

DEPARTMENT OF THE INTERIOR**National Indian Gaming Commission****25 CFR Parts 502 and 546**

RIN 3141-AA31

Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using “Electronic, Computer, or Other Technologic Aids”

AGENCY: National Indian Gaming Commission (“NIGC” or “Commission”).

ACTION: Proposed Rule.

DATES: Submit comments on or before August 23, 2006.

Consultation: The Commission will be conducting government-to-government consultations with Tribes on this proposed rule at the following times:

July 10–11 Minneapolis, Minnesota
 July 12–13 Denver, Colorado
 July 18–19 Washington, DC
 July 24–25 Tacoma, Washington
 July 26–27 Ontario, California
 August 8–9 Oklahoma City, Oklahoma

Invitations will be mailed out to Tribal leaders in the coming weeks. These consultation meetings will be transcribed. To schedule a consultation please contact Natalie Hemlock, Special Assistant to the Commission, at (202) 632-7003.

ADDRESSES: Mail comments to “Comments on Class II Classification Standards” National Indian Gaming Commission, Suite 9100, 1441 L Street, NW., Washington, DC 20005, Attn: Penny Coleman, Acting General Counsel. Comments may be transmitted by facsimile to 202-632-0045, or mailed or submitted to the above address.

FOR FURTHER INFORMATION CONTACT: Penny Coleman or John Hay, Office of General Counsel, Telephone 202-632-7003. This is not a toll free call.

SUMMARY: The proposed rule clarifies the terms Congress used to define Class II gaming under the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq. (“IGRA” or “Act”). First, the proposed rule further revises the definitions for “electronic or electromechanical facsimile” and “other games similar to bingo” that appear in part 502 of Commission regulations (25 CFR part 501 et seq.). The Commission defined these terms in 1992, revised the definitions in 2002, and proposed further revisions to the term “electronic or electromechanical facsimile” separate from this proposed revision. The proposed rule offers further revision

that would incorporate the new part 546 into the definitions. The Commission adds a new Part to its regulations (part 546) that explains the basis for determining whether a game of bingo or lotto, “other game similar to bingo,” or a game of pull-tabs or “instant bingo,” meets the IGRA statutory requirements for Class II gaming, when such games are played electronically, primarily through an “electronic, computer or other technologic aid,” while distinguishing them from Class III “electronic or electromechanical facsimiles.” This new part also establishes a process for assuring that such games are Class II before placement of the games in a Class II tribal gaming operation. This process contains information collection requirements subject to the Paperwork Reduction Act of 1995. The Commission has submitted the information collection request to OMB for approval.

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I. Background

The Indian Gaming Regulatory Act, 25 U.S.C. 2701–21 (IGRA), enacted by the Congress in 1988, establishes the NIGC and sets out a comprehensive framework for the regulation of gaming on Indian lands. The Act establishes three classes of Indian gaming.

“Class I gaming” means social games played solely for prizes of minimal value or traditional forms of Indian gaming played in connection with tribal ceremonies or celebrations. 25 U.S.C. 2703(6). Indian tribes are the exclusive regulators of Class I gaming.

“Class II gaming” means the game of chance commonly known as bingo, whether or not electronic, computer, or other technologic aids are used in connection therewith, including, if played in the same location, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and various card games so long as they are not house banking games. 25 U.S.C. 2703(7)(A). Specifically excluded from Class II gaming, however, are banking card games such as blackjack, electronic or electromechanical facsimiles of any game of chance, and slot machines of any kind. 25 U.S.C. 2703(7)(B). Indian tribes and the NIGC share regulatory authority over Class II gaming. Indian tribes can engage in such gaming without any state involvement.

“Class III gaming” includes all forms of gaming that are not Class I gaming or Class II gaming. 25 U.S.C. 2703(8). Class III gaming thus includes all other games of chance, including most forms of casino-type gaming such as slot machines of any kind, electronic or electromechanical facsimiles of any game of chance, roulette, banking card games such as blackjack, and pari-mutuel wagering. Class III gaming may be conducted lawfully only if the state in which the tribe is located and the tribe reach an agreement called a tribal-state compact. Alternatively, a tribe may operate Class III gaming under gaming procedures issued by the Secretary of the Interior if the tribe and the state have not reached agreement or if the state has refused to negotiate in good faith toward an agreement. The tribal-state compact or Secretarial procedures may contain provisions for concurrent state and tribal regulations of Class III gaming. In addition, the NIGC also exercises regulatory authority over Class III gaming under IGRA, and the United States Department of Justice and United States Attorneys possess exclusive

criminal jurisdiction over Class III gaming on Indian lands and also possess certain civil jurisdiction over such gaming.

As a legal matter, Congress defined the parameters for game classification when it enacted IGRA. As a practical matter, however, the Congressional definitions were general in nature and specific terms within the broad gaming classifications were not explicitly defined. The Commission adopted regulations in 1992 that included definitions for many terms used in the statutory classification scheme, including “electronic or electromechanical facsimile” (25 CFR 502.7), “electronic computer or other technologic aid” (25 CFR 502.8), and “other game similar to bingo” (25 CFR 502.9). The Commission revised the definitions in 2002. See 67 FR 41166 (June 17, 2002) for an extensive discussion of the reasons for the Commission’s decision to revise these key terms. However, the Commission did not define the many other terms used in conjunction with the various Class II games.

A recurring question as to the proper scope of Class II gaming involves the use of electronics and other technology in conjunction with bingo and lotto as well as pull tabs, instant bingo, and other games similar to bingo that may be Class II if played in a location where Class II bingo is played. In IGRA, Congress recognized the right of tribes to use “electronic, computer or other technologic aids” in connection with these forms of Class II gaming. Congress provided, however, that “electronic or electromechanical facsimiles of any game of chance or slot machines of any kind” constitute Class III gaming. Because a tribe wishing to conduct Class III gaming may do so only in accordance with an approved tribal-state compact, it is important to distinguish the two classes.

Currently, the distinction between an electronic “aid” to a Class II game and an “electronic facsimile” of a game of chance, and therefore a Class III game, is often unclear. With advances in technology, the line between the two has blurred. When in IGRA, Congress defined “the game of chance commonly known as bingo,” 25 U.S.C. 2703(7)(A), it could not have foreseen the technological changes that would affect all games of chance. Likewise, by allowing electronic aids to the game of bingo, Congress could not have foreseen that some vendors and gaming operators would be unable or unwilling to distinguish between Class II games, which tribes regulate, and Class III facsimiles, which require compacts

between tribes and states. The Commission is concerned that the industry is dangerously close to obscuring the line between Class II and III. It believes that the future success of Indian gaming under IGRA depends upon tribes, states, and manufacturers being able to recognize when games fall within the ambit of tribal-state compacts and when they do not.

Against this backdrop, the Commission has determined that it is in the best long term interest of Indian gaming to issue classification standards clarifying the distinction between “electronic, computer, and other technologic aids” used in the play of Class II games and other technologic devices that are “electronic or electromechanical facsimiles of a game of chance” or slot machines.

This approach is somewhat different from the approach taken by the previous Commission when it proposed a rule on Classification of Games in November 1999 (See 64 FR 61234). After considering the comments of tribes and the public to the proposal, the Commission withdrew the proposed rule in July 2002 (See 67 FR 46134). At that time, the Commission expressed the view that the proposed rule would have more likely satisfied the concerns of all had there been greater opportunity for tribal input during its development. The Commission recommended that for any future such rulemaking, a tribal advisory committee be established to advise the Commission as to the nature and content of such a rule.

As the Commission worked through a process to develop these classification standards, it became apparent that the revised definitions issued by a divided Commission in June 2002 (See 67 FR 41166) did not provide the clarity that had been a goal in that rulemaking. Accordingly, the Commission proposes further revisions to the definitions for the terms “electronic or electromechanical facsimile” in a separate rulemaking, as well as revisions to the definitions of facsimile herein that incorporate part 546.

In a related matter, the Commission is also developing specific technical standards for Class II “electronic, computer and other technologic aids” utilized in Indian gaming operations. These technical standards will be presented in a separate proposed rule.

II. Development of the Proposed Rule Through Consultation With Indian Tribes

In recognition of tribal sovereignty and the fundamental importance of game classification to the operation and regulation of gaming on Indian lands

under IGRA, the Commission developed a policy and process for consultation with Indian tribes that would provide opportunity for early and meaningful tribal input regarding formulation of these proposed Class II gaming regulations.

In particular, while initially advising tribes of the Commission’s intention to develop these Class II Game Classification Standards, the Commission also actively consulted with tribes regarding formulation of the Commission’s first-ever official government-to-government tribal consultation policy. After several months of consultation with tribes, the Commission’s official tribal consultation policy was adopted and published in the **Federal Register** on March 31, 2004 (See 69 FR 16973). The Commission purposely established this policy in order to have consultation policy guidelines in place for pre-rulemaking tribal consultation on the Class II classification standards and other planned Commission rulemaking initiatives.

The Commission’s tribal consultation policy calls for the Commission, to the extent practicable and permitted by law, to engage in regular, timely, and meaningful government-to-government consultation with Indian tribes when formulating proposed new or revised administrative regulations that may substantially affect the operation or regulation of gaming on Indian lands. To fulfill this policy commitment to consult with tribes on these proposed Class II regulations, the Commission devised a three-part plan to afford tribes a reasonable and practicable opportunity to consult with the Commission and to provide early input in formulation of the regulations before they were published as proposed new rules in the **Federal Register** and the actual rulemaking process began.

First, the Commission endeavored to consult in person at least twice with each gaming tribe between May 2003 and March 2006 regarding development of these proposed regulations. During this time period, the Commission sent out over 500 separate invitations to individual tribes to consult with the Commission and provide input. Many tribes accepted one or more of the Commission’s invitations to consult during this pre-rulemaking period and participated in separate government-to-government consultation meetings with the Commission regarding the proposed regulations and other matters. While some tribes declined the Commission’s invitation(s) to consult, between May 2003 and March 2006 the Commission conducted over 300 separate

government-to-government consultation meetings with individual tribes and their leaders or representatives regarding development and formulation of these proposed regulations.

Second, the Commission established a joint Federal-Tribal advisory committee on March 31, 2004, composed of both Commission and tribal representatives to assist the Commission in formulating these proposed Class II gaming regulations. In January 2004, the Commission requested all gaming tribes across the country to nominate tribal representatives to serve on this advisory committee. From the tribal nominations received, the Commission selected the following seven tribal representatives on March 31, 2004, to serve on the committee: Norm Des Rosiers, Gaming Commissioner, Viejas Band of Kumeyaay Indians; Joseph Carlini, Gaming Commission Executive Director, Agua Caliente Band of Cahuilla Indians; Kenneth Ermatinger, Gaming Commission Executive Director, Sault Ste. Marie Tribe of Chippewa Indians of Michigan; Jamie Hummingbird, Gaming Commission Director, Cherokee Nation, Oklahoma; Mark Garrow, Gaming Commission Inspections Manager, St. Regis Mohawk Tribe; Melvin Daniels, General Manager, Muckleshoot Indian Bingo, Muckleshoot Indian Tribe; Charles Lombardo, Sr. Vice-President for Gaming Operations, Seminole Tribe of Florida.

To date, the advisory committee has held six (6) meetings: May 13, 2004, in Washington, DC; August 2–3, 2004, Washington, DC; September 13–14, 2004, Cherokee, North Carolina; December 1–3, 2004, Oklahoma City, Oklahoma; January 12–13, 2005, Palm Springs, California; and March 11, 2005, Chicago, Illinois. During these meetings, all of which were open to the public, the committee discussed the various characteristics of Class II and Class III games of chance, their play, and related gaming technology and methods. In addition, the Committee also discussed, reviewed, critiqued and commented on four (4) different, successive preliminary working drafts of the proposed Class II classification standards, which were prepared by the Commission representatives on the committee.

The seven tribal committee representatives provided early tribal input and valuable insight, advice, and assistance to the Commission in developing each of the respective working drafts, as well as the current proposed regulations. Although there were many instances of accord, there were also many times during the development of the proposed

regulations that the tribal committee representatives strongly disagreed with decisions made by the Commission.

In particular, tribal representatives strongly advocated automatic daubing (covering) for the entire game of bingo; elimination of any time delays for either adding players or covering in bingo; elimination of any requirement for multiple bingo draws or releases; authorization of wholly electronic pull-tab games; and no change to the current rule definition of “electronic or electromechanical facsimile” of games of chance. While understanding the tribal representatives’ position on these issues and their general desire to assure that the games are economically viable, the Commission is bound by Congress’s intent, as expressed in IGRA, to promulgate rules that clearly distinguish technologically-aided Class II games from Class III “electronic or electromechanical facsimiles of any game of chance” or “slot machines of any kind.” Accordingly, the Commission concluded that it could not accept some of the tribal representatives’ recommendations in formulating proposed rule.

The Commission’s establishment of the joint Federal-Tribal advisory committee was the subject of a legal challenge while the Commission was preparing the proposed rule for publication.

On March 10, 2005, nearly one year after the Commission established the committee, the Confederated Salish and Kootenai Tribes of the Flathead Nation and the Santa Rosa Rancheria Indian Community filed suit against the Commission alleging that several of the committee members were not eligible to participate on the committee. Following a hearing in Federal court, at which the request for temporary restraining order was denied, the Commission determined that it should proceed to publish the proposed rule for comment while the legal standing of the committee was further litigated. The Commission also sought clarification from those tribes nominating the committee members concerning the member’s role as an official representative of the tribe. As a result of this clarification, and, out of an abundance of caution, the Commission regretfully requested that two members of the Committee step down.

The third component of the Commission’s effort to consult with tribes during the development of these proposed regulations was to make the various preliminary working drafts of the proposed regulations available to all tribes and their leaders for review and comment independent of the joint

Federal-Tribal advisory committee. All five preliminary drafts were published on the Commission’s Web site. In addition, the third and fourth preliminary drafts were successively mailed to each tribe inviting written comment. Many tribes and the public submitted written comments on these respective working drafts. The tribal comments were shared with the members of the advisory committee for their review and carefully considered by the Commission in formulating these proposed regulations.

In addition to forming the advisory committee, scheduling and conducting individual tribal consultation meetings and advisory committee meetings, and requesting and considering written tribal comments to preliminary drafts of the proposed regulations, the Commission also facilitated further pre-rulemaking consultation with tribes by other means. In particular, the Commission attended and addressed several different assemblies of tribal leaders and tribal gaming operators and regulators at meetings and conferences between January 2003 and March 2006 organized by state and regional tribal gaming associations, the National Indian Gaming Association, and the National Congress of American Indians. At these meetings and conferences, the Commission advised tribal leaders of its intention and plan to develop these regulations and provided periodic updates regarding the progress and status of the regulations development. The Commission also made itself available at these meetings to answer any questions from tribal leaders regarding the proposed regulations or their formulation.

In addition, the Commission also met individually with several tribes and their leaders in its Washington, DC, offices, at each tribe’s request, to discuss these proposed regulations and their formulation and implementation.

Through each of these various means, the Commission actively endeavored to provide all tribes with a reasonable and practical opportunity over the past twenty-six months to meet and consult with the Commission on a government-to-government basis and provide early and meaningful tribal input regarding the formulation and implementation of these proposed regulations.

By April of 2005, the Commission was prepared to send the fifth draft to the **Federal Register** for publication as a proposed rule. However, the Department of Justice (“DOJ”) contacted the Commission and expressed concern that the draft regulations might not be consistent with the Johnson Act. The Commission spent five months meeting

with DOJ to resolve its concerns. As a result of these meetings the DOJ drafted amendments to the Johnson Act. Following several consultation sessions with Tribes the DOJ sent the draft amendments to the Office of Management and Budget earlier this year. So much time has elapsed that it is not likely that the proposed legislation will pass the 109th Congress. The need to regulate Class II technologic aids has not diminished and the Commission is compelled to proceed with these regulations. The proposed regulations differ from the fifth draft that was provided to the public in April of 2005. The changes to that draft are a result of the Commission addressing the concerns of DOJ that these regulations clearly distinguish between Class II and Class III games. These changes relate to the size of the bingo card as well as the time period for the release of numbers. Additionally, the proposed changes require a fixed written notification to the player that the game they are playing is a game of bingo, a game similar to bingo, or a game of pull tabs. Finally, they prohibit pull tab machines from paying winnings in any form.

III. Purpose and Scope

The proposed revision to the current definitions regulation and the proposed classification regulation are intended to clarify terms used by the Congress to define Class II gaming under IGRA. Through a separate regulation, the Commission has proposed to revise the current definitions. The change to the definition for the terms “electronic or electromechanical facsimile” and “other games similar to bingo” provides consistency and clarity in understanding Class II gaming concepts intended by Congress. The classification standards serve to distinguish the use of “electronic, computer, or other technologic aids” in the play of Class II bingo, lotto, “other games similar to bingo,” pull tabs, and instant bingo from the play of Class III gaming machines.

These standards focus on the play of bingo, lotto, and “other games similar to bingo” when these games are played through an electronic medium using “electronic, computer, or other technologic aids.” The Commission’s intent with classification standards is not to prescribe rules for how a tribal gaming operation conducts its live session bingo. The only exception to this general approach is when a tribal gaming operation conducts its live session bingo exclusively through networked electronic player stations when these devices essentially perform all the functions of bingo play normally undertaken by the players. Games

played in such a manner on these electronic player stations are included within the parameters of bingo, lotto, and “other games similar to bingo” games played through an electronic medium addressed in the Classification Standards.

These standards apply only in bingo, lotto, other games similar to bingo, pull tabs, and instant bingo played primarily through an electronic medium. They apply only to the electronic format because in an electronic format it becomes too easy to use features such as the instantaneous, rather than serial, release of numbers and the automatic covering (daubing) of those numbers on a player’s electronic card as a pretext to fundamentally change or distort the nature of the game such that it becomes an “electronic facsimile” of the game. In live session bingo, the pace and style of the game will normally preclude such distortions.

In many respects, the current generation of electronic bingo games shows features that turn bingo on its head. Many games offer players the opportunity to play with as few as one other player in games where the object is to obtain and cover one or more “interim” prize patterns which offer significant monetary reward. The game-winning pattern is more often than not a pattern with a low-value, inconsequential prize. The machines, offered as “technologic aids” to the play of bingo, are often designed to play close to the line by using alternative displays of the game results to resemble the experience of a slot machine for the player. This is not inherently wrong nor does it necessarily make such machines Class III devices. But it does make them more difficult to distinguish from Class III devices.

Faced with the explosion of these “technologic aids” on the floors of Class II gaming facilities, or on the floors of Class III gaming facilities as an exception to the number of slot machines authorized for the facility under a tribal-state compact, the Commission has determined that some bright-line classification standards must be developed to distinguish Class II games from the slot machines they mimic. The standards interpret in operational terms Congress’s prescribed legal criteria for Class II bingo, lotto, and other games similar to bingo. As to pull tabs and instant bingo, the standards fully embrace the Federal court decisions that have dealt with the technologic aids to the game. The standards demand in some cases, and prohibit in others, certain play features. In short, the purpose in describing play features is to distinguish the play of

these “technologic aids” from the play of “electronic facsimiles of a game of chance or slot machines of any kind,” which is Class III gaming under the IGRA. The standards clarify the terms Congress used when it defined Class II gaming, not knowing the full potential of modern technology that could be brought to the industry.

IGRA defines Class II bingo with three statutory criteria. It is the game of chance commonly known as bingo

* * *

(1) Which is played for prizes, including monetary prizes, with cards bearing number or other designations;

(2) In which the holder of the card covers such numbers or other designations when objects, similarly numbered or designated, are drawn or electronically determined; and

(3) 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). The game of “lotto” and “other games similar to bingo” were not defined in the Act. The terms were defined in 1992 by the Commission as having the same requirements as bingo. The term “other games similar to bingo” was also defined by the 1992 Commission as requiring that the games could not be house-banked. In reviewing the definition of “other games similar to bingo,” the 2002 Commission retained this non-house-banked requirement but only described these games as a variant of bingo. What constituted a “variant” was not explained. Furthermore, the Commission in its advisory opinions has been unable to identify what constitutes a variant of bingo. It has only described what is not a variant—e.g., a pre-drawn bonanza bingo game.

IGRA also allows for advances in technology to aid the way the game is played. Speaking on another aspect of the game, the U.S. Court of Appeals for the Ninth Circuit observed that bingo is not necessarily the “traditional” game that “was played in our childhoods or home towns.” 223 F.3d 1091, 1096 (9th Cir. 2000). At the same time, IGRA has not changed. In it, Congress delegated to NIGC the task of implementing the Act’s provisions. The three statutory criteria for bingo must continue to be the fundamental principles on which a Class II classification is based. It is this balance between capitalizing on technological advances while continuing to give IGRA’s definitions meaning that the NIGC is attempting to strike in these Classification Standards. These standards explain the statutory criteria and represent the Commission’s

effort to distinguish Class II bingo, lotto, and “other games similar to bingo” from Class III gaming.

The Commission also addresses the games of pull tabs and “instant bingo” in the classification standards. These games are not defined in IGRA, but have been discussed in Federal court cases. These cases provide guidance for distinguishing the Class II versions of these games from “electronic and electromechanical facsimiles” of the games which are Class III. The Classification Standards specifically rely on this case law.

Finally, these regulations address a problem highlighted by the Commission in 2002, but left unresolved. As noted by the Commission, the process for classifying games has been an imperfect process. Under the current informal process, the Commission’s Office of General Counsel issues advisory classification opinions. Often these are obsolete as soon as they are released. Looking forward, electronic games change much too rapidly to encourage dependence on a small legal staff to provide the appropriate classification guidance. The advisory opinions also suffer from major drawbacks. For example, it is sometimes difficult to identify whether the games described in the advisory opinions are the same games as those that are offered for play in a tribal gaming facility. In addition, the advisory opinions are not final agency action and therefore are not subject to judicial review.

A second method for classifying games, the issuance of a Notice of Violation and Closure Order, while subject to judicial review, also has drawbacks. This formal enforcement process is often slow and expensive, forces tribes to defend games they often believe in good faith are permissible games, and can result in decisions that have little impact on the new games that replace those that are the subject of the enforcement action.

A third method, leaving the decision entirely to tribal gaming commissions, has other problems. Decisions are sometimes inconsistent with those of other commissions. Disagreements between tribes and states arise, and all of the concerned parties, including manufacturers, as a practical matter need a central authority to decide what games can be played as Class II.

Definitions in Part 502

a. “Electronic or Electromechanical Facsimile”

The Commission proposes to revise the definition for “Electronic or electromechanical facsimile” contained

in § 502.8. The revision clarifies that games under this section that comply with part 546 are not electronic or electromechanical facsimiles of any game of chance.

b. “Other Games Similar to Bingo”

The Commission proposes to revise the definition for “other games similar to bingo” contained in § 502.9. The revision to the definition shifts the focus for the classification determination in an other game similar to bingo from whether the game is house-banked to whether the game has players competing against other players for the prizes. The revision removes the requirement, not present in IGRA, that these games not be house-banked. The revision also strengthens the requirement that the games involve players competing against other players for a common prize or prizes.

As to house banking, IGRA defines as Class II bingo and, if played in the same location, pull-tabs, punch boards, tip jars, and games similar to bingo, but makes no requirement that any of these games be house-banked, or not be house-banked. IGRA’s only requirement about the banking of Class II games is to exclude house-banked card games from the definition and make them Class III. Congress has, in other words, defined both bingo and games similar to bingo as Class II, regardless of how they are banked. Some, but not all bingo games are played in a house-banked format. Accordingly, the Commission proposes to remove the limitation on house-banking for games similar to bingo as inconsistent with IGRA.

The revision maintains that part of the definition that describes “other games similar to bingo” as variants of bingo. Proposed Part 546 explains what variants are contemplated.

IV. Definitions for 25 CFR Part 546

The Commission proposes definitions for terms not previously defined in its regulations. These definitions apply only to these terms as used in the proposed Part 546 and do not necessarily have other general application.

The Commission defines what is a “game” of the “game of chance commonly known as bingo” or “other games similar to bingo” so that a player will know when the game begins, when the game ends, and what the player must do to participate and win in an individual game. Each bingo game should have a distinct reference number visible on the screen at each player station and used subsequent to the game to track game play and results.

The Commission has previously defined the game of “lotto” as a game played in the same manner as bingo. 25 CFR 502.3. Accordingly, the classification standards for bingo apply to “lotto” the same as they apply to defining bingo. The term “lotto” does not mean “lottery” in general or the type of lottery operated by various states and denominated “lotto” or some derivative thereof.

The Commission defines “the game of pull tabs” and “electronic pull tab” using terminology commonly accepted in the federal courts. See *Cabazon Band v. NIGC*, 827 F. Supp. 26, 28 n. 2 (D.D.C. 1993), *aff’d* 14 F.3d 633 (D.C. Cir. 1994).

The Commission defines the term “instant bingo” by relying on federal case law. See *Julius M. Israel Lodge of B’nai B’rith v. Commissioner of Internal Revenue*, 98 F.3d 190 (5th Cir. 1996). In its decision, the court set out some fundamental differences between bingo and instant bingo. Using common definitions of bingo from dictionaries, the court stated:

The taxpayer’s Instant Bingo is devoid of the critical element of bingo that runs through these ordinary, everyday definitions—that players place markers over randomly called numbers in an attempt to form a preselected pattern. Instant Bingo involves only the player’s purchase of a prepackaged card * * *, and winning cards are those in which the preprinted appearance of numbers on the front of the card * * * matches the preprinted winning arrangement indicated on the reverse side of the card * * *.

Julius M. Israel Lodge of B’nai B’rith, 98 F. 3d at 192–93.

The Commission defines the terms “bonus prize” and “progressive prize” in bingo, lotto, or other games similar to bingo to distinguish them from the game-winning prize. See the discussion below on prizes generally.

V. Criteria for Meeting the Class II Requirements for Bingo, Lotto, and Other Games Similar to Bingo Established by IGRA

IGRA establishes three requirements in defining the game of bingo as a Class II gaming activity. The intent of the proposed rule is to clarify the terms used in this statutory definition when the game is played primarily through “electronic, computer, or other technologic aids.” In drafting the standards, the Commission has been careful to derive criteria from the statutory language.

VI. Bingo, Lotto, and Other Games Similar to Bingo Are Games Played for Prizes, Including Monetary Prizes, With Cards Bearing Numbers or Other Designations

This section of the proposed rule deals with two essential elements of bingo, lotto and “other games similar to bingo”: Cards and prizes. It offers criteria for the card so that it is visible and useful to the game. It explains criteria for prizes but permits a wide variety of prizes for a game.

Cards

Central to the game of bingo is that participants play the game on bingo-faced cards and compete against other players to win prizes in the game. Pursuant to IGRA’s second statutory element, players cover numbers or other designations on their cards “when” those numbers or other designations are drawn. This necessarily means that the player has the card in her possession before the numbers are drawn. This also means that players cannot change cards once the game begins and the numbers are being drawn and displayed, although they certainly may do so before a new game starts.

There is no statutory requirement that bingo be played with paper cards as in a traditional bingo game. In fact, case law and NIGC’s regulations provide that Class II bingo games may be played with electronic cards. The U.S. Court of Appeals for the Tenth Circuit, in *U.S. v. 162 Megamania Gambling Devices*, 231 F. 3d 713 (10th Cir. 2000), ruled that a game, Megamania, was Class II because it met the three statutory criteria for bingo, among them, that the game “is played with an electronic card that looks like a regular paper bingo card containing a grid of numbers * * *.” *Id.* at 719. The Ninth Circuit also affirmed the Class II status of Megamania, observing that the game consisted of “electronic game ‘cards.’” *U.S. v. 103 Electronic Gambling Devices*, 223 F. 3d 1091, 1093 (10th Cir. 2000). NIGC’s regulation on technologic aids, 25 CFR 502.7(c), explicitly names “electronic cards for participants in bingo games” as an example of an aid, which is allowable for Class II games under 25 CFR 502.3(a).

Because bingo is a game played with the cards, the cards must be clearly visible to the player on the video screen of the “electronic, computer, or other technologic aid” displaying the card. In order to ensure visibility the Commission proposes that the screen always display a card that is at least one half the available space on the screen. A larger card would be useful for better

visibility, but the Commission recognizes that the stated minimum size serves the purpose of having a visible card and at the same time allows flexibility for placing other information and features on the video screen.

In the traditional “game of chance commonly known as bingo,” the card contains a grid of 25 spaces in 5 horizontal rows and 5 vertical columns. This is not clearly stated in the statute although it is the norm for the game. The Commission believes that a game using other than 25 spaces placed in a 5 by 5 grid would more properly be considered an “other game[s] similar to bingo.” While a previous Commission explained that the bingo game would not be limited to a grid of 5 rows and 5 columns, in giving meaning to the term “other games similar to bingo,” the Commission now believes Congress had in mind a traditional bingo card when it drafted the sections on Class II bingo since it expressly referred to “the game of chance commonly known as bingo” when listing the statutory elements of the game.

As a major variant from the game of bingo, for other games similar to bingo, the card has many possibilities. The only stated restriction is that each card must have at least three (3) spaces to be covered, in addition to any “free space,” because a winning pattern in the game must have at least three (3) spaces, as explained elsewhere in this preamble.

Each card must have unique numbers or other designations that appear only once on the card. This means a number could appear twice, so long as a qualifying factor such as color established the unique character, e.g., a “blue 5” and a “red 5” could both appear on the card but each would be unique. The unique number or designation can appear only once in order to give meaning to game play. The term “other designations” includes letters, figures or symbols.

Except as noted below, the card must always be displayed for the player in a clear and visible manner. If multiple bingo cards are in use by a player, the player station must have capability to display for the player on the video screen any of the bingo cards being used by the player in the game during play. Before game play, a single card may be shown. During game play, if only one card is shown, the default card being shown will be the card closest to a bingo win or the card with the highest value prize, if a winning card, with each such card display meeting the specified visibility requirements. At the end of the game, a player must have the option of reviewing all the cards used by the player in the game.

An exception to the requirement that the card must always be shown is made for alternative display during a graphical display presented as a second screen during a bonus prize round which is intended for entertainment only. The screen will return to its normal display, including a card, at the conclusion of the round.

The card may contain one free (covered) space without a specified number or other designation, provided the free space is located identically on every card in play or available to be played in the game.

When the Commission issued regulations in 1992, it recognized that Congress did not intend to limit bingo to its classic form and that, if it had, Congress could have spelled out further requirements such as cards having the letters B I N G O across the top with numbers 1–15 in the first column, etc. See 57 FR 12382 (April 9, 1992). This early rulemaking was not specifically directed at distinguishing between play of bingo on electronic player stations from the play of a Class III electronic facsimiles or slot machines. The Commission also found that in defining Class II to include games similar to bingo, Congress intended to include more than bingo in its classic form in that class.

This interpretation, however, begs the question of what IGRA meant by the phrase “game of chance commonly known as bingo.” In differentiating between bingo and other games similar to bingo, the Commission now understands that Congress did intend bingo to be played in its “classic form” (i.e., its common form) which includes the traditional 25 space card but that tribes should also be able to take advantage of modern technology to play the game. Accordingly, the proposed rule clarifies that bingo played in an electronic medium through an “electronic, computer or other technologic aid” will be played on the classic bingo card, but this may be an electronic card.

“Other games similar to bingo” are games that are bingo-like and would not necessarily be played on the classic form of bingo card. With the corresponding change to the definition of “other games similar to bingo” set out in this proposed rule, the Commission believes it is not taking a step back on what is included within Class II but giving correct meaning to the terminology. Bingo is played on a classic card; games that are similar to bingo, but still Class II, can be played on non-traditional cards.

This is consistent with the holdings in the MegaMania cases. As the Tenth Circuit noted:

In this case, MegaMania meets these three criteria. Specifically it is played with an electronic card that looks like a regular paper bingo card containing a grid of numbers and the first persons to cover a previously designated arrangement of numbers—in this case five straight line spaces and the necessary corner spaces—wins a monetary prize.

U.S. v. 162 Megamania Gambling Devices, 231 F. 3d 713, 719 (10th Cir. 2000).

Prizes

Because bingo is “played for prizes” and “won by the first player” covering, the winning prize must have meaningful value compared to the entry fee for the game. The Commission believes that while this prize need not be the highest value prize in the game, or be greater than the amount wagered, it should have significant value. Accordingly, the Commission places a value of at least 20% of the amount wagered and one cent as the minimum value for a game-winning prize.

Other prizes, referred as to “bonus prizes” and “progressive prizes,” to distinguish them from “game winning prize,” may also be awarded based on a player completing another pre-designated pattern during the game. Each such designated pattern or arrangement must also be disclosed to the players upon request before the game begins.

A bonus prize is a prize awarded in a game in addition to the game-winning prize. The prize may be based on different pre-designated and pre-announced patterns than the game-winning pattern, may be based on achieving a winning pattern in a specified quantity of numbers or designations drawn or electronically determined and released, or based on a combination of these conditions. The bonus prize may also be limited by game rule to obtaining the required pre-designated pattern in a specified quantity of numbers or other designations released before the game-winning pattern is obtained by a player in the game. Bonus prizes take two forms: Interim and consolation. Interim prizes are prizes won before or at the same time the game winning prize is won but based on the player covering a pre-designated pattern other than the pre-designated winning pattern. Consolation prizes are won by another player in the game after the winning player successfully covers the pre-designated game-winning pattern. The difference is that consolation prizes

require an additional release of numbers or other designations.

In bingo, lotto, and “other games similar to bingo,” the game is “won” by the first player covering the pre-designated winning pattern. Consequently play must stop, or pause, when the last number or other designation that forms the pre-designated game-winning pattern is released to the players for the game-winning player to cover the pattern, announce bingo, and claim the win. A player may win an interim prize using the quantity of numbers or other designations necessary to form the game winning pattern or a lesser quantity of such numbers or other designations and claim that prize at the same time the game-winning player claims the game-winning prize. However, another release of numbers or designations is required for the players remaining in the game to receive the numbers or other designations that appear on their card(s) and try to obtain the pre-designated pattern for a consolation prize(s), assuming the game does not end with the award of the game-winning prize and continues through one or more consolation prize rounds.

Under the proposed regulation, each game must provide an equal chance of obtaining any winning pattern for each card played by an active player in the game. The probability of achieving any particular pre-designated winning pattern must be the same for all cards played in a game and may not vary based on the amount wagered except that a minimum wager may be established as a condition of eligibility to win a progressive prize. All prizes in the game must be fixed in amount or established by formula and disclosed to all participating players in the game. Prizes that are not fixed or established by formula, i.e., prizes that are random or unpredictable, are not permitted.

The Commission recognizes that game designers may establish various wagering levels in a game. This is permissible provided that all players in the game are eligible to compete for all winning patterns in the game. The higher wager or entry fee can result in a higher value prize but that prize must be based on a pattern or patterns available to all players. For example a player entering a game at the one credit wager level could cover a particular pattern and win a five (5) credit prize, but another player entering at the ten (10) credit level could win a higher multiple of the prize based on covering the same pattern.

A multiplier to the prize or other bonus based on a winning pattern containing a specified number or other

designation is permitted. Similarly, the order of, or quantity of, numbers or other designations randomly drawn or electronically determined may affect the prize awarded for completing any previously designated winning pattern in a game.

Prizes may not be based on an event not directly related to bingo play, such as the spinning of a wheel with eligibility to spin having been determined by a player obtaining and covering a specific pattern in the game. This subsequent “chance” event is not bingo, lotto, or an “other game[s] similar to bingo” and is not a Class II gaming activity. Consequently, it follows that prizes must be established before the game begins. A “second screen” or “bonus round” feature is permitted, however, provided the round is for entertainment only and the prize was determined through the play of the underlying game of bingo, lotto or other game similar to bingo before the bonus round commenced. An alternative display may show the award of free games.

A progressive prize is an established prize for a game, funded by a percentage of each player’s buy-in or wager, that is awarded to a player for obtaining a specified pre-designated and pre-announced pattern within a specified quantity of numbers or designations randomly drawn and released or electronically determined, or randomly drawn and released or electronically determined in a specified sequence. If the progressive prize is not won in a particular game, the prize must be rolled over to each subsequent game until it is won. The progressive prize is thus increased from one game to the next based on player buy-in or wager contributions from each qualifying game played in which the prize is not won. All contributions to the progressive prize jackpot must be awarded to the players. A winning pattern for a progressive prize is not necessarily the same as the game-winning prize pattern.

The method of determining the winner of a progressive prize in a game must be based only on the play of the game of bingo and may not be based on events outside the random selection of numbers or other designations and the action of the competing players to cover such numbers or other designations on their respective cards to achieve the pre-designated winning patterns in the game. As an example, an acceptable basis for awarding a progressive prize would be for the winning player to obtain a winning bingo pattern in the first five numbers drawn in the exact order in which they are drawn.

A pattern used to establish the progressive prize must be a pre-designated pattern that can be obtained by all players in the game. The game may provide that only players wagering at or above a certain entry level are eligible to win the progressive prize associated with that pattern. However, other participants in the game not playing at the required minimum entry level to win the progressive prize must be eligible to win some other prize if the pre-designated pattern is obtained and covered by that player, and the prize claimed.

Progressive awards with only one participating player station, usually called "stand-alone progressives" or "personal progressives," are not permitted in Class II bingo, lotto, or other games similar to bingo played through an electronic medium. In "personal progressives," eligibility to participate and win is based upon some identifying factor, such as a player tracking card. As an example, a prize for the lone eligible player might be greater on the player's 1000th game or a game between 500 and 600 as determined by a random number generator. These formats introduce an additional element of chance into the prize award not involved in the play of the game by all the participants in the game and, thus, fall outside the definition of Class II gaming.

"Mystery Jackpots," where winners are determined from events outside the play of game, e.g., a format in which a player's bet causes a hidden jackpot amount to be exceeded thus enabling the player to play for that jackpot, are not permitted. In this format, an event outside the play of bingo, lotto, or an other game similar to bingo triggers the unique prize award for that player.

A "gamble feature," sometimes called a double up, double play, or double pay, etc., may not be used with Class II bingo, lotto, or other games similar to bingo played through an electronic medium. They are a pretext to alter the fundamental concepts under the IGRA by which prizes in a bingo or lotto game or an other game similar to bingo are awarded. These prize multipliers provide the opportunity, after the completion of the game, for a separate "double or nothing" wager. As such, they do not fall within the definition of Class II games.

Similarly, a separate game or wager to convert the fractional amount left in player credits to either the coin value of the game or nothing, often called "residual credit removal," does not fall within the definition of Class II gaming. These credits must stay on the player station credit meter for use by the

current or a subsequent player until their accumulated value reaches the coin value of the game.

The award of additional "free" games as a marketing tool is permitted so long as all players that participated in the game that initiated the prize of a free game or games receive the same number of free games. This is not considered to be the award of a prize outside the play of the game. Essentially, as part of its marketing program, the house determines that all players in a particular game will receive additional game credits to use in later games.

Finally, a tribal gaming operation may in its discretion offer extraneous marketing prizes such as a "good neighbor prize" awarded to the player sitting next to a player winning a large jackpot progressive prize. This prize is not the result of consideration paid by the player winning the progressive or by the player winning the good neighbor prize. It is merely the gaming operation exercising a marketing decision.

VII. Bingo, Lotto, and Other Games Similar to Bingo Are Games in Which the Holder of the Card Covers the Numbers or Other Designations on the Player's Card When Objects Similarly Numbered or Designated Are Drawn or Electronically Determined

In the game of chance commonly known as bingo, numbers or other designations are drawn from a pool of 75 such numbers or other designations. The term "designations" can mean letters or figures and may include attributes such as color which provide a unique quality to a number, letter, or figure that is used more than once in the game. The random draw or electronic determination of the numbers or other designations must be from a non-replaceable pool, meaning that, for each game, the numbers or other designations randomly drawn or electronically determined are not put back in the pool to be drawn again in that game. For example, if the number B-15 is drawn or electronically determined, it cannot be used again in that game. At the end of the game, all numbers or other designations are returned to the pool to be drawn in the next game.

In bingo and lotto, the use of a non-replaceable pool of 75 numbers or other designations is matched with a card containing 25 non-repeating spaces. For "other games similar to bingo" the Commission believes that the non-replaceable pool of numbers or other designations must consist of a number greater than the number of spaces on the card to be used in the game.

A common draw or electronic determination of numbers or

designations may be utilized for separate games that are played simultaneously.

In bingo, lotto, and "other games similar to bingo" played through an electronic medium, cards containing pre-covered numbers or designations cannot be used. The term "pre-covered numbers or designations" means that the numbers or designations were selected before an individual game begins or before players accept the card or cards each will play and are marked as having been covered. Accordingly, the proposed rule provides that numbers must be selected in real time during the game, as part of the game, and not drawn early and stored for later use. No exception is made for "bonanza bingo" style games, although the Commission acknowledges that this form of play may be found in live session bingo play.

Under IGRA, a game is Class II bingo only if players are required to cover the numbers or other designations on their cards in "real time" (the actual time that it takes a process to occur) or "near real time" response to those numbers or other designations being drawn, and if the first person to cover a designated pattern of those numbers or other designations on a card held by that player wins the game. The requirement that a player cover when objects are drawn means that games that use pre-drawn numbers cannot constitute bingo or an other game similar to bingo. Some have argued that for the purposes of IGRA "when" means "after" and that it should not matter how long after balls are drawn that the card is daubed, thus allowing for pre-drawn numbers. This is contrary to the common meaning of the word "when." Webster's Collegiate Dictionary (10th ed.) defines the conjunction "when" as:

1a: at or during the time that: WHILE
* * * b: just at the moment that * * * c: at any or every time that * * * 2: in the event that: IF * * * 3a: considering that * * * b: in spite of the fact that: ALTHOUGH * * * 4: the time or occasion at or in which * * *.

This definition is counter to the proposition that "when" means "at any point after."

The random draw by either a bingo blower or some other method where numbers are "electronically determined" must occur in real time or very near in real-time to the actual play of the particular bingo game. The act of covering the numbers must occur in close proximity to the drawing of those numbers or in real time. Allowing a game time to distribute numbers through a network of terminals to help ensure continuity of fast paced

electronic bingo games would be logical. In the Commission's view, however, consistent with statutory intent, such "near real-time" play contemplates only the lapse of a minimal period of time necessary to accomplish these objectives. This time period would be measured in seconds, not minutes or hours.

In games with pre-selected numbers or designations, the numbers or other designations are chosen by a random number generator at some time prior to the cards being sold and then the completed games are stored in the host computer and sold to players. By the time the player begins participating, the game has been played within the machine or a server for the network and the machine distributes the completed game to the player. The winning cards are determined at the time the computer draws the numbers and matches them against the existing deck, not during the course of play. Therefore, the bingo player is not "covering" a previously designated arrangement and the "covering" is not happening "when" the objects are drawn.

An acceptable "electronic, computer, or other technologic aid" to the play of bingo, lotto, or "other games similar to bingo" could include the capability for the player to cover all of the numbers or other designations drawn and released to the point the player instructs the aid to perform the cover action on the electronic card used by that player in the game. In other words, the player does not have to touch each number or other designation on the card to cover the number, or use an electronic pen or "dauber" to mark each number or designation. Instead, the player can touch the screen or a designated button to perform this function. This action must occur after each release of numbers or other designations in the game because players must cover "when" numbers or designations are released, as discussed above. (The numbers may be released in rounds, each round containing one number or a set of numbers. In a game designed in this manner, the required cover action by players must occur after each round or release of a set of numbers.)

An "electronic, computer or other technologic aid" cannot employ a feature whereby the "aid" accepts instruction from the player at the beginning of the game to later cover (daub) the numbers that will be drawn in later rounds or releases of numbers or other designations. This is sometimes referred to as total "auto-daub" meaning a feature incorporated into an aid to the play of bingo, lotto, or an other game similar to bingo that automatically

performs the requirements for the player to cover (daub) numbers or designations on the player's electronic card. Use of this feature would mean players were not covering "when" those numbers were drawn and released. Similarly, the equipment would lose its character as an "electronic, computer, or other technologic aid" to Class II gaming and would become an "electronic facsimile" of the game if it performed all of the "cover" functions for the player without specific player direction or if it performed those functions following an instruction from the player to cover at some later point "when" and if the numbers other designations were drawn. The device would essentially play the game for the player. The player would merely start the game, watch play unfold, and be paid any amounts won without further action.

It follows that a player should have a reasonable opportunity to cover the numbers or other designations after those numbers or other designations are released before forfeiting the use of the covered numbers or designations. The Commission believes a minimum time of two (2) seconds is appropriate in each round for players to have an opportunity to accomplish this function. If all players have covered sooner, the game may proceed.

To "sleep" or to "sleep a bingo" means that a player fails, within the time allowed by the game: (i) To cover (daub) the previously released numbers or other designations on that player's card(s) constituting a game-winning pattern or other pre-designated winning pattern, or (ii) to claim the prize to which the player is entitled, having covered (daubed) a previously designated winning pattern thereby resulting in the forfeiture of the prize to which the player would otherwise be entitled.

Because each game of bingo, lotto, or other game similar to bingo must have a winning player (game is "won by the first player" covering a pre-designated pattern), it follows that a player who fails to cover the game-winning pattern on that player's card(s) under the time permitted by the rules of the game "sleeps" that game-winning pattern, and the game must continue for some player in the game to win following a subsequent release of numbers or designations. Game rules may specify a time period of not less than two seconds for this cover opportunity to facilitate movement in the game and speed play. If the game waited endlessly for a non-attentive player to cover, other players would be stuck in the game waiting for additional numbers or other designations to be drawn and released,

and the opportunity to play the subsequent round. A player who fails to cover the numbers or designations making up that game-winning pattern released in the first round or in a subsequent round may later cover those numbers or designations ("catch-up") and still remain eligible to win the game-winning prize, provided that prize has not been awarded to another player who covered the numbers or other designations making up the pattern and claimed the prize. However, a player failing to cover (daub) those numbers or designations within the permitted time loses the opportunity to make a pattern from those numbers or designation that could result in a bonus or progressive prize.

VIII. Bingo, Lotto, and Other Games Similar to Bingo Are Games Won by the First Person Covering a Previously Designated Arrangement of Numbers or Other Designations on the Card or Cards Held by the Player

Key to understanding IGRA's third statutory element is an examination of the term "first person." The Commission understands Congress's use of this term to indicate that bingo, lotto, and "other games similar to bingo" must be played by more than one person if there is to be a "first person." In the Commission's view, bingo, lotto and "other games similar to bingo" are games where broad participation is favored, although the Commission recognizes that a simplistic reading of the IGRA requirements would allow the game to be played only by two (2) players. Furthermore, players must be competing for all available winning patterns in the game including all patterns associated with the bonus prizes and the progressive prize, if any, in the game. In other words, the game and all prize patterns associated with it must be played by more than one (1) person and preferably by many players.

The need for multiple players is also a factor distinguishing "electronic, computer, or other technologic aids" from electronic facsimiles of a game of chance in that an "aid" facilitates broad participation in the game. Accordingly, the Commission wants to make clear that a network of linked player stations for the play of bingo, lotto, or other games similar to bingo must be designed to facilitate broad participation and not limit play to two (2) players. In an effort to quantify this for game design, the Commission proposes that games encourage play with six (6) or more participants. It has drafted the rule to allow a short but reasonable period for these additional players to enter the game after the first player enters. If six

(6) players do not enter within two (2) seconds, the game can begin with a minimum of two players.

When played with electronic player stations, players must be linked through a networked system. Participating linked player stations may be located adjacent to or separately from one another at each location at which a common game is played. The networked system may also extend to electronic player stations at multiple tribal gaming locations. Players at electronic player stations in different locations may be linked into a common game.

The location of any "electronic, computer, or other technologic aid" assisting game play by providing the random draw or electronic determination of numbers or designations used in the game, controlling a progressive game, or allowing a player to participate in the game must be located on "Indian lands" as that term is defined in the IGRA. Electronic, computer, or other technologic systems which only monitor game revenue may be located elsewhere.

The patterns or arrangement of numbers or designations which the players strive to cover in the game have minimum requirements under the proposed rule. A game-winning pattern will have at least three spaces on the card in addition to any free space used. Other winning patterns will have at least two (2) spaces on the card in addition to any free space used. The maximum number of spaces for any winning pattern in a game is the number of spaces on the card.

A game may have more than one game-winning player. In other words, ties are permitted. To constitute a tie, each game-winning player must use the same number or other designation drawn and released in the game that finalizes the game-winning pattern for each player and must cover and claim the prize under the procedures described.

The requirement that there must be a "first person must cover" a pattern also has important implications for the game. Participants must take an active role during the competition in covering the numbers or other designations on their cards when the numbers are drawn.

The third statutory requirement also means that there must be at least two (2) releases of numbers before a winning game-ending pattern is created. The statutory language, "won by the first person," describes a contest or race among players to be the first to win. Central to "the game of chance commonly known as bingo" is the competition built up over the course of successive ball draws, as each player

covers matching numbers or designations in an attempt to be the first to cover the winning pattern. No such challenge exists where all of the balls are revealed at once. Said differently, if all the balls necessary to produce a game-winning pattern are drawn at once, the game will likely end with only one ball draw, thereby removing the contest element.

This interpretation of the statutory definition, requiring balls to be released in multiple rounds during the course of the game, is supported by case law. In the Ninth and Tenth Circuits' opinions on MegaMania, the courts found that the game was Class II. *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000). The courts reached their decisions after an analysis of the play of the game for whether it met the statutory criteria for bingo. According to the courts, in MegaMania numbers are drawn by a bingo blower and released three balls serially at a time. If a player wants to continue playing the game after the first three balls are drawn, the player pays additional money to stay in the game for the release of the next three balls. The game is won by the first person to cover a five-space straight line on an electronic bingo card.

Intrinsic to the play of MegaMania were the successive rounds that a player must engage in to win the game. The game cannot be won after a single release or numbers or other designations. The Ninth Circuit's ruling-limited as it was to the facts-recognized an inherent character of bingo: that the game requires a player to participate in a process of numbers being revealed. MegaMania could be won by two successive releases and so the Commission does not require more than two releases of one or more numbers or other designations. However, the Commission's interpretation of IGRA's definition of bingo, with the winner being the first to cover, does require more than one release. Consequently, the quantity of numbers or other designations released in the first round must be some number less than the number of balls required for a player to achieve the win, that is, cover the game-winning pattern.

Furthermore, in Megamania, the balls, although released in clusters of three, they each rolled out one at a time. They did not pop out three at a time. This roll out of each individual ball allowed players to track the balls and the game. We believe that this serial release of the balls is a practical approach for allowing players to identify what numbers they are covering. The requirement that the

release take 2 seconds also allows the player a minimum time to view the balls as they are released.

The Commission is wholly cognizant of the Ninth Circuit's caveat that, "Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhood or home towns might discover, IGRA's three explicit criteria constitute the sole legal requirements for the game to count as class II bingo." *103 Electronic Gambling Devices*, 223 F.3d at 1096. This interpretation of the third statutory element, consistent with both case law and the statutory definition, respects what the Commission understands "the game of chance commonly known as bingo" to be. As previously discussed, the Commission is concerned that the lines between what constitute Class II and Class III games are being blurred by technological advances that Congress could not have foreseen and did not explicitly address in 1988 when it enacted IGRA, with its three simple statutory criteria for what constituted bingo. The Commission nonetheless must continue to distinguish Class II from Class III games because Congress distinguished between them. The Committee Report on the bill that became IGRA noted that "both state and tribal governments have significant governmental interests in the conduct of class III gaming." S. Rep. 100-446, p. 13. Having weighed the merits of different interpretations of the third statutory requirement, the Commission believes that requiring multiple ball releases, in the format described, is in keeping with the statutory language, case law, and with its concern that play of bingo must be distinguishable from the play of a slot machine, over which Congress intended tribes and states to compact.

IX. Use of "Electronic, Computer or Other Technologic aids" in the Play of Bingo, Lotto, and "Other Games Similar to Bingo" Through an Electronic Medium.

In light of the Commission's understanding of IGRA's statutory requirements as well as the distinction between "aids" and "facsimiles," the Commission believes the following steps describe the play of bingo, lotto, or "other games similar to bingo" in an electronic medium, as Class II gaming.

- (1) A request for entry into the game;
- (2) A release of a group of balls, one at a time, in no less than two seconds;
- (3) A first cover (daub) opportunity of at least two seconds for all competing players in the game to cover (daub) the numbers or other designations on their cards that correspond to the numbers or

other designations drawn and released in the first round and action by the players to cover (daub) the numbers or other designations on their cards following this release;

(4) A second cover (daub) opportunity of at least two seconds for all competing players in the game to cover (daub) the numbers or other designations on their cards that correspond to the numbers or other designations drawn and released in the second round and an action by the players to cover (daub) the numbers or other designations on their cards following this second release together with an action to claim any prize won.

The minimum two-second opportunity for covering (daubing) the selected numbers or other designations in each release that appear on players' cards may be shortened, and the game may proceed, if all players in the game cover (daub) their cards in less time.

One or more additional releases and cover (daub) opportunities may be necessary, if there is not a winner in the game following the second release and cover (daub) opportunity. A game design may provide for more than two releases prior to a winner being determined.

Using these three steps, permissible Class II game play for bingo, lotto, or other games similar to bingo utilizing linked player stations as "electronic, computer or other technologic aids will proceed as follows:

(1) To enter and begin the game, each player accepts the card or cards to be used by that player and requests entry into the game by selecting an amount to wager and pressing or touching a button showing the word "play" or other similar designation. The cards must meet the requirements specified in Part 546 and any Technical Standards issued by the Commission.

(2) After the game begins, one or more unique numbers or other designations must be randomly drawn or electronically determined, without replacement, from a finite pool of numbers or other designations. For example, if the number B-15 is drawn or electronically determined, it cannot be used again in that game.

(3) Each game must permit the random draw and release or electronic determination of all numbers or designations in the non-replacement pool of such numbers or other designations. Numbers or other designations must be selected and used immediately in real time by the competing players in the game for which they are drawn or electronically determined, that is they cannot be selected and released until all players have entered and the game has actually

commenced. Selected numbers or other designations must be used in the sequence in which they are drawn or electronically determined.

(4) Numbers or other designations will be randomly drawn or electronically determined and released to players in separate multiple rounds. Each round may consist of one number or other designation or a set of numbers or other designations. The numbers or other designations selected must be displayed to the player in the sequence they are used in the game. When each release of numbers or designations occurs, the technologic aid may highlight the numbers or designations on the card that a player should cover (daub) by a change of color that changes again when the player covers (daubs) those numbers or designations.

(5) Prizes cannot be won in the first release of numbers or other designations, meaning that players are required to participate and compete through the random determination and release of at least two rounds as part of the contest to be the first to cover the winning pattern.

(6) All players must have an opportunity to cover (daub) their cards after each release to reflect their participation in a common game. Players may cover (daub) each card they have in play by touching the video screen at the player station or a button showing the word "cover" or other similar designation. A minimum time of two seconds, or a lesser time if all players have covered, must be available for each player to accomplish the cover (daub) action. Following this action by a player, the video screen at that player station must display a different color or other marking on the number or designation on that player's card if that number or designation has been properly covered (daubed) by the player. Players must be notified that they should cover (daub) their cards when the numbers or designations are revealed. For each cover opportunity, the game must wait (indefinitely) until at least one player performs the cover (daub) action.

(7) After the first release and cover (daub) opportunity by all players, a subsequent number or set of numbers or other designations must be released. The quantity of numbers or designations released in each subsequent round may not extend beyond the quantity of numbers or other designations necessary to form the first available eligible game-winning pattern on a card in play in the game. Following each subsequent release, all players must again have the opportunity to cover (daub) the spaces on their cards that contain any of the

numbers or designations randomly drawn and released or electronically determined. Numbers or other designations covered (daubed) by a player must stay covered throughout the play of the game.

(8) A player wins the game by being the first player(s) in the game to cover (daub) a pre-designated game-winning pattern or arrangement of numbers or other designations and, after the release of at least the second set of numbers or other designations, claiming the win by touching the screen or a button showing the word "cover," "daub," "claim" or other similar designation within the time allowed by the rules of the game which must be at least two seconds.

(9) A player who "sleeps" a potentially winning pattern or fails to timely claim that winning pattern and thereby forfeits the win based on that pattern, must be informed by an indication on the player station video screen that the player has "slept" the win. Numbers or other designations that have been slept must be clearly and uniquely marked on the player's card. Note that a player who fails to cover (daub) the numbers or other designations drawn and released in the first round, or a subsequent round, within the time allowed may not later use those numbers or other designations in a prize-winning pattern other than the game-winning pattern. The player may later cover (daub) the numbers or designations ("catch-up") and be awarded the game-winning prize provided the player is the first player(s) in the game to cover (daub) the numbers or other designations making up the game-winning pattern and claim the win.

(10) A bingo game cannot end until a player in the game wins the game winning prize i.e. obtains a pre-designated game-winning pattern, timely covers (daubs) all of the numbers or other designations in the pattern, and timely claims the win in the manner prescribed by the rules of the game. The game may end at this point or other additional criteria for the end of the game may apply, such as the additional release(s) of randomly drawn or electronically determined numbers or other designations for a consolation prize(s), provided such criteria are clearly stated in the rules available to the players.

(11) After all available numbers or designations have been randomly drawn or electronically determined and released that could lead to a game winning prize (i.e. no more balls could be drawn that would assist in the formation of a game winning prize), the game may allow an unlimited length of

time to complete the last required cover (daub) and claim the prize, or be declared void and wagers returned to players and prizes canceled—the latter action is only to be permitted under strict security control of the gaming facility.

(12) Each player in a game must take overt action to cover (daub) the player's card(s) during play of the game by touching the screen or a designated button one time after each set of numbers or other designations is released. Each released number or designation does not have to be covered individually by the player, i.e., the player need not touch each specific space on the electronic bingo card where the called number or designation is located, but the player must overtly touch the screen or a designated button at least one time to cover (daub) the numbers or designations drawn and released in each round that appear on the player's card. When each release of numbers or other designations occurs, the technologic aid may highlight the numbers or designations on the card that a player should cover (daub) by a change of color that changes again when the player covers (daubs) those numbers or designations.

X. Alternative Display of the Results of the Game on the Video Screen at the Player Station.

An electronic player station may offer an alternative technologic display of the results of the game in addition to the display of the game results on the electronic bingo card. The game results may be shown on a video screen using a game theme display such as spinning reel icons. If the alternative display is presented, the video screen must continue to display the bingo card and results to the player. The alternative display of bingo game results may also be shown on a secondary display screen.

The alternative technologic display of bingo game results may be shown on a technologic aid using mechanical reels, but only if there is also a screen which is a component of the technologic aid which always shows the results of the bingo game as well as other important player information such as the current bet amount.

Alternative result display options may only be utilized for entertainment or amusement purposes and may not be used to independently determine a winner of the game or the prizes awarded or change the results of the bingo game in any way.

Each game must give the player the option to select only the bingo card display on a video screen and to play

the game using that display alone. The video screen may revert to the combined screen with alternative display if the credit meter reaches zero.

If both the electronic bingo card and the additional depiction of the results using a game theme display are presented simultaneously, the bingo card must be displayed in a manner (size, color, location, etc.) that allows the player to clearly see the numbers or other designations on the bingo card and any results of covering (daubing). At the conclusion of a game, the screen must reflect whether the player has won and the value of any win without reference to the alternative display.

XI. The Relationship of "Other Games Similar to Bingo" as Class II Gaming to the Requirements for Bingo Specified by IGRA

IGRA does not define "other games similar to bingo." The Commission initially defined the term to mean any game that met all the requirements for bingo and was not a house-banking game. See 57 FR 12382 (April 9, 1992). In 2002, the Commission revised the definition as:

Any game played in the same location as bingo * * * 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 CFR 502.9.

In the preamble comment to the 2002 revision, the Commission explained that under the previous definition, "other games similar to bingo" were games that met the same precise statutory criteria set for bingo. Such a definition would be illogical, the Commission said, because a game that met each of the statutory requirements of bingo would simply be bingo, making a class of games similar to bingo unnecessary. Instead, the Commission said, games similar to bingo should be understood to be games:

that are bingo-like, but that do not fit the precise statutory definition of bingo. * * * "[O]ther games similar to bingo" constitute a "variant" on the game and do not necessarily meet each of the elements specified in the statutory definition of bingo.

67 FR 41171 (June 17, 2002). In its 2002 revised definition, the Commission did not include the statement that such games similar to bingo "do not necessarily meet each of the elements specified in the statutory definition of bingo." It relegated that idea instead to the preamble commentary. The Commission also did not define the term "variant."

Application of the 2002 definition has been limited and difficult. Subsequent

to the definition's publication, the Commission endeavored to clarify exactly what statutory requirements "other games similar to bingo" would or would not include. In Bulletin 03-03, for example, the Commission determined that at least some of the statutory requirements for bingo also had to be met by "other games similar to bingo":

The question before us then is whether any characteristics of bingo are so fundamental that a game without them cannot even be said to rise to the level of a variant of bingo and, if so, whether numbers drawn after the player enters the game is one of them.

We conclude that there are characteristics of bingo that are so critical that games lacking them cannot even be said to be a variant or bingo-like.

In NIGC Bulletin 03-03 (September 23, 2003), p. 5. the Commission concluded that having numbers drawn after game play commenced was so critical to the character of bingo that games with pre-drawn numbers could not even be said to be a game similar to bingo. IGRA requires that a player cover when the numbers or objects are drawn [25 U.S.C. 2703(7)(A)(i)(II)], the Commission observed. The act of covering the numbers must occur in close proximity to the drawing of those numbers or in "real time." Covering numbers substantially later than numbers are drawn or determined is not consistent with the dictionary definition of "when." As a result, games in which numbers are not drawn and covered after play begins do not meet the second statutory criterion and are not bingo, the Commission reasoned. Neither can these games be "other games similar to bingo," it stated.

The Commission continues to believe that pre-drawn numbers are anathema to games similar to bingo. The Commission also believes that the other IGRA requirements are so critical to bingo that games lacking them cannot be "other games similar to bingo" within the definition for Class II gaming. For example, the Commission views the requirement that the game is won by the first to cover a pre-designated pattern or arrangement of numbers or other designations to be a characteristic of bingo so critical that games lacking this feature cannot be games similar to bingo.

While the Commission believes it cannot dispense with these important statutory criteria when evaluating "other games similar to bingo" for Class II determination, it also believes there can be a variation in applying the statutory criteria. This approach gives

meaning to the category of games to which Congress referred in IGRA as “other games similar to bingo” within Class II but which were not specifically defined.

The proposed regulation on “games similar to bingo,” born out of the Commission’s experience with past definitions, its desire to clarify what constitutes a “variant,” and its observations about advancing bingo technology, thus has the following effect. “Other games similar to bingo” will not include games with pre-selected numbers, although such games may be “pull-tabs” or “instant bingo.” (These are games distinct from “other games similar to bingo.”) Players also must cover the numbers or other designations on their cards, whatever the size or shape of the card may be, “when” numbers or other designations are randomly determined and released and the winning player will be the first to cover a pre-designated pattern on the card. Games in which players do not play for pre-designated patterns or do not require the winning player to be the first player to cover numbers or other designations making up a pre-designated game-winning pattern on a card cannot be Class II bingo, lotto, or an “other game similar to bingo” under the IGRA definition.

Under the revised definition for “other games similar to bingo,” the game of “keno” will continue to be viewed by the Commission as a Class III game because it is not played with pre-designated patterns as an objective and players are not competing against each other to be the player to cover a pre-designated winning pattern. In keno players simply bet that they have selected the winning numbers to be drawn from a pool of such numbers, usually 80.

The proposed regulation also departs from the previous definition in that it deletes the requirement that “other games similar to bingo” not be a house-banked game. The proposed regulation also emphasizes that the format of the game must require players to compete against each other for a common prize or prizes rather than merely permitting player competition.

In short, the Commission believes that a “variant” of the game of bingo is a game that is bingo-like but is played on a card displaying numbers or other designations that is not the classic bingo card format. Additionally, the winning numbers will be drawn from a pool no larger than 75. In other words, under the revised definition, all of the statutory requirements for bingo would be present, but the game would be played on a variant of the typical bingo card.

This interpretation of the term “variant,” along with elimination of the requirement that the game not be house-banked, will mean that bingo, lotto, and “other games similar to bingo” will be treated equally for purposes of defining the limits of Class II gaming. The fundamental aspects of each game as Class II gaming under the IGRA definition will be the same. Game designers will have the opportunity to design games that are not tied to a classic bingo card, but the games will always be played in a bingo-like manner.

XII. Use of State Law in Determining Whether a Game is Bingo, Lotto, or an “Other Game Similar to Bingo” Under IGRA

As noted in Commission Bulletin 03–03, the holding in *Julius M. Israel Lodge of B’nai B’rith v. Commissioner of Internal Revenue*, 98 F. 3d 190 (5th Cir. 1996) also supports the Commission’s view that state laws allowing play of games do not affect the analysis of what constitutes bingo, lotto, or an “other game similar to bingo” under IGRA. The taxpayer in the case argued that bingo and instant bingo were authorized under Texas law. The Fifth Circuit dismissed the argument, saying “As a threshold matter, we dismiss the taxpayer’s contention that we must look to Texas state law in determining whether Instant Bingo is exempt from federal taxation under the federal tax code.” 98 F. 3d at 191, n. 2.

States may designate whatever games are legal within their borders. That some state codes describe, for example, bonanza bingo as a pre-drawn game and allow it for play as it would a bingo game does not address the question of what constitutes bingo, lotto, and “other games similar to bingo” for the purposes of IGRA.

XIII. Additional Comment Regarding Player Against Player Competition in Bingo, Lotto, and “Other Games Similar to Bingo.”

The Commission believes that Congress intended the play of Class II bingo, lotto, and “other games similar to bingo” to involve competition among players to determine the winner. In other words, players do not compete against the house to win but against others playing the game simultaneously. This application is simple enough in live session bingo in which the house sponsors a game at a particular time, sells bingo-faced cards, calls numbers, and awards a prize to the first player covering a pre-designated pattern on the card held by the player. The application is more difficult when the players

engage in a fast play game on electronic player stations with electronic cards. The conclusion that Congress intended Class II bingo to be a competition with and against other players is also key to the distinction between Class II bingo using “electronic, computer, or other technologic aids,” in which players actively play against each other throughout the course of the game, and Class III electronic facsimiles of a game, in which players play against a machine.

The Commission notes the trend in “electronic bingo” games using technologic aids is to offer a player the opportunity to compete against other players for a pre-designated “game-winning” pattern (referred to in some game designs as a “game-ending” pattern) while at the same time offering players the opportunity to compete for higher value, pre-designated, “interim prize” patterns. In these games players ostensibly compete against one or more other players to be the first to obtain the necessary numbers and then cover the pre-designated “game-winning” pattern. The result is that the game ends and the winning player registers the credits associated with that pattern on the credit meter at his or her player station. More often than not, this prize has only minimum value. More important to the player, the games offer the opportunity to win larger value prizes if the player is successful in obtaining one or more of the many other pre-designated bonus—prize winning patterns rather than the “game-winning” or “game-ending” pattern offering minimum prizes. There is a fine line between whether play for these other patterns is play against the machine or the controlling game server, which is a Class III gaming activity, and competition against other players, which is Class II.

In an effort to preserve the sense that these games involve player against player competition, the Commission interprets the statutory requirements for bingo, lotto, and “other games similar to bingo” to mean that all players in an individual “game” must be competing for the same set of these other pre-designated winning patterns and each player’s successful quest for these patterns must be accomplished by the time the first player obtaining the so-called “game-winning” pattern obtains and then covers the numbers on the card producing that pattern. In other words, the competition for the patterns producing the higher value “interim prizes” must be in sync with the competition for the game-winning pattern. If it is not, the players are not in competition with one another but in

competition with the controlling game server, and in that respect, the house. This would make the game an "electronic facsimile" of a lottery.

XIV. Classification Standards for Pull Tabs, Electronic Pull-Tabs and "Instant Bingo"

The proposed regulation includes definitions for the terms "Pull-tabs" and "Instant Bingo." The definitions used by the Commission are drawn from federal case law.

The definition of a pull-tab game is drawn from the definition used by the Court in *Cabazon Band v. NIGC*, 827 F. Supp. 26, 28 (n. 2)(D.D.C. 1993), aff'd 14 F.3d 633 (D.C. Cir. 1994) wherein the Court described the game as follows:

The game of pull-tabs is a game of chance played traditionally as a paper game. Players purchase outwardly identical cards from a stack of cards (the "deal"). The deal includes a pre-determined number of winning and losing cards. The player opens the tab and finds out if the card is a winner.

Under IGRA and Commission regulations, the paper game of pull-tabs is Class II when played in the same location as bingo. See 25 U.S.C. 2703 (7)(A)(i)(III) and 25 CFR 502.3(b).

A wholly electronic version of pull-tabs is played with a similar underlying concept, but without any tangible or paper pull-tab deals. A player obtains an electronic "card" or "ticket" that is displayed for the player on a video monitor from a "stack" of similar "cards" or "tickets" stored electronically. Using the electronic equipment available to the player, the player "opens" the electronic pull-tab and examines the combinations on the video screen to determine if she has a winning combination. As with paper pull-tabs, the "deal" is finite which is to say that the numbers of winning and losing tickets are known when the "deal" is loaded electronically into the gaming equipment. In some versions, the deal is contained in a cartridge or series of cartridges that are loaded individually into a single player terminal. In others, the deal is loaded into a central computer that can be accessed through a number of individual player terminals.

In either of these instances, the game does not exist in paper format or any other tangible format, but only in an "electronic" format. As such, the game becomes an "electronic facsimile" game of paper pull-tabs and, by the statutory definition, cannot be a class II game. See 25 U.S.C. 2703(7)(B)(ii).

This analysis finds support in *Cabazon Band of Mission Indians v. National Indian Gaming Commission*,

14 F.3d 633, 636 (D.C. Cir. 1994) (*Cabazon II*) wherein the Court noted:

There is now a computerized version of pull-tabs. The computer randomly selects a card for the gambler, pulls the tab at the gambler's discretion, and displays the result on the screen. The computer version, like the paper version has a fixed number of winning cards in each deal. The computer may be interconnected so that each gambler simultaneously plays against other gamblers in pods or banks of as many as forty machines.

* * * * *

[T]he tribes concede that the video version of pull-tabs is the same game as the paper version. * * * Because class II gaming does not include "electronic or electromechanical facsimiles of any game of chance" (25 U.S.C. § 2703(7)(B)(ii)), this concession alone demonstrates that the video game is not in the class II category. "By definition, a device that preserves the fundamental characteristics of a game is a facsimile of the game." *Sycuan Band of Mission Indians v. Roach*, (S.D. Cal. 1992). As commonly understood, facsimiles are exact copies or duplicates. Although there may be room for a broader interpretation of "facsimile," the video version of pull-tabs falls within the core meaning of electronic facsimile. It exactly replicates the paper version of the game, and if that is not sufficient to make it a facsimile, we doubt * * * that anything could qualify.

* * * * *

* * * [T]he 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.

Cabazon II, 14 F.3d, at 636.

See also *Sycuan Band v. Roache*, 54 F.3d 535 (9th Cir. 1995) which considered an electronic pull-tab device known as the Autotab Model 101 and found the device to be class III. ("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 electronically reveals concealed numbers to determine whether he or she is a winner. * * * 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 * * *". *Sycuan*, 54 F.3d. at 541.)

While the *Cabazon II* and *Sycuan* cases deal with pull-tabs in electronic format, other important cases decided by the United States Courts of Appeals for the District of Columbia Circuit, Tenth Circuit, and Eighth Circuit discuss "paper" pull-tabs played with "electronic, computer, or other technologic aids."

In *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000), United States Court of Appeals for the District of Columbia Circuit concluded that a gaming device known as the Lucky Tab II was a technological aid to the play of paper pull-tabs and a Class II device under the IGRA. There is, however, a substantial difference in how the Lucky Tab II game described in *Diamond Game* is played compared to the game in *Cabazon II*. The Lucky Tab II device uses a paper roll of pull-tabs that are read by optical scanner and then displayed on a video monitor. The Court concluded that the game was not an electronic facsimile of the paper game and thus was not excluded from the Class II definition. The Lucky Tab II machine was described by the court as follows:

The machine dispenses pull-tabs from a roll containing approximately 7500 tabs. About 100 rolls comprise a deal, within which winning pull tabs are randomly distributed. The machine cuts the pull-tab from the roll and drops it in a tray. A bar code scanner inside the machine automatically reads the tab and then displays its contents on a video screen. A placard on the machine informs players that "video images may vary from actual images on pull tabs. Each tab must be opened to verify." To collect prizes, players must present the actual winning tab to a clerk. We think the Lucky Tab II is quite different from the machine at issue in *Cabazon II*. To begin with, 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. Instead of using a computer to select patterns, the Lucky Tab II actually cuts tabs from paper rolls and dispenses them to players. In other words, the game is in the paper rolls, not as in the case of the *Cabazon* machine, in the computer.

Diamond Game v. Reno, 230 F. 3d at 367-368.

Thus, the court concluded that "the machine functions as an aid—it 'helps or supports,' or 'assists' the paper game of pull-tabs." Consequently, the court ruled that the game played with Lucky Tab II is not a facsimile of paper pull-tabs, but it is paper pull-tabs.

The Eighth Circuit Court of Appeals has also held that Lucky Tab II was a Class II technological aid. *United States v. Santee Sioux Tribe*, 324 F.3d 607 (8th Cir. 2003), cert. denied, 2004 U.S. Lexis 1807 (U.S. Mar. 1, 2004). The court's analysis was that:

Operation of the Lucky Tab II machines does not change the fundamental fact that the player receives a traditional paper pull-tab from a machine, and whether he or she decides to pull the tab or not, must present that card to the cashier to redeem winnings. * * * the machines do not replicate pull-

tabs; rather, the player using the machines is playing pull-tabs.

Santee Sioux Tribe, 324 F.3d at 615.

The Magical Irish Instant Bingo Dispenser System, identical to the Lucky Tab II system, was also held to be a “technologic aid.” See *Seneca-Cayuga Tribe of Okla. v. NIGC*, 327 F.3d 1019, 1042–44 (10th Cir. 2003), cert. denied, 2004 U.S. Lexis 1651 (U.S. Mar. 1, 2004). The Tenth Circuit Court of Appeals decided that the Magical Irish machine was a Class II aid because:

The Machine (1) cuts tabs from paper rolls and dispenses them to players, and when its “verify” feature is enabled, displays the contents of the paper pull-tab on the video screen; (2) does not use a computer to select the patterns of the pull-tabs it dispenses; and (3) requires players to peel each pull-tab to confirm the result and provide the pull-tab to a clerk for inspection prior to receiving any prize.

Seneca-Cayuga Tribe, 327 F.3d at 1043. Therefore, the court concluded that the “Machine is not the game of pull-tabs; rather, the Machine facilitates the playing of pull-tabs, the game is in the paper rolls.”

The Commission understands that courts have concluded that the Lucky Tab II and the Magical Irish machines are “technological aids” because they assist players in playing actual paper pull-tabs. See, e.g., *Diamond Game*, 230 F.3d at 370 (“the machine functions as an aid—it helps or supports, or assists the paper game of pull-tabs”); *Seneca-Cayuga Tribe*, 327 F.3d at 1043 (the “Machine facilitates the playing of pull-tabs, the game is in the paper rolls”). These machines do not alter the format of the game—the game remains in the actual paper pull-tabs, not in a computer or electronic format. See, e.g., *Seneca-Cayuga Tribe*, 327 F.3d at 1043; *Diamond Game*, 230 F.3d at 370; *Santee Sioux Tribe*, 324 F.3d at 615.

The proposed regulation relies specifically on the developed federal case in this area, as discussed above.

The Commission recognizes that gaming technology has moved forward in the ten years since the *Cabazon II* and *Sycuan* cases were decided.

Nevertheless, the Commission believes these cases continue to represent the state of the law for the play of pull-tabs that do not exist in tangible format readily accessible to the player. Consequently, the proposed regulation requires the pull-tabs or “instant bingo” tickets exist in tangible medium readily accessible to the player at the player station. Pull-tabs that exist in tangible medium remote from the player, such as in a controlled storage room at or near the gaming facility where the game is played and which are converted to

electronic images for display at the player station are not immediately available to the player. In this method of play, the game is not in the paper, as the courts require for Class II play, but is in the computer or electronic format, which the courts find to be a Class III electronic facsimile.

Under the proposed regulation, the game may not accumulate credits for the player. The player station may not dispense winnings in any form. Additionally, the pull-tabs themselves must exist in tangible format at the player station and be available for the player and the gaming operation to validate the game results and prize, if desired.

The proposed regulation also permits alternative display of game results. The results may appear on a screen using game theme graphics, spinning reels, or other imagery. The alternative display of pull-tab game results may be shown on a primary screen or on a secondary display screen. The alternative display of pull-tab game results may also be shown on a technologic aid using mechanical reels but only if there is also a screen which is a component of the technologic aid which always shows the contents and results of the pull-tab game as well as other important player information such as current bet amount.

XV. Process for Certification of Games and “Electronic, Computer, and Other Technologic Aids” as Meeting the Classification Standards

The Commission recognizes that Indian tribes are the primary regulators for Indian gaming. Accordingly, this proposed regulation provides that a Tribe’s gaming regulatory authority will be the entity authorizing specific games and gaming systems for use in that Tribes’ gaming operation. From its standpoint, however, the Commission believes that establishing uniform minimum classification standards for Class II “electronic, computer, or other technologic aids” is part of its oversight role. Before permitting operation and play of Class II “aids” in its gaming operation, the Tribe’s gaming regulatory authority must ensure that a game or “aid” to the play of bingo, lotto, or “other games similar to bingo,” or pull-tabs or “instant bingo” is certified as meeting the criteria established by the Commission’s Classification Standards by an independent testing laboratory recognized as qualified to perform such testing. The testing laboratory does not “classify” the game or “aid” or otherwise usurp the authority of the Tribe’s gaming regulatory authority. Rather, the testing laboratory merely provides a report that it has tested and

evaluated the game or “aid” and that the game or “aid” meets the Commission’s Classification Standards. The Tribe may rely on this certification. The Tribe may adopt additional classification standards that do not undermine the Commission’s minimum standards, if it so desires, and require testing and certification to the Tribe’s additional standards as a condition to operation and play of the game or “aid” in the Tribe’s gaming operation.

The Commission believes that, as a condition of being recognized to perform these important evaluations, a testing laboratory must be required to demonstrate its integrity, independence, and financial stability by providing evidence that it has been licensed in a competent jurisdiction that required a thorough background investigation as part of the licensing process. The testing lab must also demonstrate its technical skill and capability by providing evidence that it has conducted suitable testing to standards established by other jurisdictions. The NIGC will conduct an onsite review of the testing lab’s facilities prior to recognizing a lab as qualified and competent to perform evaluation and testing under its standards. The Commission may extend provisional recognition to a new testing laboratory that has not undergone a background investigation review for a license or that has not previously provided testing and evaluation to comparable standards.

A testing laboratory recognized by the NIGC should expect to demonstrate its continuing level of technical skill through a Key Performance Indicator (KPI) analysis evaluated yearly as a condition to maintaining its recognition. This KPI analysis will take into account:

(1) Accuracy of evaluation of Class II Classification and Technical standards conducted through periodic audit by the NIGC of the testing laboratory’s recommendations.

(2) Reports of serious classification or technical faults in games and associated equipment placed in operation in tribal gaming facilities following certification by the testing laboratory. To assist with this evaluation, tribal gaming regulatory authorities are encouraged to report serious classification or technical faults to the NIGC Chairman as they become known.

The Commission recognizes that in some unique circumstances, a testing laboratory may have questions about aspects of the Classification Standards. Accordingly, the process set out in the proposed regulation provides that the laboratory may seek to resolve questions with the gaming developer or manufacturer, the sponsoring tribe, or

with the NIGC Chairman. The Commission expects these discussions will normally resolve any question.

In even more unique circumstances, a testing laboratory may not properly apply the Classification Standards or may misinterpret those standards when it issues a report.

In these circumstances, the NIGC Chairman may object to a certifying laboratory report and require its withdrawal. The Chairman will provide notice to the testing laboratory, the requesting party submitting the game for evaluation, and the sponsoring tribe, and attempt to resolve the matter through negotiation. If the Chairman continues to have objection following these discussions, the Chairman will issue a determination. This determination by the Chairman may be reviewed by the full Commission on appeal from the testing laboratory, the requesting party, or the sponsoring tribe. A Commission decision upholding the Chairman's objection will constitute a "final agency action" that may be appealed to federal court.

Regulatory Matters

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Indian Tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of \$100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The Commission has determined that this proposed rule does not impose an unfunded mandate on state, local, or Tribal governments or on the private sector of more than \$100 million per year. Thus, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.* The Commission has determined

that this proposed rule may have a unique effect on Tribal governments, as this rule applies to Tribal governments, whenever they undertake the ownership, operation, regulation, or licensing of gaming facilities on Indian lands as defined by the Indian Gaming Regulatory Act. Thus, in accordance with section 203 of the Unfunded Mandates Reform Act, the Commission implemented a small government agency plan that provides Tribal governments with adequate notice, opportunity for meaningful consultation, and information, advice, and education on compliance.

The Commission's plan includes the formation of a Tribal Advisory Committee and request for input from Tribal leaders through government-to-government consultations and through written comments to draft regulations that are provided to the Tribes. Section 204(b) of the Unfunded Mandates Reform Act exempts from the Federal Advisory Committee Act (5 U.S.C. App.) meetings with Tribal elected officials (or their designees) for the purpose of exchanging views, information, and advice concerning the implementation of intergovernmental responsibilities or administration. In selecting Committee members, consideration was placed on the applicant's experience in this area, as well as the size of the Tribe the nominee represented, geographic location of the gaming operation, and the size and type of gaming conducted. The Commission attempted to assemble a committee that incorporates diversity and is representative of Tribal gaming interests. The Commission will meet with the Advisory Committee to discuss the public comments that are received as a result of the publication of this proposed rule and make recommendations regarding the final rule. The Commission also plans to continue its policy of providing technical assistance, through its field offices, to Tribes to assist in complying with classification issues.

Takings

In accordance with Executive Order 12630, the Commission has determined that this proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of General Counsel has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This proposed rule requires information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and is subject to review by the OMB. The title, description, and respondent categories are discussed below, together with an estimate of the annual information collection burden.

With respect to the following collection of information, the Commission invites comments on: (1) Whether the proposed collection of information is necessary for proper performance of its functions, including whether the information would have practical utility; (2) the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Process for Certification of games and "electronic, computer, and other technologic aids" as meeting the Classification Standards," proposed 25 CFR 546.11.

Summary of information and description of need: This provision in the proposed rule establishes a process for assuring that Bingo, lotto, other games similar to bingo, pull tabs, and instant bingo, played through or using electronic aids, are in fact Class II before their placement on the casino floor in a Class II operation.

This process requires a Tribe's gaming regulatory authority to require that all such games or aids, or modifications of such games or aids, be submitted by the manufacturer to a qualified, independent testing laboratory for review and analysis. That submission includes a working prototype of the game or aid and pertinent software, all with functions and components completely documented and described. In turn, the laboratory will certify that the game or aids do or do not meet the requirements of the proposed rule, and any additional requirements adopted by the Tribe's gaming regulatory authority, for a Class II game. The laboratory will provide a written certification and report of its analysis and conclusions, both to the Tribal gaming regulatory authority for its approval or disapproval of the game or aid, and to the Commission for its review. In the circumstance that a laboratory has

misinterpreted the applicable regulations, the NIGC Chairman may object to a certifying laboratory report and require its withdrawal. This action may be reviewed by the full Commission on appeal from a Tribe or manufacturer submitting the game for its certification. A Commission decision upholding the Chairman's objection will constitute a "final agency action" that may be appealed to federal court.

This process is necessary because the distinction between an electronic "aid" to a Class II game and an "electronic facsimile" of a game of chance, and therefore a Class III game, is often unclear. With advances in technology, the line between the two has blurred. The Commission is concerned that the industry is dangerously close to obscuring the line between Class II and III and believes that the future success of Indian gaming under IGRA depends upon Tribes, States, and manufacturers being able to recognize which games fall within the ambit of tribal-state compacts and which do not. The information collection requirements are an essential component of the process. Laboratories cannot conduct meaningful evaluation and analysis of games without documentation from the manufacturers. Tribes cannot make meaningful classification determinations without reports from the laboratories. The Commission cannot meaningfully review the process and, if necessary, object to a laboratory's findings, without reports.

Respondents: The respondents are developers and manufacturers of Class II games and independent testing laboratories. The Commission estimates

that there are 20 such manufacturers and 5 such laboratories. The frequency of responses to the information collection requirement will vary.

During the first 6 to 12 months after adoption of the proposed rule, all existing games or aids in Class II operations that fall within this rule must be submitted and reviewed if they are to continue in Class II operations. Following that period, the frequency of responses will be a function of the Class II market and the need or desire for new games or aids. Thus, the Commission estimates that the frequency of responses will range over an initial period of frequent submissions, settling down into infrequent and occasional submissions during periods when there are a few games, aids, or modifications brought to market, punctuated by fairly steady periods of submissions when new games and aids are introduced. In any event, the Commission estimates that submission will number approximately 200 during the first year after adoption and approximately 75 per year thereafter.

Information Collection Burden: The preparation and submission of documentation supporting submissions by developers and manufacturers (as opposed to the game or aid hardware and software per se) is an information collection burden under the Paperwork Reduction Act, as is the preparation of certifications and reports of analyses by the test laboratories. The amount of documentation or size of a laboratory certification and report is a function of the complexity of the game, equipment, or software submitted for review. Minor modifications of software or hardware

that a manufacturer has already submitted and that a laboratory has previously examined is a matter of little time both for manufacturer and laboratory, while the submission and review of an entirely new game platform can be quite time consuming.

The practice of submission and review set out in the proposed rule, however, is not new. It is already part of the regulatory requirements in Tribal, State, and Provincial gaming jurisdictions throughout North America and the world. Manufacturers already have significant compliance personnel and infrastructure in place, and the very existence of private, independent laboratories is due to these requirements.

Accordingly, the Commission estimates that a gathering and preparing documentation for a single submission requires, on average, 8 hours of an employee's time for a manufacturer and that following examination and analysis, writing a report and certification requires, on average, 12.5 hours of an employee's time for a laboratory. In the first year after adoption, then, the Commission estimates that the information collection requirements in the proposed rule will be a 1600-hour burden on manufacturers during the first year after adoption and a 600-hour burden thereafter. The Commission estimates that the information collection requirements in the proposed rule will be a 2500-hour burden on laboratories during the first year after adoption and a 940-hour burden thereafter. The following table summarizes:

Provision	Respondents	Number of respondents	Collections, 1st year	Hours per collection	Total hours	Collections, year 2 forward	Hours per collection	Total
25 CFR 546.11 ..	Laboratories	5	200	12.5	2500	75	12.5	937.5
25 CFR 546.11 ..	Manufacturers	20	200	8	1600	75	8	600

Comments: Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3507(d), the Commission has submitted a copy of this proposed rule to OMB for its review and approval of this information collection. Interested persons are requested to send comments regarding the burden, estimates, or any other aspect of the information collection, including suggestions for reducing the burden (1) directly to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for National Indian Gaming Commission, 725 17th St. NW., Washington DC, 20503, and (2) to Penny J. Coleman, Acting General Counsel, National Indian

Gaming Commission, 1441 L. Street NW., Washington DC 20005.

National Environmental Policy Act

The Commission has determined that this proposed rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*).

List of Subjects in 25 CFR Parts 502 and 546

Gambling, Indian lands, Indian tribal government, Reporting and recordkeeping requirements.

Accordingly, for the reasons described in the preamble, the Commission proposes to amend its regulations in 25 CFR part 502 and add a new part 546 to read as follows:

PART 502—DEFINITIONS OF THIS CHAPTER

1. The authority citation for part 502 continues to read as follows:

Authority: 25 U.S.C. 2701 *et seq.*

2. Amend § 502.8 by adding paragraph (c) to read as follows:

§ 502.8 Electronic or electromechanical facsimile.

* * * * *

(c) Bingo, lotto, other games similar to bingo, pull tabs, and instant bingo games that comply with Part 546 of this chapter are not electronic or electromechanical facsimiles of any game of chance.

3. Revise § 502.9 to read as follows:

§ 502.9 Other games similar to bingo.

Other games similar to bingo means any game played in the same location as bingo (as defined in 25 U.S.C. 2703(7)(A)(i)) that constitutes a variant on the game of bingo, provided that such game requires players to compete against each other for a common prize or prizes.

4. Add a new part 546 to read as follows:

PART 546—CLASSIFICATION STANDARDS FOR BINGO, LOTTO, OTHER GAMES SIMILAR TO BINGO, PULL TABS AND INSTANT BINGO AS CLASS II GAMING WHEN PLAYED THROUGH AN ELECTRONIC MEDIUM USING “ELECTRONIC, COMPUTER, OR OTHER TECHNOLOGIC AIDS”

Sec.

546.1 What is the purpose of this part?

546.2 What is the scope of this part?

546.3 What are the definitions for this part?

546.4 What are the criteria for meeting the first statutory requirement that the game of bingo, lotto, or other games similar to bingo be “played for prizes, including monetary prizes, with cards bearing numbers or other designations?”

546.5 What are the criteria for meeting the second statutory requirement that bingo, lotto, or other games similar to bingo be one “in which the holder of the card covers such numbers or other designations when objects similarly numbered or designated are drawn or electronically determined?”

546.6 What are the criteria for meeting the third statutory requirement that bingo, lotto, or other games similar to bingo be “won by the first person covering a previously designated arrangement of numbers or designations on such cards?”

546.7 What are the criteria for meeting statutory requirement that Class II pull-tabs or instant bingo not be “electronic or electromechanical facsimiles?”

546.8 When is a pull tab or instant bingo game an “electronic or electromechanical facsimile?”

546.9 What is the process for approval, introduction, and verification of “electronic, computer, or other technologic aids” under the classification standards established by this part?

546.10 What are the steps for a compliance program administered by a tribal gaming

regulatory authority to ensure that “electronic, computer, or other technologic aids” in play in Class II tribal gaming facilities meet the classification standards of this part?

Authority: 25 U.S.C. 2701 *et seq.*

§ 546.1 What is the purpose of this part?

This part clarifies the terms Congress used to define Class II gaming under the Indian Gaming Regulatory Act, 25 U.S.C. 2701, *et seq.* (IGRA or “Act”). Specifically, this part explains the criteria for determining whether a game of bingo or lotto, an “other game similar to bingo,” or a game of pull-tabs or “instant bingo,” meets the statutory requirements when these games are played primarily through an “electronic, computer or other technologic aid.” This part also establishes a process for establishing Class II certification of “electronic, computer, or other technologic aids” and the games they facilitate. These standards for classification are intended to ensure that Class II gaming using “electronic, computer, or other technologic aids” can be distinguished from forms of Class III gaming that employ “electronic or electromechanical facsimiles” of a game of chance or slot machines.

§ 546.2 What is the scope of this part?

This part is intended to address only games played with electronic components. It does not address live session bingo unless that game is played exclusively through electronic components.

§ 546.3 What are the definitions for this part?

(a) What is a “game” of bingo or other game similar to bingo? A “game” of the “game of chance commonly known as bingo” or an “other game similar to bingo” consists of the random draw or electronic determination and release of numbers or other designations necessary to form the pre-designated game-winning pattern on a card held by the winning player and the participation of competing players to cover (daub) the numbers or other designations which appear on their card(s) when the selected numbers or other designations are released for play. A “game” ends when a participating player(s) claims the win after obtaining and covering (daubing) the pre-designated game-winning pattern and consolation prizes, if any, are awarded in the game.

(b) What is “Lotto”? The term “Lotto” means a game of chance played in the same manner as the game of chance commonly known as bingo.

(c) What is a “bonus prize” in the game commonly known as bingo or “other game similar to bingo”? A bonus

prize is a prize awarded in a game in addition to the game-winning prize. The prize may be based on different pre-designated and pre-announced patterns than the game-winning pattern, may be based on achieving a winning pattern in a specified quantity of numbers or designations drawn or electronically determined and released, or a combination of these conditions. A bonus prize may be awarded as an “interim prize” while players are competing for the game-winning prize or as a “consolation prize” after a player has won the game-winning prize.

(d) What is a “progressive prize” in the game commonly known as bingo? A progressive prize is an established prize for a game, funded by a percentage of each player’s buy-in or wager, that is awarded to a player for obtaining a specified pre-designated and pre-announced pattern within a specified quantity of numbers or designations randomly drawn and released or electronically determined, or randomly drawn and released or electronically determined in a specified sequence. If the progressive prize is not won in a particular game, the prize must be rolled over to each subsequent game until it is won. The progressive prize is thus increased from one game to the next based on player buy-in or wager contributions from each qualifying game played in which the prize is not won. All contributions to the progressive prize jackpot must be awarded to the players. A winning pattern for a progressive prize is not necessarily the same as the game-winning prize pattern.

(e) What does it mean to “sleep” in the game of bingo or an “other game similar to bingo”? To “sleep” or to “sleep a bingo” means that a player fails, within the time allowed by the game:

(1) to cover (daub) the previously released numbers or other designations on that player’s card(s) constituting a game-winning pattern or other pre-designated winning pattern; or

(2) to claim the prize to which the player is entitled, having covered (daubed) a previously designated game-winning pattern or other winning pattern, thereby resulting in the forfeiture of the prize to which the player would otherwise be entitled.

(f) What is the “game of pull-tabs”? In the game of pull-tabs, players purchase cards from a set of cards known as the “deal.” Each deal contains a finite number of pull-tab cards that includes a pre-determined number of winning cards. Each individual pull-tab within a deal is a paper or other tangible card with hidden or covered symbols. When those symbols are revealed, there is an

arrangement of numbers or symbols indicating whether the player has won a prize. Winning cards with pre-established prizes are randomly spaced within the pre-arranged deal. One deal consists of all of the pull-tabs in a given game that could be purchased.

(g) What is an “*electronic pull-tab*”? An electronic pull-tab is an electronic facsimile of a pull-tab that is displayed on a video screen.

(h) What is “*instant bingo*”? In “instant bingo,” a player purchases a card containing a pre-selected group of numbers or designations; the winning cards are those in which the pre-selected group of numbers or designations on the card matches the preprinted winning arrangement indicated elsewhere on the card. The game is functionally the same as pull-tabs.

§ 546.4 What are the criteria for meeting the first statutory requirement, as stated at 25 U.S.C. 2703 (7)(A)(i)(I), that the game of bingo, lotto, or other games similar to bingo be “played for prizes, including monetary prizes, with cards bearing numbers or other designations?”

(a) Each player in the game must play with one or more cards. Each player in the game must obtain the card or cards to be used by that player in the game before numbers or other designations for the game are randomly drawn or electronically determined. Players cannot change cards once play of a particular bingo game has commenced. Electronic cards are permissible.

(b) Electronic cards in use by a player must be displayed prominently on a video screen of the electronic player station utilized by the player and must be clearly visible to that player at all times during game play. If multiple electronic cards are used by a player, the game must offer the player the capability of seeing each one of his or her cards. At the conclusion of the game, each player must see his or her card with the highest value prize or, if no prize was won, the card closest to a bingo win. At no time shall an electronic card measure less than 2 (two) inches by two (2) inches or four (4) square inches if other than a square card is used. When displayed, the game of bingo, or other games similar to bingo, including the electronic card but excluding any alternative displays, shall fill at least $\frac{1}{2}$ of the total space available for display.

(c) For a game of bingo, each card must contain a five (5) by five (5) grid of spaces. Each space will contain a unique number or other designation which may not appear twice on the same card. The card may contain one

“free space” without a specified number or other designation, provided the free space is in the same location on every card in play or available to be played in the game.

(d) Each technologic aid shall prominently display the following message: “THIS IS A GAME OF BINGO” or “THIS IS A GAME SIMILAR TO BINGO.” Each letter of the display must measure at least two (2) inches in height.

(e) As a variant of bingo, in an “other game similar to bingo,” each card must contain at least three (3) equally sized spaces. Each space will contain a unique number or other designation which may not appear twice on the same card. One space may be designated a “free space” provided the card has at least three (3) other spaces.

(f) When a number or other designation is covered, the covering must be indicated on the card by a change in the color of the space, a strike-out through the space, or some other readily apparent visual means.

(g) All prizes in the game, except for progressive prizes, must be fixed in amount or established by formula and disclosed to all participating players in the game. Random or unpredictable prizes are not permitted.

(h) Other patterns may be designated for the award of bonus prizes in addition to the prize to be awarded based on the game-winning pattern. Each such designated pattern or arrangement must also be disclosed to the players upon request before the game begins.

(i) The designated winning patterns and the prizes available must be explained in the rules of the game, which must be made available to the players upon request.

(j) Each game must have a winning player and a game-winning prize must be awarded in every game. The pattern designated as the game-winning pattern does not need to pay the highest prize available in the game. A game-winning prize may be less than the amount wagered, provided that the prize is no less than 20% of the amount wagered by the player on each card and at least one cent.

(k) A bonus prize in a game that is designated as an “interim prize” must be awarded in a random draw or electronic determination and release of numbers or other designations that is no more than the exact quantity of numbers or designations that are needed for the game-winning player to achieve the game-winning pattern.

(l) A bonus prize in a game that is designated as a “consolation prize” may be awarded after the game-winning

pattern is achieved and claimed by a player but only after a subsequent release of randomly drawn or electronically determined numbers or other designations has been made.

(m) A progressive prize may be awarded only if the game also provides a game-winning prize as described elsewhere in this Part.

(n) All prizes in a game, including progressive prizes, must be awarded based on the outcome of the game of bingo and may not be based on events outside the selection and covering of numbers or other designations used to determine the winner in the game and the action of the competing players to cover the pre-designated winning patterns. The prize structure must not rely on an additional element of chance other than the play of bingo.

(o) A player station may offer an alternative display of the results of the game in addition to the display of the game results on the electronic bingo card, provided that the player has the option to not view the alternative display and play using only the electronic card display. An alternative display may include game theme graphics, spinning reels, or other imagery. The results may also be displayed on mechanical reels. In no instance may the alternative display fill more than $\frac{1}{2}$ of the total display space.

§ 546.5 What are the criteria for meeting the second statutory requirement, as stated at 25 U.S.C. 2703 (7)(A)(i)(II), that bingo, lotto, or other games similar to bingo be one “in which the holder of the card covers such numbers or other designations when objects similarly numbered or designated are drawn or electronically determined?”

(a) In a game of bingo, the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool containing 75 such numbers or other designations and used in the sequence in which they are drawn. Each game will permit the random draw and release or electronic determination of all numbers or designations in the pool. A common draw or electronic determination of numbers or designations may be utilized for separate games that are played simultaneously.

(b) As a variant of bingo, in an “other game similar to bingo,” the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool of such numbers or other designations which is greater than the number of spaces on the card used in the game.

(c) All numbers or other designations used in the game must be randomly

drawn or electronically determined after the cards to be used in the game have been assigned to or selected by the players in the game. The cards cannot have pre-covered numbers or other designations.

(d) The numbers or other designations randomly drawn or electronically determined must be used in real time and not stored for later use. The numbers or other designations must be used in the sequence in which they are drawn.

(e) To “cover,” a player in a game must take overt action after numbers or designations are released. A player covers (daubs) by touching either the screen or a designated button on the player station at least one time in each round after a set of numbers or other designations is released.

(f) Players must have an opportunity to cover (daub) after every release. Each released number or designation does not have to be covered (daubed) individually by the player, i.e., the player need not touch each specific space on the electronic bingo card where the called number or designation is located. However, the player must have to opportunity to cover (daub) by touching the screen or a designated button at least one time in each round when those numbers or other designations are released, if those numbers or other designations appear on the player's card. Following this action by a player, the video screen at that player station will display a different color on the number or designation on that player's card, a strike-out through the space, or some other readily apparent visible characteristic if that number or designation has been properly covered (daubed) by the player. Players must be notified that they should cover (daub) their cards when the numbers or designations are revealed.

(g) Games may not include a feature whereby covering (daubing) after a release occurs automatically or without overt action taken by the player following the release.

(h) All players in a game, and not just a winning player, must be required by the rules of the game to cover (daub) the selected numbers or other designations that appear on their card when those numbers or other designations are released as an indication of their participation in a common game.

(i) A minimum of two (2) seconds must be provided after the completion of each release of numbers or other designations for players to complete each cover (daub) opportunity. The game may not proceed until at least one player has covered (daubed) the selected

numbers or other designations appearing on the player's card, but, in any event may not proceed in less than two (2) seconds.

(j) Players must cover after each release in order to achieve any winning pattern, except that a player may later cover numbers or designations slept following a previous release (“catch up”) for use in obtaining the game-winning pattern. Failure to cover after each release results in the player forfeiting use of those numbers or other designations in any other pattern in the game. For bonus prizes and progressive prizes, if a player “sleeps,” i.e. fails to cover one or more numbers or other designations, that player cannot be awarded such prize based on a winning pattern which contains one or more of the numbers or other designations slept by the player. For game-winning prizes, if a player sleeps, the player may later cover the number(s) or other designations and win such prize if that player is the first player to cover all other numbers or designations making up the game-winning pattern.

(k) If a player sleeps the game-winning pattern, the game must continue until a player subsequently obtains and covers (daubs) and claims the game-winning pattern.

(l) All numbers or other designations slept by a player must be clearly and uniquely identified as such by displaying them in a unique color, by drawing a strikeout through them, or by other readily visible means. A player who sleeps a winning pattern must be notified by visible message on the video screen that the pattern was slept. Players who fail to cover (daub) numbers or other designations that establish patterns yielding bonus or progressive prizes also must be notified by visible message on the video screen that the pattern was slept.

(m) After all available numbers or designations that could lead to a game winning prize have been randomly drawn or electronically determined and released (i.e. no more balls could be drawn that would assist in the formation of a game winning prize), the game may allow an unlimited length of time to complete the last required cover (daub) and claim of the prize, or it may be declared void and wagers returned to players and prizes canceled.

(n) The gaming facility or its employees may not play as a substitute for a player.

§ 546.6 What are the criteria for meeting the third statutory requirement, as stated at 25 U.S.C. 2703 (7)(A)(i)(III), that bingo, lotto, or other games similar to bingo be “won by the first person covering a previously designated arrangement of numbers or designations on such cards?”

(a) Because the game must be won by the “first person,” each game must be played by multiple players. Players in an electronic game must be linked through a networked system. The system must require a minimum of two players for each game, but not limit participation to two players, and must be designed to broaden participation in each common game by providing reasonable and sufficient opportunity for at least six players to enter the game. Games cannot begin until two (2) seconds have elapsed from the time that the first player elects to play, unless six players enter. Nothing in this section is intended to limit games to six players.

(b) In order for players to participate in a common game, and to meet the requirements for the minimum number of players, each player must be eligible to compete for all winning patterns in the game. A game may offer players the opportunity to play at different entry wagers, and the prizes in the game may be increased, or a progressive prize offered, based on a higher entry wager, so long as all prizes are based on achieving pre-designated winning patterns common for all players.

(c) To establish the game as a contest in which players play against one another the game must provide for two or more the releases of selected numbers or other designations. Each release will provide one or more numbers or other designations randomly selected or electronically determined. Each release must take a minimum of two (2) seconds. Numbers or other designations must be released one at a time. The game may end after the second release or after subsequent releases, when the game winning-pattern is covered (daubed) and claimed. After the game-winning pattern is covered and claimed, there may be additional releases of randomly drawn or electronically determined numbers or other designations for a consolation prize(s).

(d) During the first release, the maximum amount of numbers or characters to be revealed is one less than the number required for a game winning pattern.

(e) Each game must have one game-winning pattern or arrangement, which may be won by multiple players simultaneously. Each game-winning pattern or arrangement must consist of at least three (3) spaces, not counting any free spaces used. The game-winning

pattern or arrangement must be available to players before the game begins.

(f) Other patterns or arrangements consisting of at least two (2) spaces each, not counting free spaces, may be used for the award of bonus or progressive prizes, if the patterns or arrangements are designated and made available to players before the game begins.

(g) Events outside the play of bingo may not be used to determine the eligibility for a prize award or the value of a prize.

(h) The set of selected numbers or other designations in the first release may not contain all of the numbers or other designations necessary to form the game-winning pattern on a card in play in the game. The set may contain the numbers or other designations necessary to form other winning patterns for bonus or progressive prizes. The quantity of numbers or designations in the second or subsequent release may not extend beyond the quantity of numbers or other designations necessary to form the first available eligible game-winning pattern on a card in play in the game. There may be additional releases to allow for additional bonus prizes.

(i) Prizes cannot be claimed following the first release of numbers or other designations. Two or more releases are required before a player can claim any prize in any game.

(j) Bonus or progressive prizes may be awarded based on pre-designated patterns provided the award of these prizes is based on the play of bingo in the same manner as for the game-winning prize. Bonus or progressive prizes may be based on different pre-designated and pre-announced patterns, on achieving a winning pattern in a specified quantity of numbers or designations drawn or electronically determined and released, on the order in which numbers or designations are drawn or electronically determined and released, or on a combination of these criteria. Bonus or progressive prizes may be awarded as interim prizes, before or as the game-winning prize is awarded, or as consolation prizes after the game winning prize is awarded.

(k) An "ante-up" format, in which a player is required to wager before each release as a condition of remaining in the game, is permissible, provided the game maintains at least two participating players. If only one player remains after one or more releases, that player will be declared the winner of the game-winning prize, and the game will end, provided that player obtains and covers (daubs) the game-winning pattern. If all players leave the game

before a game-winning pattern is obtained and covered (daubed) by a player, the game will be declared void and wagers returned to players.

(l) Each game must provide an equal chance of obtaining any winning pattern for each card played by an active player in the game. The probability of achieving any particular pre-designated winning pattern for a participating player in the game may not vary based on the amount wagered by that player.

(m) The use of a payable is permitted. The order of, or quantity of, numbers or other designations randomly drawn or electronically determined may affect the prize awarded for completing any previously designated winning pattern in a game. A multiplier to the prize based on a winning pattern containing a specified number or other designation is permitted.

(n) A game-winning prize must be awarded in every game. If the first player or a subsequent player obtaining the pre-designated game-winning prize pattern sleeps that pattern, the game must continue until a player achieves the game-winning pattern. The same value prize must be awarded to a subsequent game-winning player in the game.

(o) Alternative result display options may only be utilized for entertainment or amusement purposes and may not be used to independently determine a winner of the game or the prizes awarded or change the results of the bingo game in any way.

§ 546.7 What are the criteria for meeting the statutory requirement that pull-tabs or instant bingo not be an "electronic or electromechanical facsimile?"

(a) Every pull-tab card or instant bingo ticket must exist in a tangible medium such as paper. Hereafter, the term "pull tabs" also includes the term "instant bingo." A pre-printed pull-tab must be distributed to the player as paper, plastic, or other tangible medium at the time the pull-tab is purchased. The pull-tab presented to the player must contain the information necessary for the player to determine if that player has won a prize in the game. The information must be presented to the player in a readable format.

(b) A pull-tab card may contain more than one arrangement of numbers or symbols, but each arrangement must comport with the requirements of this section. The player must pay for all of the arrangements on that pull-tab card in advance of its being dispensed.

(c) Pull-tabs that exist in a tangible medium may also be sold to players with assistance of a "technologic aid" that assists in the sale. The "technologic

aid" may also read and display the contents of the pull-tab as it is distributed to the player. The results of the pull-tab may be shown on a video screen that is part of or adjacent to the technologic aid assisting in the sale of the pull-tab.

(d) The player may also purchase a pull-tab from a person or from a vending unit and place the pull-tab in a separate "technologic aid" that reads and displays the contents of the pull-tab.

(e) If pull-tabs contain multiple arrangements of numbers or numbers or symbols, the rules for game play must indicate the disposition of a pull-tab in a technologic aid that is only partially played, i.e. all arrangements have not been viewed in the technologic aid.

(f) A "technologic aid" may also show pull-tab results on a video screen using alternative displays, including game-theme graphics, spinning reels, or other imagery. The results may also be displayed on mechanical reels. Options for players found in this alternative display may not determine a winner of the game or the prizes awarded or change the results of the pull-tab game in any way.

(g) If the pull-tab is a winning card, it must be redeemable for a prize when presented at the location in the gaming facility designated by the gaming operator.

(h) A pull-tab may not be generated or printed at the player station.

(i) The machine cannot pay out winnings to the player, nor dispense vouchers or receipts representing such winnings.

(j) For technologic aids that are larger than the pull-tab, the machine shall prominently display the following message: "THIS IS THE GAME OF PULLTABS." Each letter of the display must measure at least two (2) inches in height.

(k) The winning results on the pull-tab shall be no smaller than an 8 point font.

§ 546.8 When is a pull tab or instant bingo game an "electronic or electromechanical facsimile?"

(a) A pull tab game is an "electronic facsimile" if the pull tab does not exist in paper, plastic, or other tangible medium at the point of sale and is displayed only electronically.

(b) Pull-tabs that exist in a tangible medium but that are electronically or optically read and transformed into an electronic medium and made available to the player only as depictions on a video screen (and not presented directly to the player in the tangible medium) are "electronic facsimiles."

§ 546.9 What is the process for approval, introduction, and verification of “electronic, computer, or other technologic aids” under the classification standards established by this part?

(a) An Indian tribe or a supplier, manufacturer, or game developer sponsored by a tribe (hereafter, the “requesting party”) wishing to have games and associated “electronic, computer, or other technologic aids” certified as meeting the classification standards established by this part must submit the games and equipment to a testing laboratory recognized by the Commission under this part. The requesting party must support the submission with materials and software sufficient to establish that the game and equipment meets classification standards and provide any other information requested by the testing laboratory.

(b) For an “electronic, computer, or other technologic aid” to be accepted as certified as meeting the classification standards under this part, the tribe shall require the following.

(1) The testing laboratory will evaluate and test the submission to the standards established by this part. Issues that concern an interpretation of the standards or the certification procedure identified during the evaluation or testing process, if any, will initially be discussed between the testing laboratory and the requesting party. In the event of impasse, the requesting party and the testing laboratory may jointly submit questions concerning the issue to the Chairman, who may decide the issue. Questions regarding additional tribal standards will be addressed to the appropriate tribal gaming regulatory authority.

(2) At the completion of the evaluation and testing process, the testing laboratory will provide a formal written report to the requesting party setting forth its findings and conclusions. The testing laboratory will also forward a copy of its report to the Commission. The report may be made available upon request to any interested tribal gaming regulatory authority by the requesting party or by the testing laboratory.

(3) Each report from a testing laboratory must state the name of the requesting party; the type of game evaluated; name(s) and version(s) of the game played with the “electronic, computer, or other technologic aid” being evaluated; all associated game themes under which the game will be played on the “technologic aid” being evaluated; findings regarding game features and manner of play; a checklist of the standards established by this part

together with an indication of the results of testing and evaluation to each particular standard; and a summary conclusion as to whether the gaming conducted with the aid meets the requirements of this part. A supplemental report addressing additional game themes or other non-play features may follow as necessary, and will contain a statement verifying that gaming conducted with the aid continues to meet the requirements of this part.

(4) Each report will also provide one or more unique signatures or checksum values for the operating programs used with the “electronic, computer, or other technologic aid.” In the case of disk-based machines, a standard directory checking program and the data files and documentation to verify the correct operational software will be provided. In the case of EPROMs, a unique signature or checksum will be provided based upon standard algorithms. The purpose of the unique signature(s) or checksum values is to permit later verification that the games and the “electronic, computer or other technologic aids” in play in a Tribe’s gaming operation(s) are the games and aids certified by the testing laboratory, by comparison of the signature(s) or checksum values.

(5) In certifying a game or “an electronic, computer, or other technologic aid” for Class II play, a requesting party or a tribe may not rely on a report from a testing laboratory owned or operated by that requesting party or that tribe.

(c) The Commission will maintain a generalized listing of games and “electronic, computer, or other technologic aids” certified by recognized testing laboratories as meeting the classification standards established by this part. Each testing laboratory will maintain a detailed listing of the “electronic, computer or other technologic aids” it certifies. The Commission will make its listing available on its Web site. Portions of reports containing trade secrets and commercial or financial information relating to the “electronic, computer, or other technologic aid” that are considered privileged or confidential will not be made available for public review.

(d) *Additional requirements established by a tribal gaming regulatory authority.* (1) A tribal gaming regulatory authority may establish additional classification standards that extend and/or exceed the standards established by this part. It may require additional testing and certification to its own extended standards as a condition

to operation of the game and associated “electronic, computer, or other technologic aid” in a gaming facility it regulates.

(2) A tribal gaming regulatory authority may elect to provide its extended testing standards to the testing laboratories and require additional tests and certification reports applicable to its own certification of a game or “electronic, computer or other technologic aid.” A requesting party wishing to meet the specific tribal requirements will submit additional supporting materials and documentation to the testing laboratory as may be necessary to meet the specific tribal requirements. A testing laboratory evaluating a game and associated equipment will include in its report to the requesting party information relevant to the specific additional tribal requirements and provide a copy of the report to that tribal gaming regulatory authority and the Commission.

(e) *Objections to a testing laboratory certification.* (1) The Chairman or a designee will review the certifications and accompanying reports received from testing laboratories and may interpose an objection to any certification issued by a testing laboratory by notification to the testing laboratory, the requesting party, and the sponsoring tribe within 60 days of receipt of the certification and report. In the absence of objection within 60 days, the parties may assume the Chairman does not interpose an objection. The Chairman may object to a testing laboratory certification subsequent to the 60-day period upon good cause shown.

(2) The Chairman or a designee will conduct additional discussions with the testing laboratory, the requesting party, and the sponsoring tribe on any game or “electronic, computer, or other technologic aid” to which the Chairman has objection and attempt to resolve the dispute within 30 days after receiving notice of the Chairman’s objection. The Chairman and the requesting party and sponsoring tribe may agree to the appointment of a mediator or other third party to review the laboratory’s certification and the Chairman’s objection and provide a recommendation on the matter within this 30-day period. Following the discussions and receipt of the recommendation of the mediator or other third party, if any, the Chairman will decide the issue and inform the testing laboratory, the requesting party, and the sponsoring tribe of his determination.

(3) Within 30 days after receiving notice of Chairman’s determination, the

testing laboratory, the requesting party, or the sponsoring tribe may appeal the Chairman's objection to the full Commission by providing written notice of appeal along with documents and other information in support of the appeal. The appeal will be decided by the Commission based on the record developed by Chairman or designee and on written submissions by the testing laboratory, the requesting party, and the sponsoring tribe, unless the Commission requests additional information. The appeal will not include a hearing under Part 577 of this chapter unless directed by the Commission.

(4) If the testing laboratory, the manufacturer, or the sponsoring tribe does not appeal the Chairman's determination, or if the objection is upheld after review by the Commission following an appeal, the testing laboratory and the requesting party will notify any tribal gaming regulatory authority to which it has provided a certification and report on the game and associated equipment that the Chairman has objected to the certification and that the certification is no longer valid.

(5) An objection by the Chairman or a designee, upheld after review by the Commission, will be a final agency action for purposes of suit under the Administrative Procedure Act by the requesting party.

(f) Recognition of Testing

Laboratories. (1) The Commission will maintain a listing of testing laboratories recognized as qualified to perform testing and evaluation for games played using "electronic, computer, or other technologic aids" that are offered for use in Class II gaming. To obtain Commission recognition a testing laboratory will demonstrate its integrity, independence and financial stability by providing evidence of licensing obtained from a competent jurisdiction that has conducted a thorough background check of the testing laboratory.

(2) The testing laboratory will demonstrate its relevant technical skill and capability by providing evidence of suitable testing previously conducted for state or tribal regulatory authorities. The Commission will conduct an onsite review of the testing laboratory's facilities as part of its evaluation and will be satisfied that the testing laboratory is qualified and competent to perform the testing required by this part before recognizing the testing laboratory.

(3) A testing laboratory recognized by the Commission will notify the Commission immediately if any license issued by a state or tribe is revoked or not renewed.

(4) The Commission may offer provisional recognition to a new testing laboratory that does not meet the requirements of paragraphs (f)(1) and (2) of this section based on its own review of suitability and technical qualifications of the testing laboratory.

§ 546.10 What are the steps for a compliance program administered by a tribal gaming regulatory authority to ensure that "electronic, computer, or other technologic aids" in play in Class II tribal gaming facilities meet the classification standards of this part?

(a) In regulating Class II gaming, a tribal gaming regulatory authority will institute a compliance program that ensures bingo, lotto, and other games similar to bingo and pull-tabs and instant bingo in use in its gaming facilities, which are operated and played with "electronic, computer, or other technologic aids" required to be certified by this part meet the requirements of this part and any additional tribal standards adopted by the tribal gaming regulatory authority. The program must include the following elements:

(1) Determination by the tribal gaming regulatory authority that "electronic, computer, or other technologic aids," along with the games played thereon, required to be certified as meeting the standards established by this part, meet the standards before the equipment is placed for use in the gaming operation.

(2) Internal controls that prevent unauthorized access to game control software to preclude modifications that would cause the "electronic, computer, or other technologic aid" and the games played therewith to no longer meet the standards established by this part.

Note: Emergency changes to a game are permitted prior to certification so long as the change does not affect the classification of the game.

(3) Periodic testing of the all of the servers and a random sample of the electronic player stations to validate that the equipment continues to meet the standards established by this part.

(b) In authorizing particular Class II gaming within a gaming facility it licenses, a tribal gaming regulatory authority shall, at a minimum, require a finding and certification by an independent gaming testing laboratory, recognized by the NIGC under this Part, that each "electronic, computer, or other technologic aid" used in connection with such gaming meets the standards of this part. If the tribe's gaming regulatory authority has established classification standards that apply additional criteria, the tribe shall require additional findings consistent

with the additional standards as a condition to authorizing a technologic aid for use and play in gaming facility it regulates.

(c) The Tribal gaming regulatory authority shall affix a seal or other label on each server and each individual client machine (player terminal) it has authorized for play under the classification standards established by this Part, indicating that all games played thereon meet the classification standards established by this Part and any additional standards established by the Tribe. The seal or other label will show the version number(s) or other unique identifier(s), as established by the manufacturer or other entity providing the game operating software, for the games authorized for play on the equipment by the Tribal gaming regulatory authority and as documented in a certification report(s) issued by a testing laboratory. The seal or other label shall conform to the requirements for "stickers" established in Part 547 of this chapter. The seal or other label shall be promptly removed from the server and any individual client machine when the version number(s) of the games played thereon are changed and a new seal or other label affixed showing the versions of the game in play, provided the new version(s) meet the Classification Standards established by this Part and any additional standards established by the Tribe.

(d) The Tribal gaming regulatory authority shall maintain a current listing of each server, each individual client machine (player terminal), and each game program it has authorized for play under the classification standards established by this Part, indicating that all such games meet the classification standards established by this Part and any additional standards established by the Tribe. The listing will show the asset number(s) of each server and client machine (player terminal) and the version number(s) or other unique identifier(s), as established by the manufacturer or other entity providing the game operating software, for the games authorized for play as documented in a certification report(s) issued by a testing laboratory.

(e) Effective date for operation of games under the classification standards.

(1) For Class II gaming operations open on the effective date of this part or that open within six months of the effective date, certification of the "electronic, computer, or other technologic aids" must be completed and authorization provided by the tribal gaming regulatory authority within six months of the effective date. Games and

associated equipment not certified within that period must be removed until certification is obtained and authorization given. The Commission Chairman may extend the period for obtaining certification for one or more periods of six months at the request of a tribal gaming regulatory authority based on good cause shown.

(2) For Class II gaming operations opening six months after the effective

date, certification and authorization to operate by the tribal gaming regulatory authority must be completed before opening.

(3) Games played with “electronic, computer, or other technologic aids,” subject to certification under this part and not in a tribe’s operation prior to the effective date, must be authorized for use as Class II by the tribal gaming regulatory authority using the processes

described in this Part prior to play in that tribe’s gaming operation.

Dated: May 18, 2006.

Philip N. Hogen,
Chairman.

Cloyce V. Choney,
Commissioner.

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