



NOV 14 2000

Bertram E. Hirsch, Esq.
P.O. Box 220145
Great Neck, NY 11022

Re: National Indian Bingo Game Classification Opinion

Dear Mr. Hirsch:

This letter responds to your request on behalf of your client, Parker Gaming, Inc. (Parker) for a game classification opinion of its proposed game called National Indian Bingo (NIB). We have reviewed your June 1, 2000, request as well as your subsequent letters of June 30, 2000, July 28, 2000, August 18, 2000, and October 25, 2000. We conclude that NIB is a Class II game pursuant to the Indian Gaming Regulatory Act (IGRA) and is therefore subject to regulation by Tribes and the National Indian Gaming Commission (NIGC). This opinion supersedes our prior opinion regarding NIB issued on August 9, 1999.

This opinion is based solely on the written materials submitted. No prototype of the game has been developed. When a tribe begins operation of NIB, continued play will be subject to our field review. If there are any changes made to the game as described below, such changes might materially alter our opinion.

BACKGROUND

On August 9, 1999, in response to a game classification request by Parker, the NIGC issued an opinion that NIB was a class III game. This opinion was based on written submissions provided by Parker and oral representations made to the NIGC.

On December 17, 1999, you filed a Complaint on behalf of Parker in the United States District Court, District of South Dakota, which challenged the August 9, 1999, opinion and sought a declaratory judgment that NIB is a class II game pursuant to the IGRA.

During January and February 2000, you had discussions with NIGC Staff Attorney Maria Getoff, during which it became apparent that the August 9, 1999 decision might have been based on incomplete information and/or a misunderstanding of certain game features. In addition, Ms. Getoff raised questions about the game that prompted Parker to consider modifications to the game.

Based on these discussions, it was agreed that Parker would seek voluntary dismissal of its Complaint and resubmit a request for a classification opinion on the revised NIB game. On February 4, 2000, Parker voluntarily dismissed its lawsuit. The NIGC agreed that it would seek to render a decision within 60 days of receipt of the resubmitted request.

On June 1, 2000, Parker resubmitted its request. Upon review of the resubmission, the NIGC determined that additional information was required before it could render an opinion. The NIGC received the requested information on June 30, 2000. On several subsequent occasions, additional questions were raised and the NIGC requested more information from Parker. This information was provided on July 28, 2000, and August 18, 2000.

DESCRIPTION OF GAME

As described in the materials, NIB is a linked bingo game with a progressive jackpot. The game would be played live once per week, at a gaming facility of one of the participating tribes. Bingo players located at the gaming facilities of the other participating tribes would play the game by watching a digital reader board display. Bingo cards would be purchased throughout the week preceding a live bingo game.

Bingo Card Dispensing Machine

There are two ways a player would be able to purchase a bingo card. First, a player, using the bingo card-dispensing machine, could directly purchase bingo cards. Alternatively, a player physically located on Indian land could establish an account at a tribal gaming facility and appoint the tribal gaming facility as legal agent for the purpose of purchasing bingo cards. The facility would then purchase cards upon instruction from the player who is physically present on Indian land and pay for the purchase from the account. In this way, a player could instruct the tribal gaming facility to purchase, for instance, one card for each of the next four weekly games.¹

NIB would utilize traditionally configured paper bingo cards bearing letters and numbers. Live drawings would be conducted with traditional bingo balls, marked with letter and number combinations, drawn from a bingo blower. Players would compete for two jackpots: a weekly jackpot and a progressive jackpot.

A bingo card holder would win the progressive jackpot if he covers a row using the first four letter or number combinations drawn and a "floating free space." If the progressive jackpot is won, the game would continue until there is a winner of a smaller weekly jackpot. A weekly

¹ Parker's original submission provided for the establishment of accounts and the purchase of cards via telephone, mail or e-mail. Parker withdrew these features due to our conclusion that all gaming activity must take place on Indian lands as required by IGRA. The use of any off-reservation game features, including account establishment or card purchase, would void this opinion and subject the tribe to civil and criminal prosecution.

jackpot winner is one who is the first to cover any five of the letter or number combinations drawn and those letter or number combinations are arranged in either a vertical, horizontal, or diagonal row. With either jackpot, if there is more than one winning card, the prize is shared equally among holders of all winning bingo cards.

Use of Agents to Play Game

NIB could be played by the purchaser/player or through a designated legal agent. Because the tribal gaming facility would not know the identities of the players who are present in person, the tribal gaming facility, acting as the legally appointed agent for each player, would play all of the cards purchased for a given drawing. To assure that each purchaser designates the tribal gaming facility as legal agent, the bingo card dispenser machine would dispense an original card with a tear off or peel off duplicate card attached. Each player would be required to validate the original card by filling in the identifying information on the card and by designating the tribal gaming facility as legal agent to play the card and at time won, to claim, receive, and hold any prize for and on behalf of an absent purchaser.

Purchasers would further be required to tear or peel off and retain the duplicate and deposit the original in a secure deposit box. If the purchaser is present when the bingo game is played the purchaser could play using the duplicate and covering the numbers when balls are drawn. If the purchaser is not physically present, the tribal gaming facility acting as agent, would play the original card by covering the numbers on the original card when the bingo balls are drawn. In either situation, the agent would play all original cards.

Bingo Card Reader/Dauber Machine

Each tribal gaming facility would carry out its agent responsibilities by the use of tribal gaming facility employees. The tribal gaming facility employees would use Bingo Card Reader/Dauber (Reader/Dauber) machines to read and daub the cards. These machines would be similar to other "bingo minder" machines in use throughout Indian country. The materials submitted indicate that Parker is unable to identify presently the number of players who would be represented by each tribal gaming facility employee playing the game. The volume of cards would dictate the number of bingo card Reader/Dauber machines that would be necessary for all of the purchased cards to be played simultaneously. NIB will, however, use the bingo card Reader/Dauber machines that within current technology can read and daub the largest volume of cards.

At the start of the game, all of the original cards purchased for that drawing would be placed in one or more bingo card Reader/Dauber machines. As each letter or number combination is drawn by the bingo blower, the agent in charge of the machine would enter into the machine the data identifying each letter or number combination and instruct the machine to scan or read each of the cards it holds and identify each card having the combination drawn. Upon further instruction by the agent the machine would daub or cover each corresponding number or letter combination on each card.

APPLICABLE LAW

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) --

(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).

NIGC regulations similarly define class II gaming as follows:

(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.

Class II gaming specifically does not include "(ii) 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 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

Use of Agents to Play Game

IGRA contains no statutory prohibition on the use of agents to play the game of bingo. The bingo definition contained in IGRA requires only that the "holder of the card" cover the numbers. 25 U.S.C. § 2703 (7)(A)(i)(II). The "holder" is not defined. The holder in NIB is either the player or the player's designated agent. Although the bingo definition in the NIGC regulations replaces the word "holder" with the word "player," this is a distinction without a difference when the law of agency is applied to the analysis. It is a fundamental tenet of the law of agency that the acts of the agent are deemed to be the acts of the principal. *See* 3 Am. Jur. 2D Agency § 2 (1986); *See also* Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 272 (5th Cir. 1980); U.S. v. Sylvanus, 192 F.2d 96, 108 (7th Cir. 1951); and Lux Art Van Service, Inc. v. Pollard, 344 F.2d 883, 887 (9th Cir. 1965). When the agent plays the NIB card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player. Therefore, the use of agents violates neither IGRA's provision regarding the holder nor NIGC's regulations that discuss the player.

The Three-Part Bingo Definition

To qualify as a class II game, NIB must meet the three-part definition of bingo. First, it must be played for prizes with cards bearing numbers or other designations. 25 U.S.C.

§ 2703(7)(A)(i)(I). The materials submitted by Parker describe the game as utilizing traditionally configured paper bingo cards bearing letters and numbers. The game is played for prizes. Therefore, NIB meets the first part of the definition.

Second, IGRA requires holders to cover the numbers or other designations when objects, similarly numbered or designated, are drawn or electronically determined. 25 U.S.C.

§ 2703(7)(A)(i)(II). NIB would utilize live drawings conducted with traditional bingo balls, marked with letter and number combinations, drawn from a bingo blower. Players or their designated agents would cover the letter and number combinations on the bingo cards when the bingo balls are drawn from the bingo blower.

As described in the submission, the letter and number combinations would be covered by the agent and by those players who are physically present. The agent will utilize a Reader/Dauber to cover combinations determined by the bingo blower (The individual player may use a device commonly used in the industry, called a bingo minder. Both devices work in essentially similar fashion). As described above, the agent enters data into the Reader/Dauber machine identifying each letter and number combination drawn by the bingo blower, and instructs the machine to scan or read each of the cards it holds and identify each card with the letter and number combination drawn. Upon further instruction by the agent the machine will daub or cover each corresponding number and letter combination on each card.

A similar feature used to cover patterns on an electronic bingo card has been found by a federal court to be an acceptable class II method. In U.S. v. 103 Electronic Gambling Devices, 1998 WL 827586 (N.D. Cal), *affirmed*, 2000 WL 1218766 (9th Cir. Aug. 29, 2000), the court determined that the MegaMania electronic bingo game was a Class II game. In so finding, the court analyzed a feature of the game which automatically identified electronically drawn numbers, requiring the player to merely push a "daub" button which covered the drawn number or numbers. This feature made it unnecessary for the player to push a button corresponding to each relevant position on the bingo card. The court held that:

There is nothing in IGRA or its implementing regulations [t]hat require a player to independently locate each called number on each of the player's card and manually 'cover' each number independently and separately. The statute and the implementing regulations merely require that a player cover the numbers without specifying how they must be covered.

Id. at 6.² While the MegaMania game automatically identifies the electronically drawn numbers, the Reader/Dauber operates in a manner that requires the agent to take an

² In another case which dealt with the classification under the IGRA of the MegaMania game, the court found unpersuasive the argument that the game was not a class II game because the player does not actually "cover" the numbers, but merely presses a lighted "daub button" and the machine does the covering. United States v. 162 Megamania Gambling Devices More or Less, et al., No. 97-C-1140-K (N.D. Okla. October 26, 1998), *aff'd*, 2000 WL 1634741 (10th Cir. Oct. 31, 2000).

independent action to enter into the machine data identifying each letter and number combination drawn. Certainly, if the automatic features of the MegaMania do not contravene the requirement that players cover the numbers when drawn, neither does the use of the Reader/Dauber in NIB. Therefore, we find that neither the use of bingo minder machines by players nor the use of the Reader/Dauber machine by agents violates the requirement that the player cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined. NIB satisfies the second part of the bingo definition.

Finally, the third element of class II bingo requires that the game be won by the first person to cover a designated pattern. 25 U.S.C. §2703(7)(A)(i)(III). According to information provided by Parker, NIB will so operate. Of course, if there is more than one winner of a bingo game, the winners split the prize evenly. Such a feature violates neither the spirit nor the letter of the law. See U.S. v. 103 Electronic Gambling Devices, 1998 WL 827586, 827587 (N.D. Cal), *affirmed*, 2000 WL 1218766 (9th Cir. Aug. 29, 2000). Therefore, NIB meets the third and final element of class II bingo.

Reader/Dauber Machine

Having concluded that NIB meets the three fundamental elements of bingo, we must next decide whether the Reader/Dauber machine qualifies as a technological aid and is therefore authorized for use in connection with class II bingo. 25 U.S.C. § 2703(7)(A)(i). To be so authorized, the Reader/Dauber must meet a three-part definition as follows:

- (a) [It] is not a game of chance but merely assists a player or the playing of a game;
- (b) [It] is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and
- (c) [It] is operated according to applicable Federal communications law.

25 C.F.R. § 502.7.

The Senate Report on IGRA is instructive when analyzing the technological aid versus electronic facsimile question:

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.

S. REP. No. 446, 100th Cong., 2d Sess. 9 (1988).

The first inquiry is whether the Reader/Dauber is itself a game of chance or whether it merely assists a player or the playing of a game. As described above, the Reader/Dauber scans the pre-printed bingo cards. As each number and letter combination is drawn by the bingo blower, the agent in charge of the machine would enter into the machine the data identifying the number and letter combination and instruct the machine to scan or read each of the cards. Upon further instruction by the agent the machine would daub or cover each corresponding number and letter combination on each card and identify each card having the combination drawn.

The Reader/Dauber is not itself a game of chance. Whether a player will win or lose a NIB game would be entirely determined by the contents of the card purchased, and whether the letter and number combinations on the bingo balls drawn by the bingo blower match the letter and number combinations on the bingo card. The Reader/Dauber would have no effect on whether the player wins or loses. Indeed, use of the Reader/Dauber would merely assist the player or agent; allowing for the play of a larger volume of cards than is possible with manual reading and daubing, thereby broadening participation levels with current technology as sanctioned by Congress. Based on this analysis, we find that the Reader/Dauber is not a game of chance but merely assists the player. Thus, it meets the first requirement of a technological aid.

Having determined the Reader/Dauber is not a game of chance but merely assists the player in the play of the game of bingo, we must next decide whether the Reader/Dauber is an "electronic or electromechanical facsimile" of the game of bingo. *See* 25 U.S.C.

§ 2703(7)(B)(ii). NIGC regulations define electronic or electromechanical facsimile to be any gambling device as defined in the Johnson Act. 25 C.F.R. § 502.8. However, two recent federal circuit courts of appeal have held that the Johnson Act definition does not apply to bingo aids. *See U.S. v. 103 Gambling Devices*, 2000 WL 1218766, _____ (9th Cir. Aug. 29, 2000) ("[T]he text of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids."); *United States v. 162 Megamania Gambling Devices More or Less, et.al.*, 2000 WL 1634741, 10 (10th Cir. Oct. 31, 2000) ("We [c]onclude 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.").

Rather, 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." *162 Megamania Gambling Devices*, at 10. *See also Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 827 F. Supp 26, 32 (D.D.C. 1993) ("The definition of facsimile is an exact and detailed copy of something."), *aff'd*, 14 F.3d 633, 636 (D.C. Cir. 1994) ("[a]s commonly understood, facsimiles are exact copies, or duplicates"); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) ("[t]he first dictionary definition of 'facsimile' is 'an exact and detailed copy of something.'").

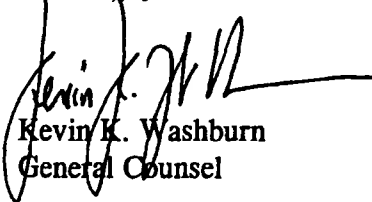
The Reader/Dauber is not an exact copy of the game of bingo. It is a device that reads and daubs bingo cards in large numbers thereby assisting players in the play of bingo. The complete game of bingo is not and cannot be played on the Reader/Dauber. For the game of bingo to be

played, cards must be purchased, balls must be drawn, and the results called out or otherwise communicated. The Reader/Dauber does none of this. As discussed above, the Reader/Dauber is merely an aid to the play of bingo, and does not replicate the game of bingo.⁴

The final requirement for use of a technological aid in connection with class II bingo is that the aid must be operated according to applicable Federal communications law. It is Parker's responsibility to ensure that NIB is so operated. We make no determination whether the game as described violates any Federal communications law.

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised, or reconsidered by a subsequent General Counsel or Chairman of the Commission. Furthermore, if there are any changes made to the game as described, such changes might materially alter our conclusion.

Sincerely yours,



Kevin K. Washburn
General Counsel

⁴ A recent D.C. Circuit Court of Appeals decision applied a similar analysis with respect to the classification of a pull-tab machine. The issue before the court was whether the Lucky Tab II game, an electromechanical device that dispenses paper pull-tabs and then displays their contents on a video monitor, should be classified under IGRA as a class II aid or a class III facsimile. The court held the device was an aid to the play of pull-tabs because it cannot change the outcome of the game but merely reads the paper pull-tab and displays the contents on a screen. Diamond Game Enterprises, Inc. v. Reno, et. al, 2000 WL 1577954, 5 (D.C. Circuit, Nov. 3, 2000).