



May 11, 2004

Mr. Alan Frank
The HomeBingo Network
24 Saratoga Circle
Saratoga Springs, NY 12866

RE: 8 Draw Kingo

Dear Mr. Frank:

The National Indian Gaming Commission (NIGC) Office of General Counsel (OGC) is issuing this Advisory Opinion in response to your initial submission on November 21, 2001, of an electronic game, 8 Draw Kingo. Pursuant to a succession of discussions with this office, you submitted revisions to the game on June 10, 2002, February 12, 2003, and October 31, 2003. The most recent submission of a copy of the game on CD-ROM was submitted January 13, 2004.

We base this game classification opinion on: submitted game descriptions, a live demonstration held at NIGC's Washington office, and play of the game pursuant to the most recently submitted CD-ROM. We have determined that 8 Draw Kingo is not a class II game under the Indian Gaming Regulatory Act (IGRA) when played as described in this Advisory Opinion.

Game Description

Mechanics of the game: 8 Draw Kingo is a software and hardware package. The game is played on electronic player stations (EPSs) that are networked.

Before play begins, a player pays a point-of-sale cashier who gives the player an account number. At an EPS, the player enters the account number on a numbered touch pad that appears on the screen.

Before play of the game, sheets of electronic bingo cards are sold. The game automatically chooses which sheets the player will play and players may play as many sheets as they want, up to the maximum allowed by the gaming operation. Once the sheets are bought, a player may choose to change one (1) sheet, five (5) sheets, or twenty (20) sheets by pushing a button. A player may continue to do this until satisfied with the sheets that have been electronically dealt. Each sheet may be chosen by more than one person, that is, the same sheets of cards are available to all players and no sheet is made unavailable by being chosen by another player. The size of each sheet on the monitor screen is approximately 4.5 inches by 4.5 inches. While

players may choose to play more than one sheet of cards, only one sheet appears on the screen at any one time. Other sheets may be played but are not seen on the screen as they are being played.

On each sheet appear nine (9) cards. The individual cards are arranged symmetrically on each sheet in a three (3) by three (3) grid. Players cannot choose individual cards within the sheets. Instead, each sheet has a pre-arranged display of cards. The size of each individual card is approximately 1.25 inches by 1.25 inches, with the top half-inch of each card displaying the card number and the word "Kingo." The top half-inch with the word "Kingo" has a pink background with black writing. The remaining three-quarters of an inch of each card's height contains its number grid. Each number grid contains 25 numbers, arranged in a five (5) by five (5) pattern like a traditional bingo card except that there is no free space and instead of B, I, N, G, O, the letters K, I, N, G, O, form the vertical columns. On the cards, numbers 1 through 6 will appear only under "K"; numbers 7 to 12 will fall only under "I"; numbers 13 to 18 fall under "N"; numbers 19 to 24 falls under "G"; and numbers 25 to 30 fall under "O." The number-grid portion of each card has a dark blue background with numbers displayed in bright yellow.

A game starts when ten (10) players have logged on and press the start button. Once the game has started, more players can log on up until the number that the gaming operation has designated as the maximum.

A game is played with a universe of 30 numbers. These can be generated by a ball blower or by a random number generator. Numbers are released one (1) at a time. Once a number is released, it immediately goes back into the universe of numbers that may be called. If that number is repeated within an eight (8) ball-draw session, another number will be drawn in its place.

When a number is drawn, it automatically turns from bright yellow to white on the cards. Players can cover the numbers on their cards after every four (4) balls are drawn. That is, after four (4) balls are released, players are given an opportunity to daub their cards to cover the numbers that have been drawn. Daubing is accomplished by touching the "daub" button. Daubing turns the drawn numbers from white to turquoise. If a player fails to daub within five (5) seconds, the numbers on his or her cards do not get covered; on the screen they remain white.

If a player fails to daub after the first four (4) numbers are drawn, the player's cards are wiped clean. In addition, the sheet that was being displayed switches to one of the other sheets that the player is playing.

Whether or not players sleep, numbers continue to be drawn indefinitely until a player achieves the game-winning pattern. Players can enter the game at any point after a game has been begun, up to the maximum that the gaming operation allows. For each player, daubs are possible after every four (4) balls. After eight (8) numbers have been drawn on the player's

card, the program automatically clears all the numbers from that player's card, unless a player has the game-ending pattern. A player may sleep a daub; however, numbers will continue to be drawn at a given pace for all the players. When the player who has slept daubs again to re-enter the game, he or she will continue to use the numbers that are being generated. However, the numbers will not have the same significance to all players. Numbers are grouped depending upon exactly when each player entered the game or last daubed. One player's group of eight (8) balls therefore may not correlate to another player's. For example, if the number 24 is generated, for one player, number 24 may be the first of his or her group of eight balls drawn; for another, 24 may be the fourth ball, after which the player has a chance to daub; and for another, it may be the seventh of the eight balls, with the consequence that the player may not daub until one more ball is drawn, whereupon the card is swept clean. In short, the significance of each ball to each individual will depend on when the individual entered or re-entered the game.

The game-ending pattern requires eight (8) spaces to be covered, one in each of the four corners and four in a diamond pattern around the middle space (what would be the free space if the game used a free space). A player who achieves this "diamond-in-a-box" pattern has 30 seconds in which to daub and claim in order to win the prize. Daubing and claiming are two different functions, each requiring a separate action. If the potential winner fails to daub and claim within 30 seconds, the numbers are wiped clean from all the cards and the game continues.

The prize is a jackpot that can be progressive or flat, at the choice of the gaming operation. Interim prizes based on other patterns may be awarded.

A variation of the game, 9 Draw Kingo, is also available. The game 9 Draw Kingo is played in exactly the same way as 8 Draw Kingo. The difference is in the individual cards that make up the sheets. In 9 Draw Kingo, cards have nine (9) spaces arranged in a three (3) by three (3) grid, instead of in a five (5) by five (5) grid. The game-ending pattern is a covering of all of the nine (9) spaces. The opportunity to daub is given every three (3) balls.

Applicable Law

The Indian Gaming Regulatory Act (IGRA) governs gaming on Indian lands. The IGRA defines class II gaming in relevant part to include:

- (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—
 - (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
 - (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

- (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo[.]

25 U.S.C. § 2703(7)(A). Games that are not within the definition of class II games are class III. *See* 25 U.S.C. § 2703(8).

NIGC regulations similarly define class II gaming to include:

(a) Bingo or lotto (whether or not electronic, computer, or other technologic aids are used) when players:

- (1) Play for prizes with cards bearing numbers or other designations;
- (2) Cover numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined; and
- (3) Win the game by being the first person to cover a designated pattern on such card;

(b) If played in the same location as bingo or lotto, pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo[.]

25 C.F.R. § 502.3.

IGRA does not define “other games similar to bingo.” NIGC regulations do, however. “Other games similar to bingo” is defined 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 C.F.R. §502.9

IGRA provides that class II games may utilize “electronic, computer or other technologic aids.” 25 U.S.C. § 2703(7). NIGC regulations define an electronic or technologic aid as

[A]ny machine or device that:

- (1) assists a player or the playing of a game;
- (2) is not an electronic or electromechanical facsimile; and
- (3) is operated in accordance with applicable Federal communications law.

25 C.F.R. § 502.7(a). Electronic or technologic aids include devices that:

- (1) Broaden the participation levels in a common game;
- (2) Facilitate communication between and among gaming sites; or
- (3) Allow a player to play a game with or against other players rather than with or against a machine.

25 C.F.R. §502.7(b).

Analysis

To issue a game classification opinion for any game, the NIGC must evaluate the elements of the game to determine whether it meets the statutory criteria for bingo, is otherwise a class II game, or whether it falls outside the limits for class II games and is therefore class III. The game's classification matters in that, under IGRA, class III games may be played only pursuant to a tribal-state compact. *See* 25 U.S.C. § 2710(d)(1)(C).

For electronic games, we must also determine whether the game is an "electronic aid" to the play of a class II game or an "electronic or electromechanical facsimile" of a game of chance or a slot machine. We will therefore evaluate whether 8 Draw Kingo is class II and whether its electronic characteristics serve as aids to the play of the game rather than rendering the game a facsimile of a slot machine.

A. Statutory Criteria for Bingo

1. Cards Bearing Numbers

IGRA requires that the game be played for prizes "with cards bearing numbers or other designations." 25 U.S.C. 2703(7)(A)(i)(I). Paper cards, as in a traditional bingo game, are not required. Case law and NIGC's regulations provide that class II bingo games may be played with electronic cards.¹ 8 Draw Kingo's use of electronic cards therefore does not render the game class III.

¹The 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 the 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 C.F.R. § 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 C.F.R. §502.3(a).

To be class II, however, electronic bingo cards must be “readily visible.”² In previous cases, the bingo cards that were found to be readily visible were at least 2 inches horizontally and vertically on 19-inch diagonal monitor. The cards in 8 Draw Kingo are the individual squares that each contain their own number grid. These cards measure 1.25 inches horizontally by 1.25 inches vertically. They are too small to meet the standard of readily visible. The visibility is also inhibited by the fact that there are nine (9) cards on the screen. The number of cards makes it difficult for a player to actually participate and react to the game that is being played, a crucial criterion for the classification of bingo. The first statutory criterion for bingo is therefore not met.

2. Holder of the Card Covers When Objects Are Drawn

The second statutory requirement is that “the holder of the card covers” the numbers on the card “when objects...are drawn or electronically determined...” 25 U.S.C. §2703(7)(A)(i)(II). Players of 8 Draw Kingo do appear to cover when the objects are drawn. It does not appear that numbers are drawn before the play of the game, which would negate a conclusion that the game is either bingo or a game similar to bingo. *See* NIGC Bulletin 03-3.

A fundamental difference between this game and the game commonly known as bingo, however, is that numbers that are covered do not stay covered throughout the play of the game. Instead, each player’s cards are swept clean—that is, numbers are uncovered—after every eight (8) balls are drawn without a winning pattern being achieved. Numbers are uncovered even more quickly for a player if, after the first four (4) balls are drawn, the player does not daub. In such a case, the player’s card is swept clean and the player starts again once he daubs.

This aspect of 8 Draw Kingo renders the game inconsistent with bingo. A purpose of the second statutory criteria is that the game builds on the numbers that have been drawn. We have previously said that competition built up over the course of successive ball draws is integral to the game of chance commonly known as bingo.³ In the past, we have therefore required more than one ball draw before a player can win in order for a game to be bingo. The game of 8 Draw Kingo has successive ball draws but competition does not build from them. While there are two ball draws, it is possible, in fact likely, that there will be no winner before the coverings are wiped clean. Uncovering spaces that the player has previously covered results in the game failing to meet the second statutory criteria.

3. Game Won by First Person Covering Previously Designated Pattern

The third statutory requirement of bingo is that the game must be won by the first person covering a previously designated arrangement of numbers or designations on such cards. 25

² See September 23, 2003, letter from NIGC Acting General Counsel to Clifton Lind Re: Reel Time Bingo and September 26, 2003, letter from Ms. Coleman to Robert Luciano Re: Mystery Bingo.

³ *Id.*

U.S.C. § 2703(7)(A)(i)(III). The endless recycling of balls in 8 Draw Kingo game raises the greater question of what constitutes a “game.” One of the characteristics of the game commonly known as bingo is that balls are drawn until all balls are used. The game is played within the parameter of one universe of balls, each ball being used once. In 8 Draw Kingo, the same numbers can be used repeatedly within the “game.”

The argument that a “game” can be played with the same numbers being drawn over and over and the cards being wiped clean after every eight (8) balls is not consistent with our understanding of bingo. We understand bingo to be built upon competition stemming from a succession of ball draws. The ball draws in 8 Draw Kingo however have no relation to each other beyond the eight (8) balls drawn before the cards are uncovered. In 8 Draw Kingo, all balls are reused after eight (8) have been drawn. The universe of balls available repeats after every eight (8). We conclude that for the purposes of bingo under IGRA, a game is limited to the play that takes place using a given universe of balls. Once that universe is replenished, another game begins. 8 Draw Kingo therefore appears to be a series of games, each one ending when the cards are wiped clean.

A related problem is that wiping a player’s cards clean when the player fails to daub creates a situation where all players are not building upon the same universe of balls for each of their games. Even though they are using the same balls that are being generated, one player, who has daubed every four balls, is looking to create a game-winning pattern from a different set of eight (8) balls than the player who failed to daub and had his or her card wiped clean after the first four (4) balls were daubed. In effect, among the two players there are two separate games being played, although each is using the same balls.

B. Electronic Aid v. Facsimile

In addition to meeting the requirements for bingo, an electronic game can be class II so long as its electronic component is an electronic aid to the play of the game. 25 C.F.R. 502.7(a). NIGC’s regulations define an electronic, computer or other technologic aid as:

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

- (1) Assists a player or the playing of a game;
- (2) Is not an electronic or electromechanical facsimile; and
- (3) Is operated in accordance with applicable Federal communications law.

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

- (1) Broaden the participation levels in a common game;
- (2) Facilitate communication between and among gaming sites; or
- (3) Allow a player to play a game with or against other players rather than with or against a machine.

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

25 C.F.R. § 502.7.

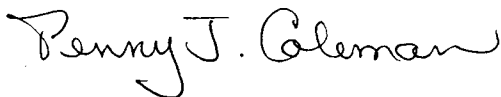
We have previously opined that for a game to qualify as bingo, there must be a common game among players. The game at issue here deviates from this in that players can enter and leave play without any player ever achieving the game-winning pattern. The game being played therefore is not a common game. Instead, the game changes every eight balls with a potentially new set of players.

It cannot be said either that the electronic wiping clean of the cards after eight (8) balls “assists” the playing of the game. Instead, the reuse of all the numbers after eight (8) balls are drawn defines the game, which is not bingo.

Conclusion

We cannot conclude at this time that 8 Draw Kingo in its present format qualifies as a class II gaming device. The game is not bingo. In addition, the game does not qualify as a game similar to bingo. To qualify as such, a game must be close enough to bingo to be considered a variant. To do so, a game must include nearly all the characteristics that are inherent in bingo’s statutory criteria. Because this game fails to meet all three statutory criteria, it does not come within the zone of games that may be considered a variant. If you have further questions, please contact Cynthia Shaw at (202) 632-7003.

Sincerely yours,



Penny J. Coleman
Acting General Counsel