March 16, 2005

The Honorable Alberto Gonzales
Attorney General of the United States
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Re: Technologic aids to Class II games

Dear Mr. Attorney General:

As I wrote to Attorney General Ashcroft this previous September, I write to request your assistance in helping the National Indian Gaming Commission ("NIGC") address a longstanding, problematic issue in the regulation of the rapidly growing Indian gaming industry. The issue concerns the interplay and apparent conflict between the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 *et seq.*, and the Johnson Act, 15 U.S.C. §§ 1171 *et seq.*, in the use of technologic aids with Class II gaming.

Since IGRA permits the use of technologic aids with Class II games, but the Johnson Act prohibits the use of "gambling devices" on Indian lands, the question before us is whether Indian tribes may offer Class II games that make use of technologic aids when the aids also meet the definition of a Johnson Act gambling device. While NIGC answers "yes," the Department of Justice answers "no." There are sound legal, regulatory, and policy reasons why the Department of Justice should reconsider and change its position:

- Courts have generally rejected the Justice Department's position.
- The Justice Department's interpretation of IGRA is contrary to Congress's clearly articulated Federal Indian gaming policy because states have no regulatory jurisdiction over technology-aided Class II Indian gaming.
- The Justice Department's interpretation of IGRA is contrary to Congress's clearly articulated Federal Indian gaming policy because IGRA permits tribes to use Class II technologic aids.
- The use of Class II technologic aids furthers the policy goals of both IGRA and the Johnson Act.

- NIGC is developing technical standards to distinguish Class II technologic aids from Class III gambling devices and to govern their permissible use under IGRA.

- The Justice Department's position discourages the participation of reputable licensed gaming manufacturers and vendors in Class II gaming and makes Class II gaming vulnerable to those who are less reputable.

Introduction and Background

As you know, IGRA authorizes Indian tribes to offer Class II gaming without having a tribal-state gaming compact. This permits tribes to offer bingo, games similar to bingo, pull tabs, and other similar games, free of state regulation, and to use electronic, computer and other technologic aids to assist players and broaden participation in those games. For tribes to offer Class III gaming - casino games that include house-banked card games and slot machines - tribes are required to enter into compacts with the states in which they conduct such gaming activity.

IGRA sets forth general definitions of Class II and Class III gaming, and the NIGC has promulgated regulations that further define and distinguish those classes. Given rapid advances in technology, however, it has become increasingly difficult to distinguish between a permitted technologic aid to a Class II game and a Class III gaming device permissible only with a compact.

NIGC has a regulatory role in both Class II and Class III gaming, and the Department of Justice is responsible for enforcing the Johnson Act. In fulfilling our respective statutory responsibilities, both the Department and the Commission must examine electronic machines and associated equipment used in connection with Indian gaming. The NIGC's regulatory duties require us to determine whether a particular machine or system is a permissible technologic aid to Class II gaming, while your attorneys must determine whether the machine or system constitutes a Johnson Act "gambling device" that is prohibited in Indian country in the absence of a tribal-state compact.

The Justice Department most recently set out its current legal position on the use of Class II technologic gaming aids in a June 2004 letter to the Senate Indian Affairs Committee. The letter addressed a provision in S. 1529 that would amend IGRA and specifically exempt Class II aids from the Johnson Act. The Department also expressed its position late last year in two petitions for writs of certiorari submitted to the Supreme Court seeking review of the decisions in *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003) and *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003).

Basically, the Justice Department's position is that the clear language of the Johnson Act and IGRA, read together, prohibits the use of gambling devices as technologic aids in

the absence of a tribal-state compact. The Johnson Act defines "gambling devices" broadly. 15 U.S.C. § 1171(a)(1), (2). It provides blanket restrictions and prohibitions on the manufacture, sale, repair, possession, and transportation of such devices within the United States, including Indian country. 15 U.S.C. § 1175(a). The Department maintains that IGRA specifically exempts gambling devices from the reach of the Johnson Act only if they are the subject of a tribal-state compact. 25 U.S.C. § 2710(d)(6). It maintains as well that IGRA incorporates the Johnson Act to define the permissible scope of Class II gaming. Specifically, Indian tribes may offer uncompacted Class II games only if the tribe is located within a state where those games are lawful for anyone for any purpose, and the games are not otherwise prohibited by Federal law, including the Johnson Act. 25 U.S.C. § 2710 (b)(1)(A).

Reading these statutory provisions together, the Justice Department concludes that while IGRA clearly exempts compacted Class III devices from the Johnson Act, there is no comparable exemption for Class II technologic gaming aids. Thus, IGRA does not exempt gambling devices used as technologic aids from the reach of the Johnson Act unless they are the subject of a tribal-state compact.

The Justice Department finds as well that its position is supported by policies underlying IGRA. Specifically, the Department claims that exempting aids from the Johnson Act will interfere with the states' ability to regulate or limit casino-style gambling within their borders, an ability that IGRA, by design, provides to the states through the mechanism of tribal-state compacts.

Courts have generally rejected the Justice Department's position.

The Justice Department's position is not without some support. It is based upon a reading of arguably clear provisions in IGRA and related legislative history. However, since the passage of IGRA in 1988, there have been numerous enforcement efforts by the Justice Department, sometimes with the support of NIGC, to prohibit the use of technologic aids the Department claimed were prohibited "gambling devices" under the Johnson Act. When those actions were directed at equipment that Indian tribes contended were Class II technologic gaming aids, courts have ruled in favor of the tribes. Indeed, all but one of the courts that have considered this intersection of IGRA and the Johnson Act have concluded that the Johnson Act does not prohibit the use of technologic aids in connection with the operation and play Class II games of chance, even if those aids meet the Johnson Act's definition of gambling device:

- *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1033 (10th Cir. 2003), *cert. denied sub. nom. Ashcroft v. Seneca Cayuga Tribe of Oklahoma*, 124 S.Ct. 1505 (2004) ("[c]ongress did not intend the Johnson Act to apply to the use of Class II technologic aids in Indian country").

- *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1101-1102 (9th Cir. 2000) ("[t]he text of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids").

- *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) ("[w]e further conclude Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid").

- *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) ("[b]oth the Commission's regulations and this Court have interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor Class III games covered by tribal-state compacts").

- *United States v. Santee Sioux Tribe of Nebraska*, 174 F.Supp.2d 1001, 1006 (D. Neb. 2001), *aff'd., but reversed as to this holding*, 324 F.3d 607 (8th Cir. 2003) ("the Johnson Act applies to Class III devices but not to Class II devices[; a]ny other construction would nullify IGRA").

- *United States v. Burns*, 725 F.Supp. 116, 124 (S.D.N.Y 1989) ("[c]ongress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games").

Only the Eighth Circuit has endorsed the Justice Department's position. *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 611-612 (8th Cir. 2003). But even then, the Court rejected the Department's argument that the machines in question were gaming devices. Subsequently, the Supreme Court declined to grant certiorari to resolve the apparent conflict between the Eighth Circuit's holding and the Tenth Circuit's holding in *Seneca-Cayuga*, *supra*. *United States v. Santee Sioux Tribe of Nebraska*, 124 S.Ct. 1506 (2004); *Ashcroft v. Seneca-Cayuga Tribe of Oklahoma*, 124 S.Ct. 1505 (2004).

The Justice Department's interpretation of IGRA is contrary to Congress's clearly articulated Federal Indian gaming policy because states have no regulatory jurisdiction over technology-aided Class II Indian gaming.

The Justice Department's position on technologic Class II gaming aids is wholly inconsistent with the carefully crafted balance of interests and regulatory roles that Congress built into IGRA. If a technologic aid to a Class II game also meets the definition of a Johnson Act gambling device, the Department's position holds, then its use is permissible only under a tribal-state compact. This has the effect of injecting the states into the regulation of Class II gaming, contrary to IGRA.

It is well settled under IGRA that Indian tribes are the primary regulators of Class II gaming, 25 U.S.C. § 2710(b)(1), subject only to regulatory oversight by NIGC. The

States are expressly excluded from Class II regulation, regardless of whether technologic aids are used in connection therewith. The Eighth Circuit stated this succinctly almost 15 years ago when it wrote, "[w]e are convinced that the Congress intended that Class II gaming be subject to Tribal and Federal oversight, and that the States' regulatory role be limited to overseeing Class III gaming pursuant to a Tribal-State compact." *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990). The report of the Senate Select Committee on Indian Affairs on IGRA itself states this unequivocally:

> S. 555 provides for a system for joint regulation by Tribes and the Federal Government of Class II gaming on Indian lands and a system for compacts between Tribes and States for regulation of Class III gaming. The bill establishes a National Indian Gaming Commission as an independent agency within the Department of the Interior. The Commission will have a regulatory role for Class II gaming and an oversight role with respect to Class III.

S. Rep. 100-446, 100th Cong., 2nd Sess., p. A-1.

Put slightly differently, it is in recognition of the sovereignty retained by the tribes that they are the primary regulators of Class II gaming and that the states have no Class II regulatory role. Tribal sovereignty is subject only to the power of Congress and not to the states at all. The Supreme Court has repeatedly upheld this principle. In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Court wrote that it "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States....'" *Cabazon*, 480 U.S. at 207 (internal citations omitted).

Tribal sovereignty prohibits the states from enforcing their laws on Indian lands if Congress does not consent or if such enforcement is incompatible with the Federal and tribal interests embodied in Federal law. *Cabazon*, 480 U.S. at 216. Thus, in *Cabazon*, the Court held that the Federal and tribal interests inherent in the bingo games operated by the Cabazon and Morongo Bands were the recognition of tribal sovereignty, the promotion of Indian self-government, and the overriding goals of tribal self-sufficiency and economic development. *Id.* at 216-217. By contrast, California's sole interest in shutting down the bingo operations was preventing the infiltration of these high-stakes bingo games by organized crime. *Id.* at 220-221. This latter interest was "surely a legitimate concern," the Court held, but it was not "sufficient to escape the preemptive force of federal and tribal interests apparent in this case." *Id.* at 221.

The point is, simply, that Congress adopted this very same constellation of interests into IGRA when it fashioned a regulatory framework for Indian gaming that protects and promotes those interests. The Justice Department's position does clear violence to this balance of interests and to IGRA's regulatory structure. The Justice Department

improperly attempts to protect state interests regarding technologically-aided Class II gaming that Congress and the courts long ago determined do not exist.

The Justice Department's interpretation of IGRA is contrary to Congress's clearly articulated Federal Indian gaming policy because IGRA permits tribes to use Class II technologic aids.

Beyond all of this, the Justice Department's position completely ignores IGRA's express authorization of "electronic, computer, or other technologic aids" in connection with the operation and play of uncompacted Class II games. By this statutory provision, Congress has determined, as a matter of public policy and law, that technologically-aided Class II gaming does not constitute casino-style gambling requiring a tribal-state compact.

In clarifying this policy determination, Congress provides in IGRA that technologically-aided Class II gaming only crosses the line into Class III gaming when an aid constitutes an "electronic or electromechanical facsimile of a game of chance" (*i.e.* when an aid replicates all characteristics of the game, 25 CFR § 542.8) or a slot machine of any kind. Thus, by essentially treating all or most Class II technologic gaming aids as Johnson Act "gambling devices," the Justice Department position ignores and undermines implementation of the clearly stated policy of Congress regarding technologically-aided Class II gaming.

The use of Class II technologic gaming aids furthers the policy goals of both IGRA and the Johnson Act.

The Justice Department should, therefore, consider and adopt the reasonable alternative position that IGRA permits the use of electronic, computer or other technologic aids in connection with the operation and play of Class II games, even if such aids fall within the broad definition of gambling device under the Johnson Act. Courts that have adopted this position have set out in detail the legal arguments in its favor, and thus there is no need to belabor them here. Suffice it to say that it makes little sense for Congress to allow tribes "maximum flexibility" in the use of Class II technologic gaming aids under IGRA, S. Rep. 100-446 at p. A-9, and, at the same time, to prohibit such aids in the Johnson Act, especially since IGRA's adoption came more than 25 years after the Johnson Act's most recent amendment.

Adopting this position would, moreover, advance the policies that the Supreme Court recognized as significant in *Cabazon* and that Congress explicitly adopted into IGRA. That tribes will benefit economically and become more self-sufficient if they can utilize technologic aids to broaden and assist the play of Class II games is obvious. 25 U.S.C. § 2702(1). Technologic aids by their nature permit greater player participation both within and between tribal gaming facilities. What is perhaps not as obvious is that the use of technologic aids fosters strong tribal government and more effective gaming

regulation and accountability to protect tribal assets and shield Indian gaming from organized crime and other corrupting influences. 25 U.S.C. § 2702(2).

The tribes are the primary governmental entities responsible for regulating Class II gaming. A tribal gaming ordinance approved by the NIGC is, of course, a necessary prerequisite to Class II gaming, 25 U.S.C. § 2710(b)(1)(B), as are background investigations and licenses for employees and management. 25 C.F.R. Parts 556 and 568. More than this, the tribes have for some years now been subject to the requirements of minimum internal control standards, ("MICS"), 25 C.F.R. Part 542. The MICS provide, among other things, security, surveillance, money handling, and accounting requirements for both Class II and Class III gaming, regardless of whether technologic aids are used in connection therewith.

For example, if a tribe conducts bingo, it must keep accurate records of all games played, cards sold, prizes paid, refunds given, and transactions to all player accounts. 25 C.F.R. § 542.7(g) - (*l*). More generally, in any gaming operation, a tribe must document all transactions at the main cage, and the cage and vault must be counted, and their contents accounted for, at the change of each shift. 25 C.F.R. 542.14(d). Along with all play on the gaming floor, this activity all takes place under the watchful eye of surveillance cameras. 25 C.F.R. §§ 542.23, 542.33. Experience has shown that MICS compliance is generally far easier to monitor and confirm when technologic aids are utilized in connection with the operation and play of Class II gaming. As a result, the MICS are more effective in ensuring the fairness and honesty of the gaming activity as well as the protection of tribal gaming assets.

NIGC is developing technical standards to distinguish Class II technologic aids from Class III gambling devices and to govern their permissible use under IGRA.

The NIGC is, moreover, currently in the middle of an ambitious project whereby we seek, with the assistance of a tribal advisory committee and, ultimately, the tribes themselves, to promulgate technical standards and regulations that will govern classification, implementation, and use of Class II technologic aids and will distinguish them from Class III gaming devices. It is our hope and expectation that when these comprehensive regulations are in place, the Commission will designate approved, independent gaming laboratories to test and certify proposed Class II technologic aids as compliant with our standards.

Under these standards, no tribe may use a Class II technologic aid prior to testing and certification. Tribes will also be responsible for continued monitoring of the games and aids through a Commission-mandated compliance program. This will ensure that Class II games and related technologic aids actually placed on the gaming floor and offered for play are identical in all respects to those that were approved. Strong tribal government and effective regulation are thus both assured.

The Justice Department's Johnson Act position discourages the participation of reputable licensed gaming manufacturers and vendors in Class II gaming and makes Class II gaming vulnerable to those who are less reputable.

Finally, the Justice Department's current position has had the unintended effect of working against Congress's intentions, expressed both in IGRA and in the Johnson Act, to provide strong regulation of legalized gambling and to prevent illegal gambling. By acting at cross-purposes in administering these two Acts, the Department and NIGC have created confusion, uncertainty, and unfair risk regarding the use of technologic aids in connection with Class II gaming. This, in turn, has made many reputable game manufacturers and vendors reluctant to enter the Class II gaming market. Only a few have done so, yet it is precisely these manufacturers that the tribes, the Department, and NIGC want involved in Indian gaming.

These manufacturers generally hold supplier licenses in most Class III casino gaming jurisdictions and have endured rigorous application procedures and investigations to secure those licenses. State gaming regulatory agencies have, however, made it quite clear to game manufacturers and vendors that illegal activity, of any kind and anywhere, puts their licenses at risk, even if they have acted in good faith. Thus, the possibility of a Johnson Act prosecution for supplying technologic Class II gaming aids, even if those aids meet the NIGC's standards for Class II technologic aids, is a strong deterrent to participation in the Class II market.

Less reputable game manufacturers and vendors, by contrast, are not licensed in Class III casino gaming jurisdictions, have less to lose, and are willing to take the risk of selling Class III gaming devices to tribes as Class II technologic aids, especially given the unsuccessful track record of Johnson Act prosecutions in Class II gaming. As a result, the current uncertain regulatory climate for Class II technologic gaming aids has made the activity more attractive and vulnerable to undesirable vendors and tends to keep many suitable game manufacturers from joining their few brethren in the Class II market. Ideally, the Class II market would be served by so many licensed game manufacturers that unsuitable individuals would be eliminated from the industry.

Beyond this, the lack of clear distinction between Class II technologic aids and Class III devices has also had the effect of discouraging Justice Department prosecutions. There have, to my knowledge, been very few Johnson Act prosecutions, successful or otherwise, because of this uncertainty. This, in turn, has the effect of taking the Justice Department out of its regulatory role under the Johnson Act and thus weakening the regulation of Indian gaming.

Conclusion

For all of these reasons, I respectfully ask the Justice Department to reconsider its position on the interplay of IGRA and the Johnson Act, to instead adopt NIGC's

alternate interpretation, and to support the NIGC's classification efforts. I would welcome an opportunity for further discussion of this important issue, which Congress has charged us both to address. Working together, I am confident that we can interpret and implement both Acts to accomplish the purposes Congress intended.

Sincerely,

Philip N. Hogen
Chairman

cc: Thomas Hefelfinger,
United States Attorney