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November 10, 2004

Hon. Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, NW
Washington, DC 20005

Re: Draft Class II Technical and Classification Standards

Dear Chairman Hogen, and Commissioners:

This Office represents the Jamul Indian Village Band of Kumeyaay Indians, located in San Diego County, California. The Jamul does not yet operate a gaming facility, however, the Tribe does have an approved Tribal-State Compact and it does plans on opening a gaming facility in the near future. I have been asked by the Tribe to provide the following comments on the NIGC's third draft of its "Classification Standards for Electronic, Computer or Other Technological Aids Used in Connection with Class II Gaming," and the first draft of its "Class II Technical Standards". The Jamul Tribe is concerned with these draft standards and hopes that the NIGC will reconsider the draft standards in light of the following comments.

In the past few years federal courts have clarified the distinctions between class II technologic aids and class III electromechanical facsimiles. These clarifications are reflected in the NIGC's definition regulation promulgated in 2002, which we believe brought greater clarity to class II gaming. Unfortunately this clarity is now threatened by the uncertainty surrounding NIGC's current draft standards. In enacting IGRA, Congress intended that tribes have "maximum flexibility" to utilize class II gaming for the purposes of economic development. Congress was also aware that technology would grow and intended that Indian gaming be permitted to grow and evolve with it. It is our belief that the NIGC's current rulemaking conflicts with this intent and now threatens the stability of all Indian gaming.

The following are the Jamul Tribe's major concerns:

1. Lack of Meaningful Tribal Consultation. The Jamul Tribe is greatly concerned with the manner in which these regulations are being developed. We have been advised that the role of the tribal advisory committee in this process has been unsatisfactory, and that utilization of the

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committee's input has been incorporated into the regulation. We are further advised that in the past, tribal advisory committees permitted tribal representatives to be active participants in all levels, including the drafting process.

It is also troubling to hear that the advisory committee meetings thus far have focused on legal rather than technical standards. Given the technical expertise of the individuals selected to serve on the committee, it seems that their input would have been better suited to the development of technical standards, rather than disagreements over the law.

Finally, while advisory committees bring great value to the rulemaking process, they are no substitute for consultation with Tribal leaders. We were surprised to learn of the NIGC's expectation that the tribal representatives to the Committee "consult" with tribes in their region as to the impact of this rulemaking. Such consultation is the responsibility of the Commission. To correct these problems, clarify the scope of the NIGC's current direction, and bring its actions into conformance with its own consultation policy, a series of regional and national tribal consultation meetings should be held before the NIGC moves forward.

2. Current Rulemaking Redefines Class II Gaming. We are also troubled that the majority of the Classification Standards focus on the legal aspects of class II gaming. Instead of addressing integrity issues, this current rulemaking calls into question ten years of case law won largely by tribes, and effectively redefines "bingo" and other class II games. In fact, the latest draft would reclassify a number of games that the federal courts, tribal gaming commissions, and the NIGC itself have previously determined to be class II.

In enacting IGRA, Congress placed only three requirements on a game of bingo. The federal courts have held that these three requirements "constitute the sole legal requirements for a game to count as class II bingo."[1] The NIGC's attempt to impose additional requirements upon class II gaming prohibits its advancement and serves only to micromanage both the business judgment and regulatory responsibilities of tribes. These arbitrary requirements intrude upon the sovereign right of tribes to operate class II games in accordance with the law, but at the same time, tailor them to the demands of their own community and business environments. Some of the most troubling provisions are outlined below.

a. Prizes. IGRA specifies only that a game of bingo must be played for prizes. The NIGC should avoid placing restrictions on either the amount or type of prizes that can be offered in a game. Features such as these are marketing decisions beyond the scope of IGRA. All such provisions should therefore be removed from the current draft.

b. Bingo Cards. While IGRA requires that bingo be played with cards, the NIGC is now attempting to regulate all facets of a bingo card, including both its size and number of squares. Requiring that a bingo card contain 25 squares, and that each square measure 1 centimeter by 1 centimeter, has no legal support, and serves only to limit the

[1] *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096, 1097 (9th Cir. 2000).

"flexibility" that Congress so clearly intended. It also reverses existing NIGC guidance that allows cards with only four squares and that measure 2⅛ inches square. The NIGC should return to its existing standard that a bingo card must be "readily visible."

c. Timing of Card Selection. The latest draft also states that a player must not be able to obtain a new card once game play begins. Nor should a player be able to join a game in progress. These requirements are arbitrary as no such restrictions are imposed upon a game of paper bingo. Such restrictions lack support from either IGRA or the courts, and stand in direct conflict with long-established games such as Bonanza Bingo.

d. Auto-Daub is Acceptable. IGRA expressly authorizes the use of technologic aids in the play of class II games. "Auto-daub" epitomizes an aid as it assists a player in covering the numbers on their card during the game's natural progression. It is particularly relevant that the courts have held that the manner in which a player covers their card(s) is irrelevant, and that bingo card minders have been in use in bingo halls nationwide for many years. The NIGC's attempt to prohibit this advancement in technology is without legal support. We also find offensive the NIGC's attempt to prohibit bingo minders simply to enhance their argument against auto-daub.

e. Bingo Ball Draw. NIGC arguments that balls must be released to players "in close proximity" to the time at which they were generated, also lacks support under IGRA. Games such as Bonanza Bingo with so-called "pre-drawn balls," predate IGRA and were not intended to be eliminated by its enactment. These provisions should be removed from the draft regulation.

f. Multiple Ball Releases. While the NIGC has previously argued that a game of bingo cannot be won after only one release of balls, the current draft extends this requirement to the interim portions of a game of bingo. Doing so violates the holdings of the Ninth and Tenth Circuit Courts of Appeal in the MegaMania cases.

g. Different Interim Patterns are Permissible Within a Common Game. Nothing prohibits players who are competing for the same game-winning pattern from competing for different interim patterns. As the courts have held, the proper focus of a game classification analysis is whether the game "as a whole" meets the three statutory requirements of bingo – not one of its constituent parts. To do otherwise is to add a limitation upon the game not envisioned by Congress.

h. House Banking. Unlike traditional house banked games such as blackjack, in bingo and games similar to bingo, the house is not a participant in the game. At no time does the house have its own card, nor does it take on or compete against the game's players. The NIGC should avoid interpreting "house banked" as something other than the way in which it is defined by its own definitions, and certainly should avoid applying a definition that conflicts with case law. Both the Ninth and Tenth Circuit Courts of Appeal have held that the fact that the house retains a percentage of the amount wagered does not make a game "house banked" as that term is defined by the NIGC. Instead of placing arbitrary restrictions upon the game of bingo or games similar to bingo, the NIGC should simply apply the definition as currently defined.

i. Broadening Participation. Contrary to the latest draft, technologic aids are not uniformly required to broaden participation. As such, requirements such as those calling for a minimum of either six players in every game or a delay of two seconds between games should not be placed upon the game of bingo. Instead, the focus should be upon ensuring that a player cannot play alone against a machine, a standard that is satisfied simply by requiring the participation of two or more players.

j. Tangible Pull-Tabs are Not Required. The current draft requires the use of "tangible," or paper, pull-tabs when the game of pull-tabs is played with electronic equipment. The NIGC bases this requirement on a couple of early cases involving self-contained facsimiles of the game; cases that are now stale and of significantly diminished precedential value. Requiring a tangible medium is not supported by either IGRA or recent court decisions, and should be removed from the regulation.

k. The Johnson Act Lacks Relevance in a Game Classification Analysis under IGRA. The NIGC's 2002 rulemaking, supported by the decisions of three federal appeals courts, removed the Johnson Act from the classification of games under IGRA. As such, a game classification analysis should begin with determining whether the equipment is a technologic aid to a class II game, and if so, should end there. To then evaluate whether the equipment may also fall within the Johnson Act definition of a "gambling device" runs counter to judicial holdings. The NIGC should avoid any return to the notion that the Johnson Act should be included in a game classification analysis under IGRA.

3. Procedural Issues and Due Process Concerns. Another major concern we have with the draft rule is that it fails to resolve the basic problems associated with the NIGC's existing game classification process. One such problem is that there is no procedure for appeal outside the enforcement context, a framework that avoids judicial oversight and violates fundamental principles of fairness and due process of law. Tribes, as the primary regulators of Indian gaming, should be able to challenge a game classification opinion on a government-to-government basis, without having to first subject itself to enforcement action.

Not only does the draft rule fail to address this problem, but it compounds it by shifting the classification process from tribal regulators and the NIGC, to private sector gaming laboratories. Nothing in IGRA suggests that testing laboratories should be placed in the position of interpreting IGRA. Instead, their role should be limited to ensuring the integrity of equipment and operating systems. The process set forth in the current draft not only deprives tribal regulators of their legitimate regulatory authority over Indian gaming, but relinquishes a critical federal responsibility to the private sector and interferes with the right of tribes to full due process of law.

4. Technical Standards Are Overly Burdensome. We are also concerned with the first draft of the NIGC's technical standards. They appear to be excessive and unsuitable for the class II gaming industry. The integrity of Indian gaming needs to be protected, however, this needs to be balanced by also allowing the Tribes to operate their games to generate needed revenues for the tribes.

We respectfully request that the NIGC re-draft the document and limit its content to only those standards necessary to ensure the success of Indian gaming. Further, we believe that the NIGC should meet with the advisory committee to thoroughly discuss its provisions before moving forward. As noted earlier, we are troubled by the fact that the meetings thus far have focused on legal rather than technical standards. Indian country should be permitted the benefit of the technical expertise held by those tribal representatives serving on the committee. We also request that these standards be issued as guidelines so that they may be tailored to the individual demands of our own community and business environments.

Thank you for the opportunity to provide these comments.

Sincerely,

Eugene Madrigal,
Attorney for the Jamul Indian Village

EM:ds
Cc: Leon Acebedo, Chairman Jamul