

COUNCIL ANNETTE ISLANDS RESERVE

METLAKATLA INDIAN COMMUNITY

KARL S. COOK, MAYOR
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May 28, 2008

Via Hand Delivery

Philip Hogen, Chairman
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, D.C. 20005

Re: Amendment to Class II Gaming Ordinance

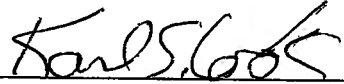
Dear Chairman Hogen:

On behalf of the Metlakatla Indian Community, pursuant to 25 C.F.R. Part 522 I am submitting for your review and approval the enclosed amendment to our Class II Gaming Ordinance. Please feel free to contact our attorney, Joseph Webster at Hobbs, Straus, Dean & Walker, LLP, if you have any questions or need additional information.

We appreciate your attention to this important issue.

Sincerely,

Metlakatla Indian Community


Honorable Karl S. Cook, Jr., Mayor

Encl.

cc: Joseph H. Webster, Esq.

RESOLUTION NO. 08-24
By the Metlakatla Indian Community Council

WHEREAS, the Metlakatla Indian Community Council is the governing body of the Metlakatla Indian Community, Annette Islands Reservation, Alaska by the authority of the Constitution and By-laws of the Metlakatla Indian Community as approved on August 23, 1944 by the Secretary of the Interior; and

WHEREAS, the Metlakatla Indian Community is an Indian Tribe organized under the provisions of Section 16 of the Indian Reorganization Act, 25 U.S.C. Section 476; and

WHEREAS, pursuant to Article VII, Section 3 of the Constitution and By-laws of the Metlakatla Indian Community the Tribal Council has the power to undertake commercial enterprises within the Reservation; and

WHEREAS, the Metlakatla Indian Community allows Class II gaming operations on the Reservation subject to the Indian Gaming Regulatory Act, the Community's Gaming Ordinance and regulations promulgated by the National Indian Gaming Commission; and

WHEREAS, the Metlakatla Indian Community's Class II gaming facility provides revenue which is used to support the Community's governmental programs and is an important source of employment for members of the Community; and

WHEREAS, due to the depressed local economy and lack of alternative economic opportunities, the Metlakatla Indian Community is seeking to increase revenue from its gaming facility by using modern technology to conduct its bingo games;

WHEREAS, the Metlakatla Indian Community Council is advised that one type of modern technology commonly used in non-Indian bingo halls is a bingo aid that assists the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player; and

WHEREAS, the Metlakatla Indian Community Council is advised that this type of bingo aid is often referred to as "auto-daub" or "one-touch"; and

WHEREAS, the Metlakatla Indian Community Council is further advised that this type of modern technology is likely to generate more revenue for the Community by increasing the speed of bingo game play and making the games more player-friendly; and

WHEREAS, the Indian Gaming Regulatory Act provides that Class II gaming includes "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith);" and

WHEREAS, the regulations of the National Indian Gaming Commission define “electronic, computer, or other technologic aid” to include “any machine or device” that “[a]ssists a player or the playing of a game.”

WHEREAS, the Metlakatla Indian Community Council, after reviewing the applicable provisions of the Indian Gaming Regulatory Act, regulations of the National Indian Gaming Commission, relevant court decisions (Tab A) and a legal analysis prepared by the Community’s attorneys (Tab B), has determined that “electronic, computer, or other technologic aids” to the Class II game of bingo include aids that assist the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player; and

WHEREAS, the Metlakatla Indian Community Council has further determined that the use of this type of bingo aid is consistent with the statutory definition of bingo set forth in the IGRA and would not cause the game to become a Class III “facsimile” of any game of chance; and

WHEREAS, the Metlakatla Indian Community Council has determined that it is desirable to clarify in its Gaming Ordinance that this type of bingo aid is permitted; and

WHEREAS, Article IV, Section 1 of the Constitution and By-laws of the Metlakatla Indian Community grants the Metlakatla Indian Community Council the power to pass ordinances for the local government of the Community;

NOW THEREFORE, BE IT RESOLVED, the Tribal Council hereby approves the attached AMENDMENT to TITLE 4 CIVIL CODE, CHAPTER 4, GAMING ORDINANCE, dated May 28, 2008 (Tab C); and

BE IT FURTHER RESOLVED, the Mayor is authorized to submit the amendment to the Gaming Ordinance to the National Indian Gaming Commission for review and approval.

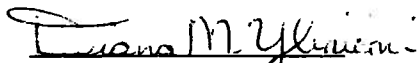
Signed and Dated: This 28th day of May, 2008 at Metlakatla, Alaska.

Signed:

Metlakatla Indian Community


Sean D. Enright, Acting Mayor

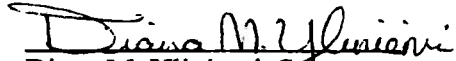
ATTEST:


Diana M. Yliniemä, Secretary

CERTIFICATION

I hereby certify that the foregoing resolution was duly approved at a meeting of the Council, held on May 28, 2008; at which a quorum was present by a vote of 8 FOR and 0 OPPOSED; the Mayor being authorized to sign said resolution.

Signed:


Diana M. Yliniemi, Secretary

TAB A

Original Submission
Includes 9th and 10th Circuit
MegaMania Cases

TAB B



MEMORANDUM

May 22, 2008

To: Tribal Council, Metlakatla Indian Community

From: Hobbs, Straus, Dean & Walker, LLP

Re: Tribal Gaming Ordinance – Proposal to Add Language on Class II Aids

You have asked us to review a proposed amendment to the Metlakatla Indian Community's Gaming Ordinance. Specifically, we understand that the Tribal Council is considering adding the following language to Section 4.2 of its Gaming Ordinance:

Class II gaming includes an electronic, computer or other technologic aid to the game of bingo that, as part of an electronically linked bingo system, assists the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player.

As detailed below, we believe that the proposed amendment is consistent with the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA") and the existing regulations of the National Indian Gaming Commission ("NIGC").

Discussion

1. Applicable Law and Regulations.

The IGRA establishes the parameters within which gaming may take place on Indian lands. A tribe may engage in Class II gaming on its lands without a tribal-state compact if the State permits such gaming for any purpose and the tribal governing body adopts an ordinance permitting such gaming, which ordinance is approved by the Chairman of the NIGC. 25 U.S.C. § 2710(b).

Class II gaming is defined under the IGRA:

(7)(A) The term "class II gaming" means—

(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

...

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

In addition to the statutory definition, the NIGC has promulgated regulations that give further guidance in determining what constitutes Class II gaming. The regulations at 25 C.F.R. § 502.3 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, 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.

The NIGC revised its definitions of technologic aids, facsimiles and other games similar to bingo in a final rule published on June 17, 2002 (67 Fed. Reg. 41166). Under the regulations, which went into effect on July 17, 2002, electronic, computer or other technologic aids are defined:

(a) *Electronic, computer or other technologic aid* means any machine or device that:

(1) Assists a player or the playing of a game;

(2) Is not an electronic or electromechanical facsimile; and

(3) Is operated in accordance with applicable Federal communications law.

(b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

(1) Broaden the participation levels in a common game;

(2) Facilitate communication between and among gaming sites; or

(3) Allow a player to play a game with or against other players rather than with or against a machine.

(c) Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games.

25 C.F.R. § 502.7. Electronic or electromechanical facsimile is defined:

Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

25 C.F.R. § 502.8. Finally, the regulations define other games similar to bingo:

Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

25 C.F.R. § 502.9.

These regulations were adopted to replace prior, more restrictive definitions in order to bring the Commission's rules into line with case law. As stated by the NIGC in the preamble, "The uncomfortable result is that the Commission cannot faithfully apply its own [previous] regulations and reach decisions that conform with the decisions of the courts." 67 Fed. Reg. 41168 (June 17, 2002).¹

¹ In late 2007, the NIGC published four related proposed rules concerning Class II gaming. See *Electronic or Electromechanical Facsimile Definition* (72 Fed. Reg. 60481 (October 24, 2007)); *Class II Classification Standards* (72 Fed. Reg. 60483 (October 24, 2007)); *Class II Technical Standards* (72 Fed. Reg. 60508 (October 24, 2007)); and *Class II Minimum Internal Control Standards* (72 Fed. Reg. 60495 (October 24, 2007)). However, none of those regulations have been finalized and thus have no present legal effect.

2. Analysis.

There has been significant disagreement in recent years between tribes and members of the NIGC concerning whether Class II bingo includes an electronic aid that automatically covers numbers for a player ("one-touch"). While this issue has not been resolved with certainty, the IGRA, legislative history, case law and the NIGC's current regulations support the position that it is permissible for an aid to a Class II bingo game to assist the player by allowing the player to push a button that instructs the aid device to cover numbers for the player after they are called.

We note that neither the IGRA nor the regulations prescribe the method by which a player must daub a card. Instead, the IGRA definition of bingo merely requires that the player "covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined." 25 U.S.C. 2703(7)(A)(i)(II). Further, the NIGC's implementing regulations expressly permit a Class II aid that "[a]ssists a player or the playing of a game." 25 C.F.R. 502.7(a)(1).

Significantly, the courts in the MegaMania cases rejected the argument that merely pressing a "daub" button does not meet IGRA's criteria for covering numbers. In MegaMania, the game allowed the player to push a lighted daub button, which caused the player terminal to cover matching numbers on the player's bingo card. Based on this feature, the Justice Department argued that the player did not actually daub the card. However, this argument was rejected by both district courts in the MegaMania cases. United States v. 162 MegaMania Gambling Devices, No. 97-C-1040-K, slip op. at 5 (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 WL 827587, at *6 (N.D. Cal. Nov. 23, 1998) ("There is nothing in the IGRA or its implementing regulations, however, that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately."). In upholding the lower courts, neither circuit court mentioned the issue. 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).²

Thus, we read the MegaMania cases to stand for the proposition that it is permissible for a Class II aid to assist the player with covering bingo numbers. Arguably, the legally significant issue is that the card not be covered until after the bingo numbers

² A further issue is whether an auto-daub aid device would transform the game into a facsimile of bingo, which would be Class III. Consistent with the legislative history of the IGRA, the NIGC's definition of facsimile (25 C.F.R. § 502.8) makes clear that the test for facsimile is not the level of assistance to the player, but whether the electronics allow a player to play alone with or against the machine rather than with or against other players. The proposed amendment provides that the aid must be used as part of a linked bingo system, which we understand would require more than one player in each game.

have been drawn and displayed to the players.³ Thus, even if the auto-daub function is activated before the ball draw (through the use of a button), the actual daubing must not take place until after the bingo numbers are drawn and displayed to the players in that game.

The feature described in the proposed amendment to the Community's Gaming Ordinance would appear to satisfy this standard. As we understand it, the aid device would assist the player by covering, at the player's request, numbers on the player's bingo card and the following sequence would be maintained: (1) player purchases bingo card, (2) bingo numbers are drawn and displayed, (3) matching numbers are covered on the player's bingo card, and (4) any prize is claimed. In no case would the actual daubing take place before the bingo numbers are displayed to the players in that game and the use of auto-daub would not change the game play sequence. For these reasons, use of such an aid would appear to be consistent with both the IGRA definition of bingo and the scope of permitted Class II aids.

We note that a contrary view is expressed in a number of advisory opinions issued by the NIGC Office of General Counsel. For example, in its Reel Time Bingo Advisory Opinion (Sep. 23, 2003), the Office of General Counsel advised:

Reel Time Bingo also meets the requirements that the person actually cover the predesignated pattern. This requirement would not be met if players could, in one motion, start the game, win, and claim their prizes. Bingo requires participation of some degree. Merely hitting a start button and having numbers covered would not comply with the degree of participation that the statutory language—"the first person to cover"—implies. Likewise, an automatic daub, in which the player need not have any response to the numbers that are called, would not

³ We understand that many bingo minders, permitted by many states as an aid to bingo, also cover bingo numbers automatically for the player. See, e.g., 50 012 CMSR 001 § LL(1)(i) (providing that Electronic Bingo Card Daubers may be used and "[t]he system may utilize an automatic mark feature that if turned on, will mark the participants cards automatically or the participant may input each number or symbol called by the licensee into memory of the dauber unit by use of a separate input function for each number or symbol."); N.D. Admin. Code § 99-01.3-04-03-11(j) (allowing bingo card marking devices, and providing that "[a] player may use an input function key on a device or an organization may use a radio frequency signal to mark each number as it is called. When a player inputs a number or an organization sends a radio frequency signal, a device may automatically mark all the player's cards that contain that number"). Such bingo minders allow a player to play dozens of bingo cards in a single game. We are advised that, in general, bingo numbers are electronically transmitted as they are called to a bingo minder, which then covers those numbers on any cards on which they appear. The use of bingo minders in bingo halls throughout the United States supports our view that bingo can be played with a device that covers cards for the player.

be acceptable. The statutory criterion is met in Reel Time because, after initiating play, players cover their numbers either by hitting the daub button on the game's hardware or touching the monitor screen when cued.

Similarly, in its Mystery Bingo Advisory Opinion (Sep. 26, 2003), it stated:

We conclude that a game offered as class II bingo or a "game similar of bingo" must provide a "daub" or "cover" requirement for all players after the bingo numbers are announced and not just for winning players. If the player has no involvement in covering the numbers, then the player is not participating in the game.

Thus, the NIGC Office of General Counsel would appear to allow a player to daub using a single button. However, the Office of General Counsel appears to take the view that the player must push the daub button after the bingo numbers are drawn and displayed, rather than initiating this aid feature at the beginning of the game.⁴

The fact that the Office of General Counsel has previously issued contrary advice on the permissibility of a "one-touch" feature on a bingo aid is not binding on the Chairman of the NIGC or the full Commission. Moreover, the views of the Office of General Counsel have evolved over time as it has continued to consider these issues. As explained above, there is a strong legal basis for approval of the proposed amendment. Thus, notwithstanding the views expressed in the past by the Office of General Counsel, we believe that the proposed amendment should be approved by the NIGC and, if it is not, then such rejection would be subject to legal challenge by the Community.

Please feel free to contact us if you have any questions or need further information.

⁴ We note that the advisory opinions issued by the Office of the General Counsel are not final decisions or rulings by the Commission. Rather, the opinions merely provide advice as to the current views of the Commission's legal staff. Thus, while the advisory opinions are a useful guide, they are not binding on Metlakatla or any other party.

TAB C

AMENDMENT to METLAKATLA GAMING ORDINANCE

By Authority of the Metlakatla Indian Community Council,

TITLE FOUR CIVIL CODE, CHAPTER 4, GAMING ORDINANCE, dated March 21, 1997 is hereby AMENDED as follows:

SECTION FOUR 4.2 GAMING AUTHORIZED is amended by adding the following sentence to the end of the section after the first paragraph:

“Class II gaming includes an electronic, computer or other technologic aid to the game of bingo that, as part of an electronically linked bingo system, assists the player by covering, without further action by the player, numbers or other designations on the player's electronic bingo card(s) when the numbers or other designations are electronically determined and electronically displayed to the player.”