity, we will refer to this opinion as the "Tab Force" opinion.

The player purchases the pull-tab from either a cashier or a floor seller. The player can determine whether he or she has won in a number of ways. First, the player can open or remove the pull-tab window to reveal the numbers. If the pull-tab contains winning combinations, the player may take the pull-tab to an attendant for payment. The player may also have the attendant determine if the pull-tab has winning patterns. Either way, the attendant validates the pull-tab. With the Tab Force pull tabs the attendant does so either by the use of a bar code scanner or by manually inputting the bar-code into a computer which verifies whether the paper pull-tab is a winner. With the Multi-Tab pull tabs, the attendant swipes the pull-tab past a laser scanner which verifies whether the paper pull-tab is a winner.

...

Both companies offer machines designed to read the pull-tabs. If a Tab Force pull-tab player chooses, he may determine whether his pull-tab is a winner by using what is called a "Validation System." A Multi-Tab pull-tab player may also have his pull-tab read by using the "Multi-Tab System." With both pull-tab games, it is entirely up to the player whether to read his pull-tab himself or use the respective System ("System" hereinafter used to refer to both Systems). With either of the Systems, a player first opens or uncovers the pull-tab to reveal the plays and then inserts it into the System. The Tab Force Validation System then reads the bar-code on the pull-tab and validates it. With the Multi-Tab System, the system reads the pull-tab, and returns the original pull-tab to the player who then takes the pull-tab to an attendant who validates the pull-tab. Both Systems present a graphic display of each of the number combinations on the pull-tab one at a time as the player presses a button to prompt each display.

After the player has determined whether the pull-tab is a winner, he may insert another pull-tab if he wishes. When a Tab Force player is done validating his pull-tab(s), the Validation System retains the pull-tab(s) and prints a voucher which the player may present to a cashier for payment. At any time, the player may obtain a voucher by pressing the "PRINT VOUCHER" button. If he does, the Validation System will more rapidly display the remaining winning and losing patterns on the pull-tab and print the voucher. When a Multi-Tab System player is finished reading the pull-tab, the original pull-tab is returned to the player, who must then redeem it with a cashier.

In both cases, the System does not accept cash, nor does it dispense cash. The Systems do not contain random number generators. In addition, they do not dispense pull-tabs. The Systems simply read the pull-tabs and display whether or not they are winners. The Systems cannot change the outcome of the game. The

outcome is determined by the pre-printed numbers on the pull-tab. A player cannot accumulate credits for more plays. If a Tab Force player wants to play more games using his winnings, he must redeem his voucher and purchase additional pull-tabs. If a Multi-Tab player want to play more games, he must redeem his pull-tab and purchase additional pull-tabs.

NIGC Tab Force Advisory Opinion (June 8, 1999).

E. Wild Ball Bingo.

The NIGC issued an advisory opinion that electronic play of Wild Ball Bingo is a Class II game based on the following description:

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.⁵ 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. The numbers, however 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

5. The table game version of Wild Ball Bingo was the subject of a favorable 1996 NIGC advisory opinion.

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.

NIGC Wild Ball Bingo (Electronic Version) Advisory Opinion (Mar. 27, 2001) (footnote omitted).

III. GENERAL CONSIDERATIONS.

While there are a number of issues relating to the use of "technologic aids" that are specific either to bingo or to pull-tabs, there are some fundamental issues that involve both.

A. Permitted Technologic Aids or Prohibited Facsimiles; Application of the Johnson Act.

Under 25 U.S.C. § 2703(7) Class II games may utilize "electronic, computer or other technologic aids." Under the NIGC's regulations, a technologic aid is "a device ... that when used ... [i]s not a game of chance but merely assists a player or the playing of a game [and] is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile." 25 C.F.R. § 502.7.

The NIGC's regulations define facsimile to include "any gambling device as defined by the [Johnson Act]." 25 C.F.R. § 502.8. However, recent cases have either explicitly or implicitly held that devices that qualify as technologic aids are not disqualified because they may also have the status of "gambling devices" under the federal Johnson Act. Diamond Game, 230 F.3d at 367 ("Class II aids, permitted under IGRA, do not run afoul of the Johnson Act." (citing Cabazon Band of Mission Indians v. National Indian Gaming Com'n, 14 F.3d 633, 635 (D.C. Cir. 1994))); 162 Megamania Gambling Devices, 231 F.3d at 725 ("Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid."); 103 Electronic Gambling Devices, 223 F.3d at 1101 ("The text of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids."); Santee Sioux Tribe, 174 F. Supp. 2d. at 1005 ("I conclude that the Johnson Act is not applicable to Class II devices."). In effect, these cases have read an implied partial repeal of the Johnson Act for Class II technologic aids under the IGRA. Although the NIGC at one time apparently took a different view, it now appears to agree with the MegaMania rulings on this point. See NIGC Wild Ball Bingo (Electronic Version) Advisory Opinion (Mar. 27, 2001).

The courts have chosen to apply a "plain-meaning" test to distinguish between facsimiles and technologic aids. As explained in the Tenth Circuit's MegaMania decision:

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, ... ; 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. ... 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 Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994) ("the first dictionary definition of 'facsimile' is 'an exact and detailed copy of something.'" (quoting Webster's Third New Int'l Dictionary 813 (1976)), cert. denied, 516 U.S. 912, 133 L.Ed.2d 203, 116 S.Ct. 297, (1995); Cabazon II, 827 F. Supp. at 32 (same); Cabazon III, 14 F.3d at 636 (stating "as commonly understood, facsimiles are exact copies, or duplicates.").

162 MegaMania Gambling Devices, 231 F.3d at 724. This distinction is firmly established in the IGRA legislative history:

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 (emphasis added). Stated more simply, an "aid" assists in the play of the game and broadens potential participation in a common game while a facsimile is a self-contained copy of the underlying game in which the player is limited to playing against the machine and not with or against other players.⁶

Applying this test, the Ninth and Tenth Circuits ruled that MegaMania is not a facsimile (an exact copy or duplicate of bingo) because the game of bingo is not wholly incorporated into the EPS; rather, the game of bingo is independent from the EPS, 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 Devices, 223 F.3d at 1100; 162 MegaMania Gambling Devices, 231 F.3d at 724. In other words, the courts have focused on whether the device makes the game available to multiple players. Similarly, the courts in the Lucky Tab II cases determined that the game was the deal of paper pull-tabs, which was available to many players and thus not wholly incorporated into the device. See Diamond Game⁷; Santee Sioux, 174 F.

6. Similar views were expressed by the Ninth Circuit:

The MegaMania terminal ... does "link participant players at various reservations whether in the same or different States [thereby] broaden[ing] the potential participation levels. ... Unlike a slot machine, MegaMania is in truth being played outside the terminal; the terminal merely permits a person to connect to a network of players comprising each MegaMania game, and without a network of at least 12 other players playing at other terminals, an individual terminal is useless.

... CornerMania players are competing against each other either to be the first to get a corners prize (if the straight-line game has ended), or (if a corners prize has already been awarded) to get a corners prize before another player gets straight-line bingo.

103 Electronic Gambling Devices, 223 F.3d at 1100-01.

7. According to the D.C. Circuit:

... Indeed, players using the Lucky Tab II often play a deal simultaneously with other players in the same hall who have chosen to purchase pull-tabs from clerks. For players using the Lucky Tab II, the

Supp. 2d at 1008 ("the use of the machines in theory facilitates greater participation, since more participants are able to play at the same time.").

In response to the developing case law and in advance of planned regulations designed to classify gaming devices, the NIGC has proposed to "remove" its definition of "facsimile." 66 Fed. Reg. 33,494 (June 22, 2001). The preamble to the announcement states that the NIGC has opted to withdraw its own regulation in favor of a "plain language" interpretation of the statute itself. The intent is to "ensure consistency with developments in the case law and to ensure a uniform approach to this term by the Commission and the Courts." See id. at 33,495. We understand that the Department of Justice objects.⁸

In its recent Tenth Circuit brief in the Seneca-Cayuga Case, the Justice Department argued for a definition of "facsimile" that would outlaw any Class II technologic aids, except those that perform such functions as linking bingo halls by telephone. Brief at 35. According to the Justice Department, any device that is designed to "simulate a slot machine effect" through "rapid fire play" is a prohibited "facsimile." Brief at 33. This view, of course, is contrary to the judicial interpretations concerning the Lucky Tab II, MegaMania and Magical Irish games discussed above—each of these games has functions which resemble elements of slot machine play, but were nevertheless held to be Class II games played utilizing technologic aids.⁹

B. Clarifying Definition for "Facsimile."

Neither the IGRA nor the legislative history have provided clear guidance for technologic aids. Recent case law provides more assistance. Those courts have distinguished between Class III facsimiles and Class II aids by asking whether a game played with an electronic aid is self-contained or provides players with the opportunity to play against each other in a common game. A more workable definition of facsimile would track this precedent and the statute as follows:

machine functions as an aid--it "helps or supports," or "assists" the paper game of pull-tabs. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 44 (1993). Without the paper rolls, the machine has no gaming function at all. It is, in essence, little more than a high-tech dealer. Viewed this way, the game played with the Lucky Tab II is not a facsimile of paper pull-tabs, it *is* paper pull-tabs.

Diamond Game, 230 F.3d at 370.

8. The validity of several of the Commission's definition regulations, including the definition of "electronic and electromechanical facsimile," was previously upheld in Cabazon Band of Mission Indians v. National Indian Gaming Com'n, 827 F. Supp. 26 (D.D.C. 1993), aff'd, 14 F.3d 633 (D.C. Cir. 1994). According to the district court, "only a definition of facsimile that is equivalent to that of [Johnson Act] gaming device renders the statute internally consistent and allows both statutes peaceably to coexist." Id. at 31. However, this portion of the district court's decision was not appealed and subsequent decisions, including the D.C. Circuit's recent decision in Diamond Game, are inconsistent with the district court's interpretation. See Diamond Game, 230 F.3d at 367("Class II aids, permitted under IGRA, do not run afoul of the Johnson Act.").

9. The Justice Department's position also conflicts with the NIGC's advisory opinion on the Tab Force machine, which involved a paper pull-tab that could, at the player's option, be read by a machine that displayed the results in slot machine format. The NIGC opined that the "reader" was a technologic aid rather than a Johnson Act device. NIGC Tab Force Advisory Opinion (June 8, 1999).

Electronic or Electromechanical Facsimile -- A game of chance played with a self-contained electronic or electromechanical device, duplicating the appearance of a Class II or Class III game, in which a single participant can play the game only with or against the device rather than with or against other players.

In other words, the classification of a particular device as a "facsimile" turns on whether the game is self-contained so that it cannot be played against other players. The superficial appearance of the game display and whether it duplicates the appearance of any Class II or Class III game is not determinative.

C. Clarifying Definition for "Technologic Aid."

Recent cases and the legislative history of the IGRA support the use of the following test to distinguish between aids and facsimiles:

An aid operates to broaden the potential participation levels in a common game and is readily distinguishable from a facsimile where a single participant can play the game only with or against a self-contained device rather than with or against other players.

This test is wholly adequate to identify a technologic aid, particularly when used in conjunction with the clarifying definition of "facsimile" set forth above. See 66 Fed. Reg. 33495.

D. Technologic Aids That Are Not Johnson Act Gaming Devices.

There are a number of NIGC and court rulings that have held that some "technologic aids" are not Johnson Act gambling devices. See United States v. 103 Electronic Gambling Devices, No. C 98-1984 CRB, 1998 U.S. Dist. LEXIS 19135, at *27 (N.D. Cal. Nov. 23, 1998) ("while the EPS is a machine designed primarily for gambling, and when operated either delivers money or entitles the player to receive money, the EPS itself does not deliver the element of chance, as is the case with a slot machine."); United States v. 162 MegaMania Gambling Devices, No. 97-C-1040-K, 1998 U.S. Dist. LEXIS 17293, at *12-13 (N.D. Okla. Oct. 26, 1998); NIGC Tab Force Advisory Opinion (June 8, 1999) ("the 'application of an element of chance' must exist for a device to be a Johnson Act device. Such an element does not exist in [the Tab Force] System itself. The element of chance occurs when the player purchases the pull-tab separately from the machine. Whether a pull-tab contains any winning combinations is pre-determined at the time the pull-tab is printed; the use of either System leaves nothing to chance.") (Emphasis added).

While any device that falls into this category presents an even stronger case, we have not developed that point in this memorandum. In our view, many technologic aids that are utilized by tribes fall within the broad sweep of the Johnson Act definition of gambling devices. Given the rulings of the Ninth and Tenth Circuits in the MegaMania cases, the D.C. Circuit in the Lucky Tab II case and the district courts in the Magical Irish case and the most recent Lucky Tab II case that a device that qualifies as a "technologic aid" is not disqualified because it is also a Johnson Act device, this point is no longer essential to the development of a comprehensive analysis on the necessary characteristics of Class II games. As developed above, the case law

supports the ability of tribes to develop and employ a variety of Class II technologic aids without regard to the strictures of the Johnson Act.

E. Requirement that Live Paper Bingo Be Played.

The IGRA allows "games similar to bingo" only if played in the same location as bingo. 25 U.S.C. § 2703(7)(A)(i)(III). Thus, the bingo games discussed in this memorandum can be played where live bingo is not played only if the game is itself "bingo." In fact, the Ninth Circuit expressly held that MegaMania is bingo. 103 Electronic Gambling Devices, 223 F.3d at 1102-03. In contrast, the NIGC General Counsel concluded that MegaMania is not bingo but is instead a "game similar to bingo." The Tenth Circuit avoided the issue as unnecessary, and held that MegaMania was either bingo or a game similar to bingo. 162 MegaMania Gambling Devices, 231 F.3d at 725 n. 9. So there is no consensus on this issue. Moreover, we are aware that the NIGC has taken the consistent position that pull-tabs -- which can only be played where bingo is played -- can only be played where "live" bingo games, rather than linked bingo games alone, are conducted.

As explained above, the NIGC's definition of "game similar to bingo" is circular in that it requires that such a game meet all the elements of bingo. See 25 C.F.R. §§ 502.3, 502.9. While we believe that MegaMania and other bingo games using technologic aids are bingo, and not merely a game similar to bingo, the fact that the NIGC thinks differently means that it would be prudent (but not necessary) to play these games only where "live" paper games of bingo are also played. Moreover, the NIGC has issued a bulletin stating its position as to where and when Class II games other than bingo can be played. NIGC Bulletin No. 95-2, "Pull-Tab Sales on Indian Lands." (While the bulletin refers specifically to pull-tabs, it logically applies to all Class II "sub-games."). The bulletin states that in order to offer pull-tabs (implying, by extension, other Class II "sub-games" as well, including games similar to bingo), the gaming facility must:

- offer bingo as its "primary game,"
- conduct a "full session" of bingo on a "regular basis," and
- seat an adequate number of people for bingo.

The bulletin further states, however, that if these requirements are not met, then pull-tabs (and, again, presumably other sub-games) may be played only during the hours of bingo operation. While this is the NIGC's stated position, all of these factors exceed the statutory requirements for bingo set forth by Congress and are consequently unfounded.

While the NIGC takes the position that bingo sub-games may be played only where paper bingo games are played, we believe that to be unnecessarily restrictive. As the case law has developed, a technological aid to the play of bingo is no other than the play of bingo itself. As such, the play of bingo with a technological aid supplies the necessary predicate for the play of other sub-games under the statute.

F. House Banked Games.

The NIGC defines Class III gaming to include "[a]ny house banking game" 25 C.F.R. 502.4. According to the NIGC, a house banking game "means any game of chance

that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win." 25 C.F.R. § 502.11 (emphasis added).¹⁰

In the MegaMania cases, the courts specifically rejected the Justice Department's contention that linked bingo games are house-banked, reasoning the house does not participate in the game, and that fees collected by the linked bingo game operator do not render linked bingo a house-banked game. As noted by the Tenth Circuit in rejecting this argument, the house is not a "'participant' because it does not play a bingo card which players must beat, nor is it ever a 'winner' in the game." 162 Megamania Gambling Devices, 231 F.2d at 721. The Ninth Circuit also rejected the argument that the game is house-banked since payouts are "based on a mathematical formula that ensures that over time the house will net fifteen percent of players' antes." 103 Electronic Gambling Devices, 223 F.3d at 1099. As explained by the Ninth Circuit:

... [T]he mere fact that the house nets a percentage of the players' fees for playing certainly cannot define a "house banking" game. In any church-hall bingo game, the "house" regularly nets some portion of the money it takes in, or there would be no point in sponsoring the game.

Id. at 1099. See also 162 MegaMania Gambling Devices, 231 F.3d at 721; NIGC Wild Ball Bingo (Electronic Version) Advisory Opinion (Mar. 27, 2001). Based upon this analysis, it is our opinion that a game is not a house banking game if the house cannot (1) "win" the game by collecting the prize(s) or (2) otherwise participate in the game by playing a game card against other players. Finally, as discussed above, the courts have indicated that the bingo requirements listed by Congress are the sole requirements, therefore banking considerations are not relevant.

G. Response to Comments.

We have received a number of comments from consortium participants concerning the requirements for bingo and pull-tabs under the IGRA. These comments are addressed below.

1. Must a player hold a card at the same time that the bingo numbers are determined?

One commenter suggested that 25 U.S.C. § 2703(7)(A)(i)(II) requires that cards be held at the same time that numbers are determined. However, section 2703(7)(A)(i)(II) does not prohibit the sale of bingo cards after some or all of the bingo numbers or designations have been determined. The requirement to daub "when" the numbers are called does not mean that the players must hold the cards when the numbers are drawn. As discussed in Appendix A (pp. 2-3), it is more reasonable to read "when" as a conditional rather than a temporal limitation.

2. Can a player use an aid device to initiate the purchase, daub and claim functions at the beginning of play through a single action?

10. In promulgating its definition regulations, the NIGC clarified that "whether a game is a house banking game ... is not relevant to the classification of games that Congress expressly placed in class II: Bingo, lotto, pull-tabs, instant bingo, and tip jars." 57 Fed. Reg. 12,388 (April 9, 1992).

The answer is yes. The IGRA does not require separate actions by a player to purchase, daub and claim prizes. In fact, neither the IGRA nor the regulations prescribe the method by which a player must perform these functions. The district courts in the MegaMania cases rejected the Justice Department's similar argument that the MegaMania player does not actually daub the card, but merely presses a lighted "daub" button. See United States v. 162 MegaMania Gambling Devices, No. 97-C-1040-K, 1998 U.S. Dist. LEXIS 17293, at *7-8 (N.D. Okla. Oct. 26, 1998) ("This argument is too weak to bear additional discussion."); 103 Electronic Gambling Devices, No. C 98-1984 CRB, 1998 U.S. Dist. LEXIS 19135, at *18 (N.D. Cal. Nov. 23, 1998) (nothing in IGRA or the regulations dictate the manner in which a player must cover the numbers). The courts of appeals apparently did not consider the issue worthy of separate discussion.

3. Must a player be permitted to "sleep" a bingo by failing to claim it?

The answer is no. Neither IGRA nor the regulations requires that a player be given the opportunity to "sleep" a bingo, whether paper or electronic. While players may be able to sleep a bingo in some traditional bingo games, the MegaMania cases are clear that "Class II bingo under IGRA is not limited to the game we played as children." 103 Electronic Gambling Devices, 223 F.3d at 1097. As stated by the Ninth Circuit: "IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo." *Id.* at 1096 (emphasis in original). Thus, the fact that a player cannot sleep a bingo is irrelevant to the determination of whether or not a game meets the IGRA definition of bingo.

4. Must a bingo game have more than one drawing or determination of numbers or designations?

While some "traditional" bingo games may be played in such a manner, IGRA's definition of bingo does not require multiple drawings of balls during each game. As noted above, the courts have held that the only requirements for bingo are those set forth in the IGRA, and multiple ball draws for each game is not among those requirements.

5. Can all of the numbers be pre-drawn in a bonanza game?

Although some states require that the number of balls called in advance be less than the number likely to produce a winner, this is not a universal requirement. In any event, the critical issue is not whether a bingo game satisfies every state law requirement for bonanza bingo, but whether the game meets the IGRA definition of bingo. IGRA does not limit the number of balls that can be pre-drawn.

6. Can a totally electronic pull-tab game qualify as a Class II game under the IGRA?

One commentator has challenged the assertion that such games are lawful. It is argued that, in the light of the early Cabazon cases, and the lack of specific authority supporting a totally electronic game, any such game is likely to be ruled unlawful by the NIGC and the courts. While as developed in the attached Guidelines, the MegaMania cases and the legislative history of IGRA support the view that a totally electronic pull-tab game is permissible, it is recognized

that the matter is unsettled and that tribes may very well elect to require a paper element in all pull-tab games in order to avoid enforcement problems.

7. Do players of pull-tabs have to compete simultaneously in order to satisfy the requirement that a Class II game not allow a player to play against other players, rather than only against a self-contained device?

One commentator suggested that allowing a single player to operate an electronically assisted pull-tab game, without at least one other player competing at the same time, did not comply with the requirement that all Class II electronically assisted games must involve players playing against each other, rather than only against the machine. As developed in the Guidelines (Appendix A attached), in a pull-tab game players can compete against each other without actually playing simultaneously, so long as the opportunity for multiple play is provided. This follows from the fact that all players who purchase tabs from the same deal are necessarily competing against each other for the prizes provided in that deal.

8. Can bingo and pull-tab games simulate slot machine play?

One commentator has suggested that if an electronically assisted bingo or pull-tabs game uses slot machine symbols and simulates, by speed of play and other features, some aspects of the play of slot machines, the device would be a prohibited "electronic facsimile" of a slot machine. While the Department of Justice continues to argue this extreme position, it has been uniformly rejected by the NIGC and the courts. (See Appendix A pp. 6-7). If a game meets the requirements to be classified as a bingo or pull-tab game, it does not matter that the results of the game are displayed in an entertaining manner to simulate some aspects of slot machine play.

CONCLUSION

As detailed above, there is a wide range of technologic aid devices available to tribes under the IGRA. The specific requirements for bingo and pull-tabs played with aid devices are discussed in Appendix A.