

**MODEL REGULATIONS ESTABLISHING
PROCEDURES AND REQUIREMENTS FOR APPROVAL BY
TRIBAL GAMING REGULATORY AGENCIES OF
CLASS II GAMES PLAYED WITH ELECTRONIC EQUIPMENT**

I. LEGAL FRAMEWORK

Under 25 U.S.C. § 2703(7), class II games may be played utilizing "electronic, computer or other technologic aids." At the same time, there is a strict prohibition against the use of "electronic or electromechanical facsimiles of any game of chance" without a tribal-state compact or Secretarial Procedures. The first question in the analysis of any proposed class II game is whether the underlying game is a class II game as set forth in IGRA. Only such games are eligible to be played using technological aids.

To assist in fulfilling this threshold task, the Model Regulations provide standardized definitions for common terms used in the play of the games in question, both in paper and electronic form. The Model Regulations do not address the question of tribal regulation of class II games played without technological aids (e.g., paper forms of bingo and pull-tabs – which are not subject to this additional testing), nor is it concerned with the regulation of class III gaming in any form, except to establish that a game played with electronic equipment that does not meet the regulatory standard for a class II device is subject to class III regulation.

Instead, the Model Regulations are provided to assist the tribal gaming commission in accomplishing a separate and complex task: to apply recent court decisions and new NIGC regulations (25 C.F.R. Part 502) that address the permissibility of technologic aids to class II games. Those court cases and federal regulations establish that an electronic or technologic aid to a class II game is permitted if it (1) assists a player or the playing of a class II game (for example, by broadening the potential participation levels in a common game), (2) is distinguishable from a "facsimile" under Section 11(c) of the Model Regulations, and (3) is operated in accordance with applicable federal communications law. This test governs determinations under the Model Regulations.

The Model Regulations were drafted to provide a suggested standard for determining the permissibility as class II games played with electronic equipment. To the extent that there are conflicting views or interpretations of critical features of such games, those conflicts are noted herein, so that tribal gaming commissions may make their own judgments.

II. IMPLEMENTATION

The Model Regulations are structured with the expectation that they will be invoked when a Tribal Gaming Facility proposes a gaming device as a class II technologically assisted game. In that event, the Tribal Gaming Facility must seek the determination of the Tribal Gaming Regulatory Agency that such game falls within the standards under the Regulations. As set forth above, the first question must be whether the underlying game is a listed class II game under the Regulations. Because all such games may have numerous variations while still meeting applicable regulations, the balance of these Guidelines is concerned with analyzing individual variations of Bingo and Pull-tabs, and assessing whether the impact of each element in a determination of whether the underlying game meets the threshold test as a class II game eligible for play with the assistance of an electronic or technologic aid.

A. CHARACTERISTICS OF BINGO GAMES.

The test of whether a specific bingo game utilizing electronic equipment is lawful depends upon whether the game meets the specific criteria for bingo set forth in the statutory definition in 25 U.S.C. § 2703(7)(A). The following analysis examines the application of the governing statutory definition to various characteristics of bingo games that are played with electronic equipment. This examination reviews some of the many varieties of traditional bingo that are played in Indian and non-Indian bingo halls around the Country and which relate to the statutory criteria.

The provisions of § 2703(7)(A) define "bingo" as follows:

(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 designation

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined,^[1] and

(III) in which the game is won by the first person covering a previously designated

¹ The phrase "electronically determined" clearly contemplates the use of electronic devices, such as random number generators, to determine bingo numbers or designations.

arrangement of numbers or designations
on such cards

The statutory definition governs the analysis of the various characteristics of bingo games played with electronic equipment. Of critical importance, the courts in both MegaMania cases rejected the Justice Department's contention that additional criteria are necessary to determine whether a game constitutes "bingo" under the IGRA. The Ninth Circuit expressly rejected this view: "IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo." United States v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1096 (9th Cir. 2000) (emphasis in original). The Tenth Circuit did not make this point expressly, although it is implicit in its opinion, which rejected every argument made by the Justice Department, and gave great weight to the National Indian Gaming Commission's ("NIGC" or "Commission") regulations and prior rulings. United States v. 162 Megamania Gambling Devices, 231 F.3d 713, 720-23 (10th Cir. 2000).

The sections that follow address the questions that arise when a game played with electronic equipment is analyzed. Although the IGRA sets forth only the three bingo criteria quoted above, questions have been raised about the numerous non-traditional innovations that are presented by the various forms of the game played with electronic equipment. The analysis below is intended to assist in the determination of whether the particular variations in a proposed device defeat the classification of the underlying game as bingo. This discussion is not intended to imply that any of these variations, such as electronic cards, electronic daubing, or unconventional ball draws must be present before a game can be played, but only considers whether their presence disqualifies the game as class II bingo.

1. May Bingo Be Played with an Electronic Card?

It has been settled that bingo may be played on an electronic card. If the cards bear numbers or other designations for use in a bingo game, the fact that the card is displayed on a video screen rather than on paper is not legally significant. Neither the IGRA, the regulations, nor the legislative history suggest that paper cards are required. To the contrary, the NIGC's new definition regulations expressly permit the use of "electronic cards for participants in bingo games." 25 C.F.R. § 502.7(c). In addition, the legislative history makes clear that Congress intended that tribes be able to use modern technology, including computers, to conduct class II games. See S. REP. NO. 100-446, at 9 (1988), reprinted in 1998 U.S.C.C.A.N. 3071, 3079 (suggesting use of "computers and telecommunications technology" to conduct class II games). Neither the Ninth nor Tenth Circuit found it significant that the MegaMania game uses electronic rather than paper bingo cards. See, e.g., 162 Megamania Gambling Devices, 231 F.3d at 720 (MegaMania "is played with an electronic card that looks like a regular paper bingo card containing a grid of numbers . . .").

2. May Players "Cover" or "Daub" Numbers After Winning Numbers or Designations are Drawn?

A critical issue in the classification of bingo games utilizing technologic aids is whether the IGRA allows bingo numbers to be pre-drawn before play begins, since some

existing electronic bingo games operate by using sets of numbers pre-selected and stored in an electronic storage device long before the games are played. This is comparable to the paper bonanza bingo game that is played in bingo halls throughout the country. See, e.g., N.D. ADMIN. CODE §§ 99-01.3-04-01.2, 99-01.3-04-03 (24); OR. ADMIN. R. § 137-025-0160 (7) ("A licensee may play 'bonanza' bingo by drawing a pre-designated quantity of bingo numbers before the actual play of the bonanza bingo game"; WASH. ADMIN. CODE § 230-20-243 ("licensees may play bingo games that allow cards to be sold after numbers or symbols have been selected and called if the numbers or symbols imprinted on the cards can not be determined by any means prior to being opened by the player.")).²

It has been suggested that the IGRA definition of bingo³ requires that bingo numbers must be drawn and daubed at the same time. However, there is no basis for believing that Congress intended "when" to have a temporal meaning in this context, since cards must be covered after numbers are drawn in ANY bingo game; it is impossible for a player to literally cover numbers "when" (at the same time) they are drawn. Since the temporal meaning of "when" does not make sense in the context of bingo, we believe that it is reasonable to read "when" as a conditional limitation. See, e.g., Webster's Ninth New Collegiate Dictionary, p. 1342 (1986) ("when" can mean "in the event that: IF <a contestant is disqualified ... he disobeys the rules>"); Webster's II New Riverside Dictionary, p. 785 (1984) ("Considering that: if <How can you succeed [when] you won't try?>"). Read as a conditional limitation, the provision would read: "the holder of the card covers such numbers or designations [if] objects, similarly numbered or designated are drawn or electronically determined."

The validity of this reading of "when" is even clearer in analyzing how paper bingo games often are played. In the most traditional form, players are given cards with the letters "B," "I," "N," "G" and "O" across the top of the card and numbers from 1-75 under the letters. The game is played by the calling of various numbers under various letters (e.g. "B15" or "N36"). Players do not "daub" their cards at the same moment the numbers are called, but only "when" a number is called that matches a number on a card held by the player. Stated otherwise, a player can only daub "if" there is a match between a number on his card with a called number. The critical element is the fact of a match between called numbers and numbers on a card, not the timing of the match.

Following this principle, there are a number of bingo games that are played around the country that make it clear that the calling of numbers may take place a

² The NIGC, the State of Arizona and several tribal gaming commissions have expressed concern that certain linked bonanza-style bingo games are not class II bingo. Many of the concerns raised go beyond the statutory criteria for bingo set forth by Congress and are thus not relevant to the classification of the games under the IGRA. This issue, however, remains controversial.

³ The IGRA requires that "the holder of the card covers such numbers or designations when objects, similarly numbered or designated are drawn or electronically determined," 25 U.S.C. § 2703(7)(A) (emphasis added).

significant time before the winning player is determined. For example, in bonanza bingo, at least one variation would have 50 balls drawn before any play begins. Individual players buy cards and daub them according to the outstanding ball call. The play of the game continues, in some circumstances, throughout the bingo session, until one player achieves a bingo. The temporal delay in that play can be prolonged.

Then NIGC general counsel touched on this issue when he opined that an electronic bingo game was class II, notwithstanding the fact that the game involved the daubing of numbers "after the winning numbers have been drawn." See NIGC Wild Ball Bingo (Electronic Version) Advisory Opinion (Mar. 27, 2001). Curiously, the general counsel stated, without any basis in the statute or citation to authority, that daubing can only take place after the numbers are drawn if it is done in "near real-time." Subsequently, the NIGC's deputy general counsel opined that the MegaNanza series of games is class III, largely based on her view that the IGRA requires that "[t]he act of covering the numbers must occur in close proximity to the drawing of those numbers or in "real time." NIGC MegaNanza Advisory Opinion (April 15, 2002). See also Defendants' Objections to Magistrate's Report and Recommendation, filed on July 18, 2002, in Multimedia Games, Inc. v. United States, Case No. 02 CV 296 P(J). This view is without merit, since it would impose a requirement for bingo beyond those set forth by Congress.

3. May Players Electronically "Daub?"

IGRA provides that bingo is a game "in which the holder of a card covers ... numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined" 25 U.S.C. § 2703(7)(A)(i)(II). As detailed above, in the MegaMania game upheld by the Ninth and Tenth Circuits, players electronically daub their cards after balls are drawn from a bingo blower. The Justice Department has unsuccessfully argued (in the MegaMania cases) that the player does not actually daub the card, but merely presses a lighted "daub" button.

There is no merit to the Justice Department's argument since neither the IGRA nor the regulations prescribe the method by which a player must cover the designated object on a card. Once an electronic card is acceptable, the concept of daubing electronically follows necessarily -- the player can no longer physically cover the designations on an electronic card.⁴ In fact, the Justice Department's argument was rejected by both district courts in the MegaMania cases. 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). In upholding the lower courts, neither circuit court mentioned the issue.

4. May Players "Ante Up?"

⁴ The same applies for "uncovering" a pull-tab.

The Justice Department also argued that MegaMania is not bingo because "a MegaMania player must continuously feed money into the machine to receive bingo balls and to continue playing the game." 162 MegaMania Gambling Devices, 231 F.3d at 722. Neither the IGRA nor the regulations prohibit the ante-up system for class II games. Applying the Indian canon of construction⁵ and giving deference to the NIGC's opinion that the ante-up feature does not violate the statutory criteria for bingo, the Tenth Circuit held that "the 'ante-up' feature does not change MegaMania's class II status." Id. at 723. See also 103 Electronic Gambling Devices, 223 F.3d at 1097 ("Given Congress's and the NIGC's apparent intentions not to supplement IGRA's bingo specifications, we reject the Government's challenge to the ante-up feature.").⁶ The courts found no basis to add requirements for bingo that were not included or intended in the IGRA or the NIGC's regulations.

5. May There Be Interim Winners and Jackpot Prizes?

The courts have rejected the argument that interim prizes are not permissible because a "bingo" game is to be won by the "first person covering a previously designated arrangement of numbers" 25 U.S.C. § 2703(7)(A)(i)(III). The courts have ruled that "nothing in the Gaming Act or regulations prohibits more than one winner or 'interim prizes' during a game of bingo." 162 MegaMania Gambling Devices, 231 F.3d at 722.⁷ Accord 103 Electronic Gambling Devices, 223 F.3d at 1097-99.

In the MegaMania cases, the Justice Department raised and lost several other arguments to support its view that, because of the interim prizes and jackpot wins, MegaMania is class III. For example, the Justice Department asserted that MegaMania is a house banking game.

The government asserts that the availability of jackpot prizes and the "continuous win" feature of the CornerMania game render Megamania a class III house banking game because the house takes fifteen percent of the money paid in and "the house may have to pay out more in winnings than it receives in bets' in a 'particular game or series of games."

162 MegaMania Gambling Devices, 231 F.3d at 720-01

⁵ See, e.g., Montana v. Blackfoot Tribe, 471 U.S. 759, 766 (1985) ("Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").

⁶ Just as the three statutory criteria are the sole criteria for bingo, (103 Electronic Gambling Devices, 223 F.3d at 1096), so there are no additional legal limitations to the play of the game.

⁷ A letter from the General Counsel of the NIGC to the Justice Department on June 30, 1999, modifies the NIGC's earlier advisory opinion on MegaMania by raising an objection to the "continuous win" feature of the game. According to the letter, the continuous win feature renders the game class III since the game is not "won by the first person covering a previously designated arrangement of numbers." 25 U.S.C. § 2703(7)(A)(i)(III). In light of the fact that this argument has been rejected by the Ninth and Tenth Circuits, it is uncertain whether the NIGC maintains this objection to the game.

However, 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.3d at 721. The court also correctly noted that the NIGC regulations recognize "jackpots are permissible in class II gaming provided the jackpot, as it does here, remains in place for players to win in future games." Id. (citing Definitions Under the Indian Gaming Regulatory Act, 57 Fed. Reg. 12,382 (April 9, 1992)).

Finally, the Ninth Circuit rejected the argument that the game is house banking 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.

6. May an Electronic Bingo Game Operate with Only One Player?

The IGRA permits the use of technologic aids that broaden potential participation in a common game. Thus, an aid that allows bingo to be played in an electronic format must make each bingo game available to at least two players. The critical issue is that the device cannot be a self-contained game such that a player is limited to playing the game against the device. In other words, the device must operate in a manner that "broadens potential participation levels ... ," (S. REP. NO. 100-446 at 9)(emphasis added)), so that each game is available to be played by more than one player.

The MegaMania and Wild Ball Bingo games that have been approved by the courts and the Commission as class II each require multiple players to purchase cards before any game begins. While not strictly required, tribes that require that at least two players participate in each bingo game would be in a significantly stronger legal position. For example, the ball draw or its distribution could be delayed until at least two players have purchased cards for that game.

7. Does a Bingo Card Have to Have Any Particular Number of Numbers or Designations?

Under 25 U.S.C. § 2703(7)(A)(i)(I), the game of bingo is played with "cards bearing numbers or other designations." The IGRA does not set any minimum or maximum number, except that the use of the plural suggests more than one. The NIGC suggested in its Wild Ball Bingo (electronic version) advisory opinion that a bingo card must have at least three numbers or designations. However, there is no statutory basis for the NIGC's view, since a blackout pattern can consist of two spaces. Thus, a card with at least two numbers or symbols should satisfy this requirement. Various states impose widely varying requirements. See, e.g., IOWA CODE § 99B.1(5) (2001) ("cards each of which is marked off into spaces arranged in horizontal and vertical rows of spaces, with

each space being designated by number, letter, or combination of numbers and letters"); CONN. GEN. STAT. § 7-169(a) (2001) ("a card containing several rows of numbers and, as numbers"); 28 DEL. C. § 1102(1) (2001) ("with cards bearing numbers or other designations, 5 or more in 1 line"). A card must have at least two numbers or symbols to satisfy the IGRA definition of bingo.

8. May Symbols or Graphics of Casino or other Theme Games be used to Supplement the Electronic Display of the Results of a Bingo Game?

Neither the IGRA nor the regulations bar the use of a technologic aid device that allows a player to view the results of a bingo game as both a video bingo card and using a casino or other game theme (such as video slot reels, poker cards, etc.), as long as the game played is really bingo.⁸ The critical issue is that the casino or other game theme display must not "change the outcome of the game." Diamond Game Enterprises v. Reno, 230 F.3d 365, 370 (D.C. Cir. 2000). See also United States v. Santee Sioux Tribe, 174 F. Supp. 2d 1001, 1008 (D. Neb. 2001)(Appeal Noted 8th Cir.)("the video does not determine the winner or loser."); NIGC Tab Force Advisory Opinion ("The chance inherent in the game is contained within the paper pull-tab itself, and is not at all impacted by the system [which displays the results as video slot reels].").

Similarly, the Ninth and Tenth Circuits have rejected the Justice Department's claim that, because of the resemblance of some aspects of its play and appearance to those of a slot machine, the MegaMania device is a class III machine. As stated by the Tenth Circuit:

The government also contends MegaMania more closely resembles a slot machine than the game commonly known as bingo. The government points out the MegaMania machines are designed to resemble slot machines, are faster-paced than traditional or manual bingo, require more investment by the participants than bingo, and cause the individual player to run a greater risk of loss than the average bingo player in a traditional bingo parlor. While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a class II game, as previously discussed. Moreover, as the Ninth Circuit pointed out, "unlike a slot machine, MegaMania is ... 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

⁸ To meet the definition of bingo, a bingo card also must be displayed on the video screen and the results using a casino theme display cannot be shown until after the numbers or designations have been daubed on the player's bingo card.

terminals, an individual terminal is useless." 103 Electronic Gaming Devices, 223 F.3d at 1100. We therefore reject the government's argument that MegaMania stations are similar to slot machines.

162 Megamania Gambling Devices, 231 F. 3d at 723 (emphasis added). See also 103 Electronic Gambling Devices, 223 F. 3d at 1100 (9th Cir.)("the terminal is merely an electronic aid to human players of bingo, something like electronic mail with a graphic user interface.").

The Justice Department has continued to press its contrary view in its recent briefs filed on October 1, 2001, in Seneca Cayuga Tribe v. National Indian Gaming Com'n, No. 01-5066 (10th Cir.), and on July 19, 2002, in United States v. Santee Sioux Tribe, No. 02-1503 (8th Cir.).⁹ The Justice Department asserts that classification of a game as a technologic aid does not remove restrictions on gambling devices imposed by the Johnson Act. If this is correct, tribal operation of technologic aids that also qualify as Johnson Act devices would still require authorization of a tribal-state compact or Secretarial procedures. This may be the most significant point of difference between the tribal position and that of the Department of Justice.

9. Are There Any Limitations on the Placement of an Electronic Bingo Card and Additional Casino or Other Game Theme Display on the Video Screen of an Aid Device?

If both the electronic bingo card and the additional depiction of the results using a casino or other game theme display are presented simultaneously on the video screen, then the definition of bingo necessarily requires that the electronic bingo card be displayed in a manner (size, color, etc.) that allows the player clearly to see the numbers or designations on the bingo card and any results of subsequent daubing; the player must be able to actually "play" the bingo card even if he/she prefers to view the results using the additional casino game theme display.

In this regard, the suggestion in the NIGC's Evergreen Bingo Advisory Opinion (Nov. 2, 1999) that the player must "focus" on the bingo card is incorrect and inconsistent with the Commission's own Tab Force advisory opinion, as well as the Lucky Tab II and Magical Irish court decisions, all of which allowed the use of entertaining displays, regardless of whether the player's attention is focused on those displays or the paper pull-tab. Based upon these cases, the player's focus is irrelevant, as long as (1) the casino game theme display cannot affect the

⁹ As noted above, the Eighth Circuit agreed with the Justice Department that the Johnson Act applies to class II devices, and held that the Lucky Toe II game was not a Johnson Act device.

outcome of the game, and (2) the game satisfies the requirements of the underlying class II game.¹⁰

10. May a Bingo Game Involve a Progressive Jackpot?

The answer is yes. The NIGC has agreed that progressive jackpots are acceptable in the context of bingo, stating that "[t]he Commission has clarified that bingo games with guaranteed bingo prizes, progressive prizes, and jackpot bingo are class II bingo games." 57 Fed. Reg. 12,387 (April 9, 1992). See also NIGC Wild Ball Bingo (Electronic Version) Advisory Opinion (Mar. 27, 2001).

¹⁰ In its brief filed in the MegaNanza case on July 18, 2002, the Justice Department made a similar argument: "The video reels in MegaNanza are clearly the focal point of the game, not the small electronically generated bingo cards that are displayed in an attempt to justify the game as constituting the play of a bingo-like game." Brief at 17. For the reasons discussed above, this "focus" test is contrary to the IGRA.

B. CHARACTERISTICS OF PULL-TAB GAMES.

The assessment of pull-tabs games is somewhat more complicated. Unlike bingo, there is no federal statutory definition for the game of pull-tabs and none has been supplied by the NIGC in its regulations.¹¹ It is merely listed in 25 U.S.C. § 2703(7)(A)(i) as a specific game that is allowed as a class II game.¹² However, a review of state gambling laws¹³ and the handful of federal cases¹⁴ that

¹¹ According to the NIGC:

Several commenters suggested that the Commission define pull-tabs, punchboards, tip jars, and instant bingo. The Commission believes that, in the absence of regulatory definitions, the accepted common law definitions of these terms would apply to any matter arising under the Act. Because the Commission views this result as desirable, it has decided not to add definitions of these terms to the regulations.

57 Fed. Reg. 12382-83 (April 9, 1992).

¹² The enumeration lists "pull-tabs, lotto, punch boards, tip jars, instant bingo and other games similar to bingo," All of the specifically listed games were deemed by Congress to be games "similar to bingo" because the specifically listed games are followed by the phrase "other games similar to bingo." (Emphasis added.) The NIGC has taken a more restrictive view and has defined "games similar to bingo" as limited to games that satisfy the statutory requirements for bingo. The net effect of this interpretation is that there may be games that do not qualify as "bingo" but would yet be deemed "games similar to bingo." We have not attempted to define such games in this memorandum.

¹³ See, e.g., ALASKA STAT. § 05.15.690(35) (Alaska law defines the game of pull-tabs as "a game of chance where a card, the face of which is covered to conceal a number, symbol, or sets of symbols, is purchased by the participant and where a prize is awarded for a card containing certain numbers or symbols designated in advance and at random."); MINN. STAT. § 349.12 (subd. 32) (2000) (defining "pull-tab" as "a single folded or banded ticket or a multi-ply card with perforated break-open tabs, the face of which is initially covered to conceal one or more numbers or symbols, where one or more of each set of tickets or cards has been designated in advance as a winner."); PA. STAT. ANN. tit. 10, § 313 (2001) (Pennsylvania defines "pull-tab" as "a single folded or banded ticket or a strip ticket or card with a face covered to conceal one or more numbers or symbols, where one or more of each set of tickets or cards has been designated in advance as a winner."); MISS. CODE ANN. § 97-33-53 (2001) (Mississippi defines "pull-tabs" as "single or banded tickets or cards each with its face covered to conceal one or more numbers or symbols, where one or more cards or tickets in each set have been designated in advance as winners."); LA. REV. STAT. § 4:703 (2001) (Louisiana defines "pull-tabs" as "single or banded tickets or cards each with its face covered to conceal one or more numbers or symbols, where one or more cards or tickets in each set have been designated in advance as a winner."); 230 ILL. COMP. STAT. ANN. 20/1.1 (2001) (Illinois defines "pull-tabs" as "a game using single-folded or banded tickets or a card, the face of which is initially covered or otherwise hidden from view in order to conceal a number, symbol or set of symbols, some of which are winners.").

¹⁴ For example, in Diamond Game, the D.C. Circuit described the game of pull-tabs in the following manner:

... A small, two-ply paper card, a pull-tab bears symbols and patterns similar to tic-tac-toe that appear when players peel off the pull-tab's top layer. The pattern of the symbols determines whether the player wins a prize. In the traditional pull-tabs game,

have considered the issue indicates that the game of pull-tabs generally is considered to be a game of chance that consists of a finite deal of two-ply cards with a pre-determined number of winners and losers, each card of which must be uncovered by the player to reveal numbers or symbols in order to win.¹⁵ As with the Bingo analysis above, the questions below address the effect of variations introduced when a game is proposed to be played through electronic aids – to determine whether those variations defeat the classification of the game as pull-tabs, and render it something not eligible for play as a class II game.

1. Must Pull-Tabs Be Uncovered to Be Redeemed?

Based upon the traditional understanding of pull-tabs (discussed above), a pull-tab must be uncovered to be redeemed. As detailed below, this requirement can be satisfied either by peeling a paper pull-tab or by revealing the results of an electronic pull-tab displayed on a video screen.

2. May the Results of a Paper Pull-Tab Be Displayed Electronically on a Video Screen?

bingo hall clerks sell pull-tabs from counters or mobile carts, and winners present the tabs to either clerks or cashiers to collect prizes. Pull-tabs are sold from large pools known as "deals." Containing anywhere from 1200 to 100,000 pull-tabs, deals have a fixed number of winners and losers.

Diamond Game, 230 F.3d at 367. Similarly, the Tenth Circuit stated:

A pull-tab is a two inch by four inch card or ticket containing five windows covered with tabs. Various symbols are found under the tabs. The face of the pull-tab discloses the combination of symbols that results in a winning ticket. To play a pull-tab, a player simply pulls back each tab and checks the symbols found under the tabs to ascertain whether he holds a winning ticket. ...

... A fixed number of tickets in each series have a winning combination of symbols, and those tickets are distributed randomly throughout the series.

Chickasaw Nation v. United States, 208 F.3d 871, 874 (10th Cir. 2000), aff'd, 112 S.Ct. 528 (2001).

¹⁵ In 1999, the NIGC issued a bulletin in which it sought to "provide tribes with guidance as to the general parameters of such [class II sub-]games." NIGC Bulletin No. 99-2 (Aug. 18, 1999). According to this guidance:

The pulltab version of instant bingo, also called "break-open" bingo, has numbers or symbols that are concealed behind perforated window tabs. A participant removes paper slips acting as concealing flaps, thereby revealing numbers or symbols which can then be compared with the winning combinations printed on the reverse of card.

The recent Lucky Tab II and Magical Irish cases clarify that the answer is yes. In those cases, the courts recognized that the display on the video screen of the results from a paper pull-tab dispensed by the aid device did not change the outcome of the game. See Diamond Game, 230 F.3d at 370 (display did not "change the outcome of the game."); Santee Sioux, 174 F. Supp. 2d at 1008 ("the video does not determine the winner or loser."). To the same effect, see NIGC Tab Force Advisory Opinion ("The chance inherent in the game is contained within the paper pull-tab itself, and is not at all impacted by the system [which displays the results as video slot reels]"). The new NIGC definition regulations expressly include pull-tab dispensers and/or readers as class II aids. 25 C.F.R. § 502.7(c).

3. May a Pull-Tab Game Be Played Without Paper Pull-Tabs?

An aid device can be used to dispense electronic pull-tabs without making the device a class III facsimile. Nevertheless, we note that some cases appear to suggest that only paper pull-tabs qualify as class II games. In Cabazon Band of Mission Indians v. National Indian Gaming Com'n, 14 F.3d 633 (D.C. Cir. 1994), the court rejected an electronic pull-tab game that involved pods of five player terminals linked to the same computer deal, that allowed for five individuals to play simultaneously. Despite agreeing that "the video version of pull-tabs is the same game as the paper version," the D.C. Circuit Court broadly stated that "the video version of pull-tabs falls within the core meaning of electronic facsimile." Id. at 636. The court further explained that the "Act's exclusion of electronic facsimiles removes games from the class II category when those games are wholly incorporated into an electronic or electromechanical version." Id. A similar result was reached by the Ninth Circuit in Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994). In that case the court held that a self-contained electronic pull-tab dispenser¹⁶ was a class III facsimile.¹⁷

¹⁶ The device at issue was the Autotab Model 101:

The "Autotab Model 101 electronic pull-tab dispenser" is a self-contained unit containing a computer linked to a video monitor and a printer. The player inserts money and sees a video reproduction of a paper pull-tab ticket. The player electronically reveals concealed numbers to determine whether he or she is a winner. If a winner, the player may cause the machine to print out a winning ticket for redemption by a cashier or may add the winning amount to a credit balance for further play. The game retains the fundamental characteristics of the paper version of pull-tab: the video pull-tab machine is supplied with a computer-chip cartridge that insures a predetermined and known number of winning tickets from a finite pool of tickets with known prizes; when all tickets have been played, all the prizes will have been awarded.

54 F.3d at 541.

¹⁷ In that case, the court stated:

The Sycuan Band questions why Congress would permit as class II gaming the traditional pull-tab game (with electronic aids to widen participation) and prohibit the same game played entirely

More recently, in Diamond Game, the D.C. Circuit distinguished its earlier Cabazon decision by focusing on the fact that the Lucky Tab II game dispenses paper pull-tabs. As stated by the court, "the game played with the Lucky Tab II is not a facsimile of paper pull-tabs, it *is* paper pull-tabs." 230 F.3d at 370. Similarly, the court also stated: "the Lucky Tab II is not a 'computerized version' of pull-tabs. Although the Lucky Tab II has a video screen, the screen merely displays the contents of a paper pull-tab." Diamond Game, 230 F.3d at 370 (emphasis added). Similarly, the district court in Santee Sioux considered it significant that "the machine only dispenses paper pull-tabs." 174 F. Supp. 2d at 1008. Recently, the NIGC issued an advisory opinion on Break the Bank in which it suggested that electronic pull-tabs are necessarily class III facsimiles, notwithstanding its earlier opinion that a game with electronic bingo cards (Wild Ball Bingo) is class II. NIGC Break the Bank Advisory Opinion (May 31, 2001).

To the extent that these cases suggest that class II pull-tabs must be paper, the decisions are incorrect. First, neither the IGRA nor the regulations require that pull-tabs be played only on paper cards. Certainly, there is no clear statement to that effect in the statute or regulations. Further, the legislative history explains that Congress intended that tribes have "maximum flexibility" to use "current technology" and "modern methods" to conduct class II gaming. S. REP. NO. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079. As society and the economy are increasingly digitized, it would be inconsistent with the legislative history to require that class II gaming be limited to paper.

Significantly, the earlier Cabazon and Sycuan cases did not consider some of the more recent refinements to some electronic pull-tab devices. Such refinements include removing the electronic pull-tab deal and/or the deal creator (with the random number generator) to a device separate from the individual player terminals and requiring multiple players to play at the same time. While we do not believe that such measures are necessary, the courts have not yet ruled on such a device. Had these refinements been present in the earlier cases, the rulings might have been different and might well be different were they presented today in light of current precedent, such as the recent MegaMania cases, which have upheld the use of electronic game cards. Since the IGRA permits technologic aids to be used in connection with all class II games, there is no reason why paper should be required for some class II games and not others, especially

electronically in stand-alone machines. We cannot and need not answer that question definitively; Congress has sufficiently dictated the result of this case in the statutory language it chose.

Sycuan, 54 F.3d at 543 (emphasis added). This language leaves open the possibility that the Ninth Circuit would agree that an electronic pull-tab device that is not self-contained and that truly facilitates simultaneous participation in a common game could be class II. The fact that the Ninth Circuit subsequently held that MegaMania (which uses electronic bingo cards) is class II supports this interpretation.

when no such separate treatment is suggested in the Act, the regulations or the legislative history.

As detailed above, the appropriate test to determine if a device is a class III facsimile is whether the device is a self-contained copy of the underlying game in which the player can play only against the device and not against other players. In other words, if a device dispenses electronic pull-tabs that must be played according to the rules of pull-tabs (discussed above) and that same device makes the game available to multiple players, it is not a self-contained copy of pull-tabs (and thus a facsimile): it is pull-tabs. This result is consistent with Congress' intent that Indian tribes have maximum flexibility to use modern technology to conduct class II games. See S. REP. NO. 100-446, at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphasis added). While recent case law supports the conclusion that totally electronic pull-tab games may be classified as class II games, the early Cabazon cases in the Ninth and D.C. Circuits, never specifically overruled, support a contrary conclusion. For this reason, tribal gaming commissions may prefer to minimize risk by taking the conservative approach discussed below which would require that a paper element be present in all class II electronically assisted pull-tab games.¹⁸

4. May a Device Provide a Player With the Option to Purchase a Pull-Tab in Paper or Electronic Form?

Although the prior analysis concludes that paper is not required for class II pull-tabs, the more conservative approach adopted by some tribes is to link printers to electronic pull-tab dispenser devices to allow players to purchase pull-tabs in either paper or electronic form from the same deals. One such device is the Break the Bank game, which (as noted above) the NIGC opined is class III in an advisory opinion issued last year. In that game, the device allows multiple players to simultaneously purchase pull-tabs from common deals, thereby broaden the potential participation in the games.

The option to purchase a tab from a deal in paper form adds significantly to the argument that the device is class II, since it prevents the game from being wholly incorporated into an electronic form. To the extent that the device allows multiple players to play from the same deal(s) at the same time, the device is even more defensible as a technologic aid. However, no court has ever ruled on a linked pull-tab device that allows players to purchase pull-tabs in paper or electronic form.

5. May the Results of a Pull-Tab Be Electronically Displayed in a Manner That Simulates the Play of a Casino or Other Theme Game?

The recent Lucky Tab II and Magical Irish cases have held that the results of a pull-tab may be displayed using casino game themes, as long as that display does not

¹⁸ The paper element could be provided by requiring (1) the use of pre-printed paper pull-tabs, (2) the printing of a covered paper pull-tab at the time of sale, or (3) that any individual pull-tab be available for purchase in either paper or electronic form.

change the outcome of the game. In other words, the result must be determined by the pull-tab, which bears a value assigned when the deal of pull-tabs is created. The Justice Department continues to assert a contrary position in the pending Lucky Tab II and Magical Irish cases.

6. May Pull-Tabs Be Redeemed by a Technologic Aid Device That Permits Accumulation and Play of Game Credits?

Neither the IGRA nor the implementing regulations bar the use of technologic aids that permit a player to accumulate credits. As detailed above, the relevant inquiry is whether the device broadens potential game participation (technologic aid) and does not limit a single player to playing the game solely against a self-contained device (facsimile). This conclusion is supported by the decisions of the Ninth and Tenth Circuit that MegaMania is class II, notwithstanding the fact that the player terminals allow players to accumulate and play credits resulting from previous outcomes. There is no basis to conclude that a different rule should apply to aid devices that dispense pull-tabs.

7. Must a Pull-Tab Game Be Available to More than One Player?

In the context of pull-tabs played with technologic aids, each deal of pull-tabs (the game) must be available to at least two players. This does not mean that multiple players must purchase pull-tabs simultaneously, since each player who purchases a ticket from the same deal is competing against all other players who purchase tickets from that deal. See, e.g., Chickasaw Nation v. United States, 208 F.3d 871, 877 (10th Cir. 2000) ("when a player purchases a [pull-tab] ticket, he is competing against every other person who purchases a pull-tab from that same series"), aff'd, 112 S.Ct. 528 (2001). This position is consistent with the Lucky Tab II and Magical Irish decisions. In those cases (which involved deals of paper pull-tabs sub-divided among a number of dispensers), the courts determined that the devices are class II, even though there was no requirement for simultaneous play. It is also consistent with the position taken by the NIGC:

Another commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.

57 Fed. Reg. 12,382 (Apr. 9, 1992).

The courts, however, have yet to uphold an electronic pull-tab dispenser as class II. Moreover, there is some suggestion in the case law that simultaneous play by more than one player is a factor favoring the classification of electronic pull-tab dispensers as class II devices. See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994).¹⁹ Thus, the class II status of the device is more secure if the electronic pull-tab deal is located separate from the pull-tab dispensers so that multiple players can play from the same deal at the same time. A tribal gaming commission may further track existing guidelines by requiring that the first player in each deal not be permitted to purchase a second pull-tab until at least one other player purchases a pull-tab from that deal.

8. May a Pull-Tab Game Involve a Progressive Jackpot?

¹⁹ In finding the Autotab Model 101 to be a class III facsimile, the court found it significant that the "machine is not being used to facilitate '[s]imultaneous games participation between and among Reservations' or even among players on the same reservation." Id. at 543. The court also noted that a player could play whether or not anyone else is playing. Id. at 543 n.5 (citing Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992)).

Pull-tab games can make use of progressive jackpots, as long as winning the jackpot depends solely on a player uncovering a pull-tab that was designated as a jackpot winner when the deal was created. Played in this manner, all of the requirements for the game of pull-tabs (discussed above) would be satisfied, and thus there would not be any change to the fundamental nature of the game of pull-tabs.

The NIGC has agreed that progressive jackpots are acceptable in the context of bingo, stating that "[t]he Commission has clarified that bingo games with guaranteed bingo prizes, progressive prizes, and jackpot bingo are class II bingo games." 57 Fed. Reg. 12,387 (April 9, 1992). See also NIGC Wild Ball Bingo (Electronic Version) Advisory Opinion (Mar. 27, 2001).

9. May More Than One Pull-Tab Deal Be Combined Utilizing Technologic Aids?

As detailed above, the game of pull-tabs must be played with finite deals. As long as this requirement is satisfied, it is permissible to sell tickets from multiple deals through an aid device, just as paper pull-tab dispensers often offer a player the chance of purchasing tabs from multiple deals.