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February 18, 2005

Hon. Philip N. Hogen, Chairman
Hon. Nelson W. Westrin, Vice-Chairman
Hon. Cloyce V. Choney, Commissioner
1441 L St., N.W., Suite 9100
Washington, DC 20005

Re: Proposed Class II Technologic Aid Classification Standards

Dear Chairman Hogen, Vice-Chair Westrin, and Commissioner Choney:

I write on behalf of the 184 Member Tribes of the National Indian Gaming Association (NIGA) and submit the following official comment on the National Indian Gaming Commission's (NIGC) Fourth Draft Proposal on the NIGC Class II Technologic Aid Classification Standards. NIGA is concerned that the NIGC has not made more changes to the draft to reflect tribal government comments. We ask that the NIGC give full consideration to our concerns and change its proposal accordingly.

As an initial matter, we ask NIGC to respect the letter and the spirit of IGRA, existing Federal court rulings, and current NIGC regulations and opinions. Given the fact that Congress directed the NIGC to consult with tribal governments concerning the implementation of NIGC's Class II Definition Regulation, published in June 2002, we were disappointed that NIGC proposes to amend the definition of "electromechanical facsimile" set forth in that regulation. We strongly oppose NIGC's proposed re-definition of the statutory term "electromechanical facsimile."

Congress intended that bingo, lotto, and games similar to bingo may be played in an electronic format, "even a *wholly* electronic format, provided that multiple players are playing with or against each other. … A manual component to the game is not necessary."[1] We disagree with the NIGC's objection to the 2002 definition of the term "electromechanical facsimile." The definition is clear on its face that when the electronic format is used to broaden participation in a Class II game "by allowing multiple players to play with or against each other rather than with or against a machine," the resulting games are *not* facsimiles but are actual class II games. The NIGC's proposed re-

[1] 67 Fed. Reg. 41,166, 41,171 (June 17, 2002).

definition of the term "electromechanical facsimile," unduly restricts the use of technology by tribal governments contrary to congressional intent. The definition of the term "electromechanical facsimile" must continue to recognize that electronic game formats that facilitate the play of Class II games between players are permissible "technologic aids."

We are also concerned about the provisions intended to promote due process. In particular, the latest draft of the Classification Standards fails to resolve the basic problems associated with the NIGC's existing game classification process and omits a meaningful role for tribal regulatory agencies. The Classification Standards continue to lack an appropriate mechanism for a tribe or its regulatory agency to challenge the classification of a game. As the primary regulators of class II gaming, tribes should be afforded the opportunity to challenge such an opinion on a government-to-government basis, without having to first subject itself to enforcement action. We ask you to amend your proposal to provide an opportunity to test NIGC classification decisions without first bringing on an enforcement action.

Tribal government regulators should not be disregarded through an undue reliance on a gaming laboratory certification process. Testing laboratories cannot make legal or regulatory decisions, and reliance on the certification process for this purpose is misplaced. The certification process is simply a means for federal and tribal regulators to verify a manufacturer's representation that the game utilizing electronics is indeed a class II game, as well as to ensure the integrity of the equipment. The certification process should not be used to replace the tribal regulator's function in determining the legal character of a game.

NIGC has chosen to split its rulemaking process by promulgating the classification standards apart from the technical standards. We ask that you either defer the comment period for the technical standards to the end of the comment period for the classification standards, or postpone publication of the classification standards until such time as work on the technical standards is sufficiently complete to publish in proposed rule form. This would enable us to consider both rules together when we submit our comments.

Current Proposal Redefines Bingo and Class II Gaming

We are concerned that the current proposal redefines bingo and Class II gaming. IGRA establishes three requirements for a game of bingo. Federal courts have held that these three statutory requirements are "the sole *legal* requirements for a game to count as class II bingo." The NIGC's current proposal to add new requirements not based in IGRA will inhibit Class II gaming from adapting as technology adapts and the game of bingo adapts throughout America. We are concerned that the NIGC requirements only serve to micromanage tribal business judgments and regulatory responsibilities through these arbitrary requirements:

- *Ball Draw Requirements*

NIGC emphasizes the time between the generation of the ball draw and its use, stating that unless balls are released to players "in close proximity" to the time at which they were generated, players are not covering the numbers "when" they are drawn. You suggest that such a game fails to satisfy "an essential element of bingo," so it is outside the category of class II gaming. Yet, these assertions find no support in the statutory language, and run counter to the Federal case law. Games such as Bonanza Bingo, using so-called "pre-drawn balls," predate IGRA and were not intended to be eliminated by its enactment. Even if these games are not bingo, they are at least games similar to bingo; the timing of the ball draw should constitute a permissible variant. We oppose the inclusion of these provisions within the regulation.

With regard to numbers in the ball draw, you say that they must be drawn or electronically determined in a random manner, and that they must be used in the same sequence as generated.[2] Without support, the previous draft added that "[t]he minimum number of numbers or other designations in the non-replacement pool from which selections may be randomly drawn or electronically determined is 75 and the maximum number is 150."[3] This draft has placed even further restrictions upon the ball draw. For a game of bingo, this draft requires that the ball draw must consist of exactly 75 numbers or other designations.[4] For a game similar to bingo, the proposals demand that "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 equal to or greater than three (3) times the number of spaces on the card used in the game."[5] We ask you to strike these arbitrary requirements from your proposal. You need not and should not put Class II gaming in a regulatory strait jacket when IGRA was intended to respect the sovereign status of tribal governments and tribal law making authority.

- *"Sleeping" Restrictions*

The provisions within this latest draft concerning the consequences of "sleeping" conflict with the game commonly known as bingo. In bingo, a player that becomes distracted, or otherwise fails to mark a number on their card, may "catch up" at any time before the prize associated with that number is awarded. Whether that number was eventually needed to complete the game-winning pattern rather than some other pattern is entirely irrelevant.

You try to distinguish between the two situations. For some reason, this draft prohibits a bingo player from "catching-up" on any number slept that contributes to either an interim, progressive, or consolation prize.[6] Moreover, slept numbers that eventually

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[2] *Mystery Bingo* at 15.
[3] *Third Draft of the Classification Standards* at §3(a)(ix).
[4] *Classification Standards* at §5(a).
[5] *Classification Standards* at §5(b).
[6] *Classification Standards* at §5(j).

contribute to the game-winning pattern may only be "caught-up" where that player is the first to cover all other numbers comprising that pattern.[7] Our question is why? Not only do these limitations conflict with the common game of bingo, but they are unsupported by anything within IGRA. Again, these provisions should be struck from the proposal because they only serve to make it difficult to play the game, and arbitrarily restrict the play of bingo by tribal governments that are not commonly used in other jurisdictions.

- *Assistance in Daubing Prohibited*

We oppose your effort to prohibit technologic aids to assist a player in daubing. Nothing in IGRA, or judicial interpretations of IGRA, prevents a game of bingo from employing a feature that assists a player in daubing. IGRA expressly authorizes the use of technologic aids in the play of a class II game and federal courts have repeatedly recognized the mode of daubing to be irrelevant. The NIGC's decision to reclassify a number of card minding devices as class III gaming simply to enhance its argument against "auto-daub" is just plain wrong, placing tribes at a disadvantage to non-tribal bingo operations. Congress did not intend to restrict tribal governments from playing bingo in ways permitted to charitable organizations and state licensees. We ask you to strike these provisions from the draft regulation.

- *Tangible Pull-Tab Requirement*

While we understand the basis for the NIGC's position that there is a "paper" requirement in the play of pull-tabs, we believe that there is also a legally principled basis for allowing the use of wholly electronic technologic aids to the game of pull-tabs. In the *Chickasaw* tax case, the Supreme Court affirmed the lower court's decision that the play of pull-tabs entails a competition between players and that the revealing of a single pull-tab is not the play of a complete game of pull-tabs. Rather, the game is not complete until all pull-tabs in a single deal are purchased by players.[8] So long as an aid is dispensing or reading, in order of the deal, all or part of a pull-tab deck with a pre-determined outcome, the existence of a paper pull-tab is irrelevant to the issue of whether the use of electronic equipment constitutes a facsimile. Only where the equipment contains or is linked to a random number generator, generating a single tab outcome based on a programmed retention ratio, is there a concern regarding paper.

Proper analysis turns on whether the equipment is dispensing or reading from an actual deck or deal of pull-tabs in which the outcome is pre-determined. Where the sequencing of the deal cannot be altered, and the game requires each pull-tab to be played in proper order, the fact that the deal consists of pull-tabs in paper form, rather than in an electronic storage medium, is irrelevant. Such a game should be permissible and is distinguishable from the facts in the early cases in which the decision turned on the fact that the game featured an electronic image of a pull-tab.

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[7] *Id.*

[8] See, *Chickasaw Nation v. U.S.*, 534 U.S. 84, 122 S.Ct. 528, 151 L.Ed.2d 474 (2001); and *Chickasaw Nation v. U.S., 208 F.3d 871 (10th Cir. 2000).*

- *Bingo Minders*

NIGC should not reclassify card minding devices, or "bingo minders," as class III gaming. Under no scenario can this action be aligned with Congress' intent in the enactment of IGRA. Reclassifying this equipment to prohibit "auto-daub" is contrary to the play of bingo in America. Congress did not choose between "electronic" bingo and "paper" bingo. There is one game of bingo, and it may be played with technologic aids. Technologically-aided bingo constitutes class II gaming as a matter of law, and that includes bingo minders. Even in the case of a bingo minder that automatically marks the player's cards, the equipment cannot be said to "replicate a game of chance by incorporating all of the characteristics of the game."[9]

- *Games Similar to Bingo*

We oppose the limitations the NIGC proposes concerning "games similar to bingo." Congress intended to leave the door open to the development of games similar to bingo, including new variations on the game of bingo. The 2002 definition permits class II gaming to evolve with changing technology, and the current Commission should respect the work of its predecessor. Changing the rules when Commissioners change undercuts the ability of tribal governments to invest and develop tribal government gaming as a means to generate revenue and build strong tribal governments, as Congress intended.

Conclusion

The Classification Standards need more work and tribal governments are on the front lines when it comes to operating, understanding and regulating Class II technologic aids. We are enclosing a detailed list of proposed changes through the attached redlined/strikeout document. Because these comments were developed in consultation with our Member Tribes we respectfully ask that you give our comments due weight and consideration and make appropriate changes to the current proposal. We remind the NIGC that IGRA is intended to promote "strong tribal government," and that means NIGC must respect our tribal gaming regulatory agencies. Please contact me at (202) 546-7711 if you have any questions or desire additional information regarding this matter.

Sincerely,

Ernest Stevens, Jr.
Chairman

Attachment

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[9] 25 C.F.R. §502.8.