

March 28, 2019

**BY HAND DELIVERY**

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James E. LaFave, Administrative Law Judge  
Office of Administrative Hearings  
600 N. Robert Street  
St. Paul, MN 55101

Re: Written Comments of Shakopee Mdewakanton Sioux Community Related  
to Proposed Amendments to Rules Governing Lawful Gambling

Dear Judge LaFave:

On behalf of the Shakopee Mdewakanton Sioux Community ("the Community"), I submit the following written commentary pursuant to the January 22, 2019 Notice of Hearing and Your Honor's instructions during the March 8, 2019 hearing.

During the hearing held on March 8, 2019, the Community presented testimony from two witnesses, Andy Kozak and Philip Brodeen. As demonstrated through that testimony, and discussed in detail below, the Community believes that certain provisions of the rules proposed by the Minnesota Gambling Control Board ("the Board") are improper and should be modified or in one case, deleted. The provisions are improper for two reasons. First, the Board adopted the draft rules without inviting the Community or representatives of any other Indian tribe to participate in the advisory committee process. Second, the provisions at issue contradict or create ambiguities with respect to certain provisions of Minn. Stat. Sec. 349, et. seq.

**I. The Board Failed to Invite the Community and Other Interested Indian Tribes to Participate in the Advisory Committee Process.**

As an initial matter, the Community is concerned with the manner in which the Board developed the proposed amendments.

To develop the proposed amendments, the Board employed a Public Advisory Committee ("PAC") to draft amendments to the rules. The PAC consisted of licensed lawful gambling organizations, licensed manufacturers, licensed linked bingo game providers, licensed distributors, game testing laboratory personnel, the Department of Revenue, and the Department of Public Safety. The Board did not, however, invite the Community or any representatives from any other federally recognized Indian tribes in Minnesota to serve on the PAC.

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As Andy Kozak explained during his testimony during the March 8, 2019 hearing, the Community and several other Indian tribes provided meaningful input when Minn. Stat. Sec. 349, et. seq. was amended in 2012 to authorize many of the games that are the focus of the proposed rules at issue in this proceeding. These tribal representatives participated in a number of meetings and discussions with the Board and with the author of the bill, John Kriesel. During this process, the tribal representatives identified a number of concerns relating to electronic pull-tabs and bingo. In particular, they expressed strong concern that the amendments to Sec. 349 not authorize such electronic forms of gambling to go beyond the paper versions of those games, and improperly mimic slot machines. These concerns were raised with the Board and with Mr. Kriesel, and ultimately, agreement was reached on language for the amendments to Sec. 349 that addressed the concerns and ensured that these electronic forms of gambling would not be allowed to go beyond the paper versions of those games, or to improperly mimic slot machines

As Mr. Brodeen explained during the hearing, since 2012 the Community (and other Indian tribes as well) have remained interested in matters pertaining to lawful gambling, and in particular, have continued to have concerns about electronic bingo and pull-tabs games that attempt to go beyond what is offered on paper versions of such games and to mimic slot machines and provide other forms of gambling or entertainment.

Unfortunately, despite being aware of the various Indian tribes' strong and longstanding interest and concerns relating to electronic bingo and pull-tabs, the Board chose not to invite any Indian tribes to participate in the PAC. Instead, it elected to only invite charitable gambling organizations and electronic gaming device manufactures to serve on the PAC, thereby giving them the first opportunity to shape the agenda and provide initial input on the proposed rules.

The Board erred by failing to invite the Indian tribes to participate. For guidance on this topic, we refer Your Honor to the Minnesota Rulemaking Manual, a reference book that was first published in 1996, is updated annually, and "represents the collective knowledge and wisdom of the Interagency Rules Committee, Minnesota's rulemaking community." See Minnesota Rulemaking Manual, 23<sup>rd</sup> Edition, September 20, 2018 ("Manual") at p. 2. The Manual states that at the outset of any rulemaking, the agency should first compile a list of affected persons. Manual, Sec. 2.6.2. To identify the interested parties, the agency should ask itself several questions, such as: "Who participated in the legislative process when the rulemaking was first authorized?"; "Who is going to be upset by these rules?"; and "Who would want to know about these rules?" Manual, Sec. 3.2.5.1.

Here, the Board clearly knew that various Indian tribes, including the Community, participated in the legislative process in 2012, and knew of their strong interest and concerns relating to the improper expansion of electronic pull-tabs and bingo beyond the paper versions of those games. No doubt it was aware that in light of these concerns, tribes might oppose some of the rules that the Board would be considering, particularly when its advisory committee was comprised of gaming device manufacturers and charitable gambling organizations. The Manual notes that when forming a PAC, an agency might “suffer the temptation” to ignore likely opponents of the proposed rules, and it provided two words of advice with respect to such temptation: “Resist it.” Manual, Sec. 2.6.2. The Manual explains: “It is shortsighted to ignore these people during the early stages of rule development, because they will almost certainly raise issues and oppose the rules when you propose them for adoption. In fact, these are exactly the people you want to notify of the rules as early as possible.” The Manual again in Chapter Three, where it discusses rule development, reminds the agencies that in forming a PAC, they should “include likely opponents of the rules. . . Discussion by persons with opposing views tends to moderate the views. . . . By including both supporters and opponents of the rules, you would ideally be able to resolve the controversial issues and possibly avoid a hearing.” Manual, Sec. 3.2.5.1.

Providing the Community and other interested Indian tribes an early and meaningful opportunity to participate in the rulemaking process would have given them an opportunity to help shape the agenda of rulemaking. It would have also allowed them to identify problematic areas of the existing rules and propose reasonable solutions before the Board became entrenched with its proposed language. As discussed in Section II below, the Board’s failure to include the tribes in the PAC process has resulted in certain provisions of the proposed rules that in some instances violate, and in other instances weaken or muddle the statutory requirements of Minn. Stat. 349, presumably in order to provide more flexibility to the parties regulated by the rules—parties who were invited to participate in the PAC.

## **II. Specific Provisions of the Proposed Rules are Improper and Should be Modified or Deleted.**

The Manual makes one principle of law crystal clear: “the *sine qua non* for every set of rules or rule amendments is statutory authority.” Manual, Sec. 3.1.1. And according to the Manual, a corollary to this principle is that “a rule must not conflict with the governing statute or applicable law.” Manual, Sec. 3.1.2. The Manual further provides guidance with respect to the use of definitions in the proposed rules: “Define all words used in the rules that do not have common meanings. Compare the definition wording in similar rules and statutes from your agency and other agencies so terms are

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defined consistently as much as possible." The Manual further advised the agencies to use a definition "when you are going to use the term in a substantive rule provision."

The Community has identified seven different provisions of the proposed rule that are improper because they are either inconsistent with the statutory language found in Sec. 349, or in the very least create ambiguities or confusion that might support arguments to allow electronic pull-tabs or bingo devices to violate Sec. 349 by improperly mimicking slot machines or providing other entertainment.

**A. 7864.0235, Subp. 18c**

The proposed language in 7864.0235, Subp. 18c relates to standards and requirements for electronic pull-tab game systems, and reads as follows:

**Subpart 18. Game information.**

C. Electronic pull-tab games may contain animated win determinations, but displays must not simulate spinning reels or nonstraight win line graphic representations. Animated game win determinations approved before the effective date of this subpart may remain available for play for 180 days after the effective date of this subpart.

This proposed language improperly authorizes the use of animated win determinations, and then states that such displays may not simulate spinning reels or nonstraight win line graphics. The statutory language in Minn. Stat. 349.12, Subp. 12b, Subp. 12c, and Minn. Stat. 349.13, however, does not support the use of animated win determinations.

Minn. Stat. 349.12, Subp. 12b states that electronic pull-tab devices may not include spinning reels or other representations that mimic a video slot machine. Minn. Stat. 349.12, Subp. 12c states that electronic pull-tab games must display facsimiles of pull-tab tickets. Minn. Stat. 349.13 states that electronic gambling devices, including electronic pull-tabs, may not display or simulate any other form of gambling or entertainment.

As currently drafted, the proposed rule allowing for animated win determinations means an electronic pull-tab game could display nearly any graphic representation as long as it does not incorporate spinning reels or nonstraight win line graphics. In fact, the Board has already approved games that incorporate animated win determinations that look and function like video slot machines in direct contravention of statutory law. The proposed language in 7861.0235, subp. 18c would improperly provide after-the-fact justification for these games by reading ambiguity into the law where it does not exist.

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During the hearing, the Community provided video of a game that has already been approved by the Board and in use in bars in Minnesota, that incorporate animated win determinations. Slot Champ, *Wild Walleye E Pull Tab Multiple Bonuses*, YouTube (Dec. 25, 2016), <https://www.youtube.com/watch?v=CBExzTNXA7o>. As noted at the hearing, the game is illegal as a matter of law because it does not require the player to activate or open each individual line, row, or column.

Aside from the illegality of the game, the video illustrates how animated win determinations fundamentally change gameplay beyond what was contemplated or authorized by the legislature. At a hearing before the House Ways and Means Committee on April 23, 2012, one of the authors of the 2012 legislation, Representative John Kriesel, stated:

Electronic pull tabs are a version, it's just like paper pull tabs, except on a machine that would be similar to an iPad. You would swipe your finger and you'd be able to then pull the simulated pull tab on there. It would be run by charities in a similar fashion to current pull tabs... It's not something that would dramatically change how you get or use the pull tabs except for the fact that it is modernized.

This principle was codified into law in Minn. Stat. 349.12, subp. 12c, which states that electronic pull-tab games must display facsimiles of paper pull tab tickets. The animated win determinations and bonus game features that have already been approved by the Board do not display facsimiles of paper pull tab tickets. The electronic pull tab game included in the video displays graphics that are closer to slot machines than paper pull tab tickets. The perception of the player is that he or she is playing a video slot machine and such games have been advertised as offering gameplay that "feels a little like playing slots at the casino." See *attachment*, Exhibit A.

7864.0235, subp. 18c allows for animated win determinations, making it inconsistent with the requirements of Minn. Stat. 349.12, subp. 12c and Minn. Stat. 349.13. In addition, the provision attempts to define the "mimic of slot machine" language in the statute to prohibit only nonstraight win line graphics. As an operator of video slot machines since 1989, the Community is well aware of additional features that could fall within the "mimic a slot machine" prohibition. These features could include, but not be limited to, nonstraight win line graphics, nonstraight pay line graphics, pay tables, bonus games, free play, wild symbols, or symbols or features not typically associated with paper pull-tabs. For both of these reasons, 7864.0235, subp. 18c should be deleted from the proposed rules.

**B. 7864.0235, Subp. 4**

The proposed language in 7864.0235, Subp. 4 relates to bonus features on electronic pull-tab games. It reads as follows:

**Subp. 4. Electronic pull-tab ticket required features.**

L. a bonus symbol must be connected to a straight-line win in order to trigger bonus play. For winning tickets, the symbol combination for each denomination must be identical in the base game for all deals within that form number. Qualifying bonus and free play symbols are considered winning symbols on a ticket regardless of the outcome of the bonus or free play. A winning ticket that includes a bonus prize must not exceed statutory prize limits under Minnesota Statutes, section 349.211.

The statutory language found in Minn. Stat. 349.12, Subp. 12b, Subp. 12c, and Minn. Stat. 349.13 does not support the inclusion of bonus features in electronic pull-tab systems.

Minn. Stat. 349.12, Subp. 12b states that electronic pull-tab devices may not include spinning reels or other representations that mimic a video slot machine. Bonus games are important features of slot machines. Minn. Stat. 349.12, Subp. 12c states that electronic pull-tab games must display facsimiles of pull-tab tickets. As Judge LaFave may recall from the video that the Community played during the hearing of an example of an electronic pull-tab game that uses bonus games, and includes graphic representations offered in bonus games that do not display facsimiles of pull-tab tickets. Minn. Stat. 349.13 states that electronic gambling devices, including electronic pull-tabs, may not display or simulate any other form of gambling or entertainment. A bonus game feature necessarily includes the display or simulation of another form of entertainment. In fact, the bonus games currently being played in Minnesota include graphic representations of games that are traditionally played on gaming consoles.



Minn. Stat. 349.12, subp. 12b allows amusement game features, but states that such features cannot award any prize. Subp. 12b also allows audio or visual enhancements to provide information about the games being played, provided that the component does not display the results of a game. In this instance, the bonus features being played in Minnesota could be considered either amusement game features or visual or audio enhancements. The games still violate the statutory requirements for amusement game features or visual or audio enhancements because they award prizes and/or display the results of the game in question. For this reason, the proposed rule in 7864.0235, Subp. 4, should be deleted.

**C. 7863.0270, Subp. 18a; and 7864.0230, Subp. 6**

The proposed language in 7863.0270, Subp. 18a relates to standards and requirements for electronic linked bingo game systems. It reads as follows:

Subp. 18a. **Animated win determination.** Electronic linked bingo games may contain animated win determinations, but displays may not simulate spinning reels or nonstraight win line graphic representations.

The proposed language in 7864.0230, Subp. 6 relates to manufacturer standards for electronic bingo devices. It reads as follows:

**Subp. 6. Manufacturing standards for electronic bingo devices.**

G. may contain animated game win determinations, but must not mimic or appear to be a video game of chance as defined in Minnesota Statutes, section 609.75, subdivision 8 simulate spinning reels or nonstraight win line graphic representations. Animated game win determinations approved before the effective date of this item may remain available for play for 180 days after the effective date of this item;

These two proposed rules authorize the use of animated win determinations in electronic bingo games provided that such games do not simulate spinning reels or nonstraight win line graphics. 7864.0230, Subp. 6 deletes the prohibition against mimicking or appearing to be a video game of chance. As noted above and during the hearing, the statutory language included in Minn. Stat. 349.12, Subp. 12a and Minn. Stat. 349.13 does not support the use of animated win determinations in electronic linked bingo.

Minn. Stat. 349.12, Subp. 12a states that electronic bingo devices may have no additional function as an amusement or gambling device other than as an electronic pull-tab game. Minn. Stat. 349.13 provides that electronic gambling devices, including electronic bingo devices, may not display or simulate any other form of gambling or entertainment.

As currently drafted, the animated win determinations proposed by the Board could display nearly any graphic representation as long as it does not incorporate spinning reels or nonstraight win line graphics. In fact, as noted above and as demonstrated in the exemplar video shown during the hearing, the Board has already approved games that incorporate animated win determinations that look and function like video slot machines in direct contravention of statutory law. *Pilot Games, Pilot Games Electronic Pull Tabs and Flash Bingo*, YouTube (Nov. 17, 2014), [https://www.youtube.com/watch?v=XfM\\_onvtoOs](https://www.youtube.com/watch?v=XfM_onvtoOs). The proposed language would improperly provide after-the-fact justification for these games by reading ambiguity into the law where it does not exist.

Any reference to animated win determinations included in 7863.0270, Subp. 18a and 7864.0230, Subp. 6 should be deleted. The proposed provisions ignore the statutory language of Minn. Stat. 349.12, subp. 12a which prohibits electronic bingo devices from having additional amusement or gambling functions. Likewise, the proposed provisions ignore the statutory language of Minn. Stat. 349.13 which prohibits such devices from displaying or simulating other forms of gambling or entertainment. Finally, 7863.0230, Subp. 6 attempts to replace the "mimic a slot machine" language to



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prohibit only spinning reels and nonstraight win line graphics. As previously mentioned, "mimic a slot machine" can mean far more than spinning reels and nonstraight win lines.

The Community proposes that 7863.0270, Subp. 18a be deleted, and proposes the following redline to remedy the offending language in 7864.0230, Subp. 6:

**7864.0230, Subp. 6. Manufacturing standards for electronic bingo devices.**

~~G. may contain animated game win determinations but must not mimic or appear to be a video game of chance as defined by Minnesota Statutes, section 609.75, subdivision 8 mimic or appear to be a video game of chance as defined by Minnesota Statutes, section 609.75, subdivision 8 and may not simulate spinning reels or include nonstraight win line graphic representations. Animated game win determinations approved before the effective date of this item may remain available for play for 180 days after the effective date of this item.~~

**D. 7861.0270, Subp. 3a**

The proposed language in 7861.0270, Subp. 3a relates to the use of electronic bingo devices. It reads as follows:

**Subp. 3a. Use of electronic bingo devices.**

~~D. E.~~ The device must be used as part of a bingo occasion and must not have ~~no added function as a gambling or any other games or interactive entertainment programs stored in or on the device~~ according to part 7864.0230, subpart 6, except that an electronic bingo device that is used for electronic linked bingo games may be used as an electronic pull-tab device.

This proposed language states that electronic bingo devices "must not have any other games or interactive entertainment programs stored in or on the device..." The statutory language included in Minn. Stat. 349.12, Subp. 12a and Minn. Stat. 349.13 provide more robust requirements.

Minn. Stat. 349.12, Subp. 12a states that electronic bingo devices can have no additional function as an amusement or gambling device other than an electronic pull-tab game. Minn. Stat. 349.13 states that electronic bingo devices may not display or simulate any other form of gambling or entertainment. These requirements should be explicitly stated in the rule. Furthermore, the proposed language waters down the statutory requirements by prohibiting only "interactive" entertainment programs. The statutory

language prohibits all forms of entertainment, whether they are interactive or non-interactive.

The Community proposes the following redline to remedy the offending language in 7861.0270, Subp. 3a:

**Subp. 3a. Use of electronic bingo devices.**

E. The device must be used as part of a bingo occasion and must not have no added function as a gambling or no additional function as an amusement or gambling device and may not have any other games or interactive entertainment programs stored in or on the device according to part 7864.0230, subpart 6, except that an electronic bingo device that is used for electronic linked bingo games may be used as an electronic pull-tab device.

**E. 7861.0210, Subp. 15c**

The proposed language in 7861.0210, Subp. 15c includes the regulatory definition for "electronic bingo device". It reads as follows:

**Subp. 15c. Electronic bingo device.** "Electronic bingo device" has the meaning given under Minnesota Statutes, section 349.12, subdivision 12a, and includes:

**A. a handheld and portable electronic device used as a nonlinked bingo card minder that:**

- (1) monitors bingo paper sheets or a facsimile of a bingo paper sheet purchased and played at the time and place of an organization's bingo occasion;**
- (2) activates numbers announced or displayed and compares the numbers to the bingo faces previously stored in the memory of the device;**
- (3) identifies a winning bingo pattern or game requirement;**
- (4) limits the play of bingo faces to 36 faces per game;**
- (5) requires coded entry to activate play but does not allow the use of tickets, tokens, coins, currency, or other cash equivalent to be inserted to activate play; and**
- (6) has the capability to allow use by a player who is visually impaired; or**

**B. a handheld and portable electronic device used as an electronic linked bingo game device that:**

- (1) is used by a bingo player to play an electronic linked bingo game;**

(2) requires coded entry to activate play but does not allow the use of tickets, tokens, coins, currency, or other cash equivalent to be inserted to activate play;

(3) has no additional function as an amusement or gambling device other than as an electronic pull-tab device defined in Minnesota Statutes, section 349.12, subdivision 12b; and

(4) meets the requirements in Minnesota Statutes, section 349.12, subdivision 12a, clauses (1), items (ii) and (iii); (2); (3); and (5) to (8).

The term "electronic bingo device" is already defined in Minn. Stat. 349.12, Subp. 12a. The proposed rules incorporate different parts of the statutory definition to create separate regulatory definitions for electronic bingo devices based on whether such device is used as a nonlinked bingo card minder and as an electronic bingo game device. The statutory definition does not support distinguishing between the use of electronic bingo devices in this manner. Nor does it support applying only specific parts of the statutory definition to bingo devices that are used in electronic bingo games as the proposed rules seem to do. For these reasons, the proposed rules should be amended to reference the statutory definition of electronic bingo devices and nothing else.

The Community proposes the following redline to remedy the offending language in 7861.0210, Subp. 15c:

Subp. 15c. **Electronic bingo device.** "Electronic bingo device" has the meaning given under Minnesota Statutes, section 349.12, subdivision 12a, and includes:

A. a handheld and portable electronic device used as a nonlinked bingo card minder that:

(1) monitors bingo paper sheets or a facsimile of a bingo paper sheet purchased and played at the time and place of an organization's bingo occasion;

(2) activates numbers announced or displayed and compares the numbers to the bingo faces previously stored in the memory of the device;

(3) identifies a winning bingo pattern or game requirement;

(4) limits the play of bingo faces to 36 faces per game;

(5) requires coded entry to activate play but does not allow the use of tickets, tokens, coins, currency, or other cash equivalent to be inserted to activate play; and

(6) has the capability to allow use by a player who is visually impaired; or

B. a handheld and portable electronic device used as an electronic linked bingo game device that:

~~(1) is used by a bingo player to play an electronic linked bingo game;~~  
~~(2) requires coded entry to activate play but does not allow the use of tickets, tokens, coins, currency, or other cash equivalent to be inserted to activate play;~~  
~~(3) has no additional function as an amusement or gambling device other than as an electronic pull tab device defined in Minnesota Statutes, section 349.12, subdivision 12b; and~~  
~~(4) meets the requirements in Minnesota Statutes, section 349.12, subdivision 12a, clauses (1), items (ii) and (iii); (2); (3); and (5) to (8).~~

#### F. 7861.0210, Subp. 15h

The proposed language in 7861.0210, Subp. 15h includes the regulatory definition for "electronic linked bingo game." It reads as follows:

Subp. 15h. **Electronic linked bingo game.** "Electronic linked bingo game" means an electronic bingo game that is played on a handheld, portable electronic device that permits play against other bingo players at multiple permitted premises.

The term is not defined in statutory law. However, there is a statutory definition for the term "linked bingo game" at Minn. Stat. 349.12, Subp. 25a. The regulatory definition for electronic linked bingo game should reference or incorporate the statutory definition of linked bingo game. Otherwise, different games could be played on the devices which was not contemplated by the Legislature when it authorized electronic linked bingo.

The Community proposes the following redline to remedy the offending language in 7861.0210, Subp. 15h:

Subp. 15h. **Electronic linked bingo game.** "Electronic linked bingo game" means an electronic bingo game that is played on a handheld, portable electronic device that permits play against other bingo players at multiple permitted premises provided that such game meets the requirements for linked bingo games defined in Minnesota Statutes, section 349.12, subd. 25a.

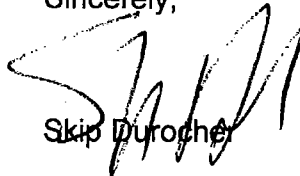
### III. Conclusion

The Community has identified serious issues with the foregoing proposed rules. Many, and perhaps all of these issues could have been avoided if the Board had followed

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the Manual's recommendations and included the Community and other Indian tribes – clearly interested parties – in the PAC process leading up to the formulation of these rules. The Community respectfully requests that Judge LaFave disapprove the aforementioned rules. With respect to proposed rules 7864.0235, subp. 18c, 7864.0235, Subp. 4, and 7863.0270, Subp. 18a, Judge LaFave should simply order them to be deleted from the proposed rules. This would allow issues of contention to be addressed in a separate rulemaking. With respect to proposed rules 7861.0210, Subp. 15c, 7861.0210, Subp. 15h, 7861.0270, Subp. 3a and 7864.0230, Subp. 6, Judge LaFave should require modifications of the language to conform with the language included in the redlined suggestions. If Judge LaFave finds that the requested modifications make the proposed rules “substantially different” than the proposed rules, the proposed rule should be deleted and a separate rulemaking should be conducted.

Sincerely,

A handwritten signature in black ink, appearing to read 'Skip Durocher', is written over the typed name.

Skip Durocher

SD:llt  
Enclosure