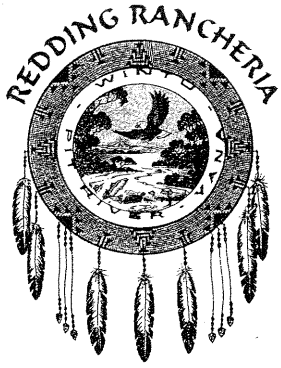

November 8, 2004

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

Re: Comments on Draft Class II Technical and Classification Standards

Dear Chairman Hogen, Vice Chair Westrin and Commissioner Choney:

Thank you for the opportunity to provide comments on the National Indian Gaming Commission's (NIGC) 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". In short, the Redding Rancheria Tribe is concerned with the NIGC's current direction and hopes that it will consider both the content of this regulation and the speed at which it is proceeding.

The Redding Rancheria Tribe s located in Redding, California and operates the Win-River Bingo Casino. We have been in operation since 1993 and currently employee more than 400 individuals. Revenues generated from our gaming operation have enable us to build a Hilton Hotel, a mini-market and purchase a warehouse in Sacramento. All these other businesses are off reservation. We have purchased land for a planned subdivision, started tribal programs that will become self supporting, have a head-start program, a health clinic and plans for a lot more. We are a self governance tribe. As you know, this enables us to have more flexibility if how we spend government funds. We are a small to medium gaming tribe which just means that we have to be plan better and just takes longer to achieve some goals.

Gaming has become an important source of revenue for our Tribe, and it is becoming increasingly clear that this rulemaking threatens its longevity. Since the enactment of the Indian Gaming Regulatory Act (IGRA), federal courts have addressed and clarified the distinctions between class II technologic aids and class III electromechanical facsimiles; clarifications that are reflected in the NIGC's definition regulation promulgated in 2002. The 2002 rulemaking brought greater clarity to class II gaming. Tribes, manufacturers, and others in the industry, have made substantial investments in reliance upon these earlier action, investments that are now threatened by the uncertainty surrounding the current rulemaking.

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 t grow and evolve with it. It is our belief that the NIGC's current rulemaking conflicts with this intent, and that if left unchecked, threatens the stability of all Indian gaming. Outlined below are some of our larger concerns with the rulemaking.

Lack of Meaningful Tribal Consultation

As an initial matter, the Redding Rancheria Tribe is greatly concerned with the manner in which this regulation is being developed. Notwithstanding the fact that the NIGC has assembled a tribal advisory committee t participate in this process, their input has been limited at best. We note in particular that the current process differs significantly from the NIGC's past interaction with tribal advisory committees, where tribal representatives were active participants not only in providing advice, but also in the drafting

2000 Redding Rancheria Rd. Redding, CA 96001 Tribal Office: 530-225-8979 Fax: 530-241-1879

process itself. Here, however, little if any of the committee's input has been incorporated into the regulation.

We also find it troubling that the advisory committee meetings held 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 as opposed to debating the law with the NIGC's lawyers.

Finially, while advisory committees bring great value to the rulemaking process, they are no substitute for consultation with Tribal leaders. We are surprised by the Commission's expectation that the tribal representatives to the Committee "consult" with tribes in their region as to the impact of this rulemaking. This is not the responsibility of tribal representatives; it is the responsibility of the Commission. To correct these problems, clarify the scope the NIGC's current direction, and bring it actions into conformance with its own consultation policy, a series of regional and national tribal consultation meetings must be held before the NIGC moves forward.

Current Rulemaking Redefines Class II Gaming

We are particularly alarmed 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. Notably, the federal courts have held that these three requirements "constitute the sole legal requirements for a game to count as class II bingo." 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 the 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.

> 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 IGRA. All such provisions should therefore be removed from the current draft.
>
> 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 "flexibility" that Congress so clearly intended. It also reverses existing NIGC guidance that allows cards with only four squares and that measure 2 inches square. The NIGC should return to its existing standard that a bingo card must be "readily visible."
>
> Timing of Card Slection. 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.
>
> 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 t prohibit bingo minders simply to enhance their argument against auto-daub.

Bingo Ball Draw. NIGC arguments that balls must be released to players "in close proximity" to the time at which they are generated, also lacks supports 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.

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.

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 classifications 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.

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.

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.

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 in not supported by either IGRA or recent court decisions, and should be removed from regulation.

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 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.

Procedural Issues and Due Process Concerns

A major concern we have with the draft 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. As the primary regulators of Indian gaming, tribes 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 compound 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 b limited to ensuring the integrity of equipment and operation 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 t the private sector and interferes with the right of tribes t full due process of law.

Technical Standards Are Overly Burdensome

We are very concerned with the first draft of the NIGC's technical standards. Not only are they excessive, but they also seem unsuitable for the class II gaming industry. While we agree that protecting the integrity of Indian gaming is an important goal, handcuffing it in the process serves no one's interest.

Rather than comment on each specific requirement, we respectfully request that the NIGC rethink this document in its entirety, 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 t 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, it is unimaginable that the NIGC would disagree. 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.

Again, I thank you for the opportunity to provide these comments. As the NIGC moves forward in this endeavor, we hope that the input of Indian country is permitted a more prominent role.

Sincerely,

James Benner

James Benner
Gaming Commission