QUAPAW TRIBAL GAMING AGENCY
P. O. BOX 405
QUAPAW, OKLAHOMA 74363
918-540-9100

November 3, 2004

Via facsimile (202) 632-7066 and U.S. Certified Mail

Phil Hogan, Chairman
National Indian Gaming Commission
1441 L Street NW
Suite 9100
Washington, DC 20005

Re: Comments and protest of the Quapaw Tribal Gaming Agency of the Quapaw Tribe of Oklahoma to the National Indian Gaming Commission proposed technical standards and procedures for the classification and approval of electronic, computer and other technologic Class II gaming machines and aids utilized in Indian gaming operations.

Dear Chairman Hogan:

As Director of the Quapaw Tribal Gaming Agency, I hereby submit comments on behalf of the Quapaw Tribe in protest of the NIGC's draft proposed rule establishing technical standards and procedures for the classification and approval of electronic, computer and other technologic Class II gaming machines and aids utilized in Indian gaming operations. As the law and regulations currently provide, Tribes possess primary regulatory authority over Class II gaming as well as the incumbent right to create their own regulations and classification standards. The Quapaw Tribe objects to any regulation that would require it to defer to the National Indian Gaming Commission and submits the following comments in support of its position.

Our history of tribal self government pre-dates the formation of the United States of America and, as a distinct community with a common culture and relations even through times of political, social, and physical hardships that have seen many tribes extinguished forever, we view the proposed rulemaking as yet another misguided step by the United States. If this rule is ultimately promulgated in its current iteration, history will judge it as an incursion into our community and interference with our sacred sovereign rights.

The NIGC should support the right and authority of the Quapaw Tribe (and others) to develop its own Class II standards that are consistently with IGRA and the policies which underlie it. Although we agree that a proper framework for the classification of games is essential, we do not agree that the framework proposed in the latest iteration of the draft proposed rule is appropriate under IGRA or modern principles of federal Indian policy

We emphasize that IGRA was enacted in 1988, a time of intense political scrutiny of the federal Indian relationship. The United States Congress was deeply engaged in the study of that relationship in the context of the federal Indian trust responsibility and other federal laws affecting Indians. Twelve days before the enactment of IGRA on October 17, 1988, Congress enacted the 1988 amendments to the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.*. Public Law 100-472, Act of October 5, 1988, 102 Stat. 2296 which, among other things, strengthened the commitment of the United States to the policy of Indian Self-determination and authorized the Self-Governance Demonstration Project, which became final law in 1994. IGRA must, therefore, be considered in light of the overall legislative direction set forth in the 1988 Indian Self-Determination Act and subsequent amendments. When the same Congress passes a law affecting an Indian tribe and enacts a second law affecting Indian tribes two months later, after coming out of the same committees of the Senate and the House, the two laws must be considered together, and the overall legislative plan must be considered.

In the 1988 amendments of the Indian Self-Determination Act, Congress amended its declaration of policy in 25 U.S.C. § 450a by adding these words:

> (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. *In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments,* capable of administering quality programs *and developing the economies of their respective communities.*

Consistent with the policy statements of the 1988 Indian Self-Determination amendments enacted almost simultaneously with IGRA, Congress included findings in IGRA that: "...a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government;" and also found that "...Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a

matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701. Congress further stated its intent in IGRA, to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702.

Only a year before passage of IGRA, the United States Supreme Court recognized that tribal self-government includes the right to engage in economic activity on the reservation, through means that specifically include the right to conduct gambling on reservation lands.

We would further point out that many of the provisions set out in the proposed rule are inconsistent with IGRA, including the statutory definition of Bingo which is mirrored in existing NIGC regulations. Furthermore, the language improperly adds elements and imposes requirements beyond those set forth in the statute. The U.S. Supreme Court has ruled that "when a court reviews an agency's construction of a statute which it administers, the court is confronted with two questions: whether Congress has directly spoken on precise question at issue; if the statute is silent or ambiguous (emphasis added) with respect to a specific issue, the [second] question for the court is whether the agency's answer is based on permissible construction of statute. Chevron v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837 (1984). The judiciary is the final authority on issues of statutory construction and it must reject administrative constructions which are contrary to clear congressional intent. Id. In relation to the criteria applicable to the game of bingo and other Class II games under the IGRA, this particular issue has already been decided by judiciary. The 9th Circuit Court of Appeals expressly ruled that "the criteria set forth in IGRA constitute the sole legal requirements for a game to count as Class II bingo." U.S. V. 103 Electronic Gambling Devices, 223 F.3d 1091 (2000). Other courts have arrived at similar conclusions. (See U.S. v. 162 MegaMania Gambling Devices, 231 F.3d 713 (10th Cir. 2000). Thus, the Congress has preempted the authority of the NIGC to place any additional requirements on the meaning of the game bingo.

Essentially, game classification involves questions of law: 1) the proper interpretation of the law; 2) the correct application of the law as properly interpreted. These are questions in the province of government, tribal and federal, not of the private sector. In IGRA Congress acknowledged that tribal government has exclusive regulatory authority over class II gaming. It assigned the NIGC only oversight authority. Where the NIGC believes that a tribal regulatory agency has incorrectly applied IGRA in classifying a particular game, then the process for resolving such dispute should be on a government-to-government basis and it should be resolved in advance of any enforcement action.

The process set forth in the current draft of the rule not only deprives tribal regulatory agencies of their legitimate regulatory authority over class II gaming, but relinquishes a critical federal responsibility to the private sector and interferes with the right of tribes to full due process of

law. Under the proposed classification scheme, enforcement would be based only on the question of whether the game at issue has been certified by game testing laboratory as meeting certain so-called technical standards rather than on whether the game meets the legal standard for class II designation under IGRA. While independent gaming laboratories provide valuable services to gaming regulators, their role is limited to ensuring the integrity of equipment and operating systems. Nothing in IGRA in any way suggests that testing laboratories should be placed in the position of interpreting IGRA.

Another major flaw in the draft is the absence of provisions for appeal, which, again, is a fundamental flaw in the present informal process. One could thus conclude that a purpose of the proposed rule would be to alter the legal and analytical framework so as to presume the correctness of the NIGC's interpretation of IGRA as set out in the draft so as to avoid judicial oversight of the fundamental legal question as to the proper classification of any particular game. Such a scheme violates fundamental principles of fairness and due process of law. Compounding the problem is the fact that the legal standards set forth in the first section of the draft are contrary to the holdings of the courts in numerous cases involving issues as to the proper interpretation of IGRA in the classification of games as set forth previously.

In its treatment of the Indian nations, and their property, the United States as trustee must be judged by the most exacting fiduciary standards. We therefore request that you withdraw from this effort of your proposed technical standards and procedures for the classification and approval of electronic, computer and other technologic Class II gaming machines and aids utilized in Indian gaming operations.

Sincerely yours,

Barbara Kyser-Collier

Barbara Kyser-Collier
Director
Quapaw Tribal Gaming Agency