

## STATE OF SOUTH DAKOTA

**OFFICE OF ATTORNEY GENERAL**

500 East Capitol Avenue  
Pierre, South Dakota 57501-5070  
Phone (605) 773-3215  
FAX (605) 773-4106  
www.state.sd.us/atg

**LARRY LONG**  
ATTORNEY GENERAL

**MARK BARNETT**  
CHIEF DEPUTY ATTORNEY GENERAL

November 29, 2004

Mr. Philip N. Hogen, Chairman  
National Indian Gaming Commission  
1441 L Street NW, Ste. 9100  
Washington, DC 20005  
FAX: (202) 632-7066

RE: Response to Request for Comments to Proposed Class II Game  
Classification and Technical Standards

Dear Chairman Hogen:

Thank you for the opportunity to submit comments with regard to  
the document entitled Third Draft--Class II Game Classifications  
and Technical Standards.

Pursuant to 25 U.S.C. 2703(7)(A)(i), Class II gaming means "the  
game of chance commonly known as bingo . . . ." The definition  
adds that "electronic, computer and other technological aids" may  
be used "in connection" with bingo. Id.

The legislative history of the section also indicates that  
although these technological aids may be used, they may not  
"change the fundamental characteristics of the bingo game."  
S. Rep. No. 100-446, at 9, 100th Cong., 2d Sess. (1988).

The term "fundamental" most certainly refers to that which is  
basic. The term "characteristic" refers to a "trait, property or  
quality distinguishing an individual, group or type." *Webster's  
New International Dictionary of the English Language*, p. 451, (2d  
ed. unabridged 1937). Based upon standard dictionary definitions  
(and there is no reason to use anything else) I would interpret  
the term "fundamental characteristic" as used in legislative  
history to be a characteristic which "distinguishes" the game,  
and by which the game is readily recognized.

The question, therefore, is whether "bingo" as defined in the  
"Third Draft" contains or encompasses the "fundamental  
characteristics" of bingo as commonly understood so that it may

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readily be "distinguished" as bingo rather than another game. The short answer is that it cannot.

For example, in the "Third Draft" a so-called "bingo" game can be initiated by a player walking up to a machine to initiate a game. The game of "bingo" can commence within two seconds as long as "at least one other player has elected to play." Third Draft, para. 3(1)(iv).

The game set out in the regulations is not the game of "bingo" and does not have the "fundamental characteristics" of what was understood to be "bingo" at the time the act was passed. At the time the act was passed, a bingo game had a pace and a quality which allowed groups of people to come together in a social context and play a game at a pace which might range from leisurely to brisk. It did not, in contrast, have the characteristic of a game which could be played with one other person at the expiration of a "two second" waiting period. The game lacks the traits, property or qualities which distinguish "bingo" as "bingo."

I recognize that some courts have treated with disdain arguments similar to the argument made here: that the "bingo" authorized by statute is a game readily identifiable as "bingo" by a reasonable person. See, e.g., U.S. v. 103 Electronic Gambling Devices, 223 U.S. 1091 (9th Cir. 2000). In Gambling Devices, the court belittled the idea that any game which had the three characteristics set out in 25 U.S.C. 2703 was not bingo. This case commits the logical fallacy of assuming that the listing of certain factors prevents the consideration of other factors in determining whether the game at issue is actually "bingo."

For example, if a statute states that a tiger is an animal with "four paws," this would not mean that everything with "four paws" was a tiger. The same logical fallacy is at work in Gambling Devices and similar cases.

This analysis is clearly applicable here, especially in light of the legislative history of the statute, a history on which both the courts (see, Electronic Devices, 223 F.3d at 1100) and the NIGC have relied and continue to rely for other parts of the analysis. That legislative history, read in full, demands that the game retain the "fundamental characteristics" of bingo.

Because the "bingo" described in the "Third Draft" fails to retain the "fundamental characteristics" of what is commonly

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"It should be noted, in addition, that even Gambling Devices considered a game with a minimum of twelve participants and 48 cards, not the two participants at issue in this regulation, moving it at least some distance from the unpersuasive description of "bingo" in the Third Draft.

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understood to be "bingo", the "Third Draft" ought to be entirely  
withdrawn.

Sincerely yours,



John P. Guhin  
Assistant Attorney General

JPG:dp

cc: Larry Eliason  
Commission on Gaming