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The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliot.

October 30, 2004

Hon. Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, DC 20005
(202) 632-7066
VIA FACSIMILE

Re: Comments on Class II Technical Standards Draft Regulation

Dear Chairman Hogen, Vice Chairman Westrin and Commissioner Choney:

On behalf of the Tulalip Tribes of Washington, I write to comment on NIGC's Class II Technical Standards Draft Regulation. Indian gaming is an exercise of inherent Indian sovereignty that is essential to tribal economic development, self-sufficiency and strong self-government. Class II gaming, including the use of "technologic aids," is essential to Indian gaming.

First and foremost, our Tribe calls upon NIGC to engage in respectful and truly meaningful government-to-government consultation concerning the Class II Technical Standards Draft Regulation. President Bush directed all executive departments and agencies to work with Indian tribes in a way that "fully respects the rights of self-government and self-determination due tribal governments." Executive Memorandum Subject: Government-to-Government Relationship with Tribal Governments, September 23, 2004.

In our view, your most recent draft is dramatically different than the earlier draft proposals, so NIGC must now begin serious consultation with tribal governments on this proposal. It is not enough to say that we have been working with a tribal advisory committee to develop the proposal because your tribal advisory committee does not substitute for government-to-government consultation, and moreover, tribal governments are aware that the NIGC has often flatly disregarded the advice that the tribal advisory committee has given you. Our tribal government expects more from the NIGC, which after all is an agency dedicated to serving Indian country. We expect you to consult in good faith with Indian tribes, with due regard for our status as sovereigns: that means,

you must work hard to close the gap between your current draft proposal and tribal government concerns before any thought is given to publishing a proposed regulation in the Federal Register. We expect that when we consult with you, you will listen with open hearts and open minds and make every reasonable effort to accommodate our legitimate concerns.

In regard to the substance of your proposal, we must all recognize that for many years, tribal governments have fought to secure recognition for our rights to use Class II technologic aids as an integral part of our tribal government gaming facilities. After tribal governments prevailed in several court decisions, NIGC adopted a regulation that explains that the touchstone for Class II technologic aids is IGRA's statutory language. Congress clearly intended to permit the use of electronic equipment, or "aids," in the play of Class II games and "that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development."[1] Legislative history shows that Congress was alert to the fact that technology would continue to advance, and expressed the intent that Class II gaming likewise evolve and grow through technological advancement. As noted in the Senate report: "The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility."[2] In your rulemaking, our Tribe calls upon you to honor IGRA's spirit and language, our Federal Court victories, NIGC's June 17, 2002 definition regulation, and the existing NIGC opinions on Class II technologic aids. We have a number of specific concerns about your proposal and they are detailed below:

- **NIGC Should Develop Technical Standards, Not Revisit Legal Standards:** While referred to as "technical standards," much of the current rulemaking focuses on the *legal* aspects of Class II gaming. This proposed rulemaking calls into question ten years of case law won largely by the tribes, as well as the NIGC's own pronouncements, and effectively redefines "bingo" and other Class II games. 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. NIGC should reject this approach and refocus on technical standards for Class II technologic aids.

- **NIGC Should Honor the IGRA's Definition of Bingo.** In IGRA, Congress placed only three requirements on a game of bingo and the federal courts have held that these three requirements "constitute the sole *legal* requirements for a game to count as Class II bingo."[3] NIGC's proposal to impose more requirements on bingo games would chill technical advancements and micromanage both the business judgment and regulatory responsibilities of tribes. NIGC should use IGRA's definition of bingo and reject arbitrary new requirements.

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[1] S. Rep. No. 100-446, at 9 (1988).
[2] *Id.*
[3] *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096, 1097 (9th Cir. 2000).

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- **Bingo Prizes.** IGRA specifies only that a game of bingo must be played for prizes. NIGC seeks to restrict both the amount and types of prizes that Tribes can offer. These are marketing decisions with tribal government discretion. Again, NIGC should respect IGRA's statutory definition of bingo.

- **Bingo Cards.** IGRA requires that bingo be played with cards, but NIGC seeks to regulate all aspects of a bingo card, including both its size and number of squares.

- **Timing of Card Selection.** NIGC's proposal asserts that a player must not be able to obtain a new card once game play begins or join a game in progress. Such restrictions find no support in IGRA or court decisions, and conflict with long-established games such as Bonanza Bingo.

- **Auto Daub is An Accepted Part of Bingo.** IGRA expressly authorizes the use of technologic aids in the play of Class II games. Further, the courts have held that the manner in which a player covers their card(s) is irrelevant. The NIGC's attempt to prohibit this advancement in technology is without legal support and disregards the fact that as Bingo is played in America, players commonly use an auto daub feature on electronic bingo minders.

- **Bingo Ball Draw.** NIGC's position 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.

- **Multiple Ball Releases.** While the NIGC has said that a game of bingo cannot be won after only one release of balls, but now seek to extend this requirement to the interim portions of a game of bingo. This aspect of NIGC's proposal violates the holdings and spirit of the *MegaMania* cases.

- **Different Interim Patterns Within A Common Game.** Nothing prohibits a game where players competing for the same *game-winning* pattern also compete 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 each constituent part of the game. To do otherwise is to add a limitation upon the game not envisioned by Congress and again, diverges from the commonly accepted requirements for bingo as played in America.

- **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. NIGC should not put arbitrary restrictions concerning "house banking" upon the game of bingo or games similar to bingo. (Any reference to a court ruling on a particular state's law must be rejected in analyzing IGRA.)

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- **Broadening Participation.** Contrary to the latest draft, technologic aids are *not* uniformly required to broaden participation but merely to facilitate the conduct of Class II games. Requirements calling for a minimum of either six players in each game or a two second delay between games should not be placed upon the game of bingo. The focus should be upon ensuring that a player does not play alone against a machine, a standard that is satisfied by requiring the participation of two or more players.

- **Paper Pull-Tabs Are Not Required.** NIGC seeks to require "tangible," or paper, pull-tabs when the game of pull-tabs is played with electronic equipment. This presumption is not supported by either IGRA or recent court decisions.

- **Focus on IGRA's Class II Technologic Aid Provisions, Not the Johnson Act.** NIGC's 2002 rulemaking, supported by the decisions of federal appeals courts, removed the Johnson Act from the analysis of Class II technologic aids under IGRA. Thus, an analysis of Class II technologic aids should begin with an inquiry as to whether the equipment is a technologic aid to a Class II game. If so, it should end there. NIGC should avoid any return to the notion that the Johnson Act should be included in a game classification analysis under IGRA.

- **Due Process Concerns.** Under the current NIGC advisory opinion process, there is no clear avenue for an appeal to the NIGC to secure a final agency decision that a tribal government may appeal to federal court. NIGC's draft proposal continues this problem by providing no clear avenue for appeal of the full Commission.

- **Bypasses Tribal Regulatory Agencies.** IGRA establishes tribal government regulatory agencies as the primary, day-to-day regulators of Indian gaming. Thus, tribal governments retain the authority to engage in Class II gaming pursuant to a tribal gaming ordinance approved by NIGC and NIGC is empowered to monitor Class II gaming. In the first instance, tribal regulatory agencies should retain the authority to review any gaming laboratory decisions concerning Class II gaming subject to NIGC monitoring. NIGC's proposal effectively cuts our tribal gaming regulatory agencies out of the process.

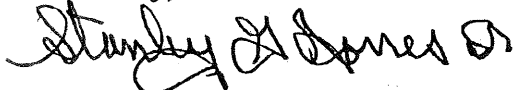
In closing, our Tribe supports the call of the National Indian Gaming Association and the National Congress of American Indians to develop a proposal on Technical Standards for Class II technologic aids that honors IGRA's spirit and language, our Federal Court victories, NIGC's June 17, 2002 definition regulation, and existing NIGC opinions on Class II technologic aids. Alternatively, we ask you to withdraw your proposal.

Again, please make every effort to respect the comments submitted by sovereign tribal governments. As an agency that represents another sovereign, the United States, NIGC must work to honor the sovereignty of tribal governments if you are to fulfill your mission within the framework of sovereign governments within America. We call upon

you to amend your proposal to take tribal comments into account prior to any effort to develop a draft for publication in the Federal Register.

On behalf of the Tulalip Tribes of Washington, I thank you for your thoughtful consideration of these important comments. We look forward to working with the NIGC in a meaningful government-to-government consultation regarding this matter.

Sincerely,



Stanley G. Jones, Sr.
Chairman