

**Tribal Advisory Committee Meeting
December 5, 2006**

**Summary of Public Comments Received on Proposed Class II Facsimile
Definition and Classification Regulations, 25 C.F.R Part 546**

Facsimile Definition

- Having multiple players is insufficient to prevent the players from playing against the machine. Consequently, we should remove the phrase: “rather than broadening participation among competing players.”
- The language “rather than broadening participation among competing players” should be deleted. It does not serve a useful purpose and is not called for in IGRA.
- In proposed § 502.8(b)(1), the definition suggests that a bingo, lotto or other game similar to bingo is an electronic or electromechanical facsimile when that electronic format incorporates all of the fundamental characteristics of the game, instead of simply incorporating the fundamental characteristics of the game. The word “all” should be eliminated, both to be consistent with subparagraph (a) (which does not use the word “all”), and because it overly restricts the definition; under the proposal, if a game played on a device incorporates anything less than “all” of the fundamental characteristics of a game, it may be argued that such a game does not meet the definition of “electronic or electromechanical facsimile.”
- The proposed definition at section 502.8(b)(1) continues to make a distinction that rests upon “broadening participation among competing players,” a distinction that is not called for by the IGRA, and does not serve a useful purpose here. The critical distinction between a Class III device and a Class II device rests on whether a player of a Class II device is playing with or against the machine that significantly applies an element of chance to win or lose. Nothing in IGRA suggests that a Class III device is acceptable for Class II gaming simply because multiple players are engaged.
- The definition change is an improvement over the 2002 change which failed to meaningfully distinguish between Class II and Class III by allowing wholly electronic formats.
- Even if there are multiple players, one can still be playing a facsimile with or against the machine.

- Wholly electronic bingo should be acceptable provided multiple players are competing.
- Do not change the existing definition as it is an appropriate representation of case law and provides a basis for distinguishing Class II from Class III. The current definitions do not permit operation of facsimiles as Class II.
- The proposed definition fails to recognize that the relevant test for whether a game is Class II or Class III is whether the electronic format changes the fundamental characteristics, not whether the game is played in an electronic format.
- Sections 502.8(a) and (b)(1) should be clarified by including the language “any, some or all of the fundamental components of a game.”
- The test should be whether electronic format changes the fundamental characteristics of Class II game by permitting a player to play alone with or against a machine. The Megamania court agrees with this interpretation.
- Bingo, lotto, and other games similar to bingo, are not facsimiles when played in an electronic medium.
- A game does not become a facsimile of bingo because a player only needs to put money in the machine, press a button to start the game, and nothing more.
- The definition change for "facsimile" should not have been published separately from the other substantive class II provisions.
- In order for a “bingo” game to be a facsimile, it must look like “bingo” but not actually be “bingo.” This means that any game that is bingo is not a facsimile.
- The proposed definition change fails to recognize that both the legislative history of IGRA and case law indicate that the relevant test for facsimile is not whether the game is played in an electric format, but whether the electronic format changes the fundamental characteristics of the Class II game by permitting a player to play alone, with or against the machine.
- The proposed definition of facsimile is incorrect. A facsimile exists only if an aid fundamentally changes the game.
- A bingo game played using technologic aids only becomes a facsimile if the technology permits the player to play “with or against a machine rather than with or against other players.”

- The proposed definition of an electromechanical facsimile not only abandons existing clarity but takes the industry back in time. This action is especially troubling given the fact that the existing definitions have been accorded deference by the judiciary.
- The proposed facsimile definition provides no certainty that a game otherwise compliant with the NIGC's classification standards for a technologic aid would not also be deemed an impermissible facsimile.
- The proposed definition effectively creates a presumption that electronic play of Class II games is illegal.
- The proposed definition does not provide the clarity sought and is itself unclear in meaning of "incorporating" all fundamental characteristics.
- The proposed facsimile definition should be consistent with the Johnson Act gambling device definition to promote uniform federal standards and therefore include any or all elements of games of chance.

NIGC Authority

- NIGC lacks statutory authority to promulgate these standards.
- The general rulemaking authority of the NIGC, as set forth at 25 U.S.C. 2706(b)(10), is insufficient to permit it to issue the proposed regulations, for its role is limited to monitoring and oversight.
- These regulations grant NIGC authority that simply does not exist under Federal law.
- The restrictions on Class II gaming proposed by the NIGC exceed the agency's authority under the Indian Gaming Regulatory Act (IGRA), destroy the viability of Class II gaming and constitute a breach of the federal trust responsibility.
- These regulations are not consistent with NIGC's statutory obligation to protect tribal gaming and promote economic self-determination.

Drawing the bright line

- Regulations will promote certainty and allow tribes to invest in machines and manufacturers to invest in the development of games.
- Clarifying regulations are critical to the success of the regulatory agencies.

- Bingo games should not have spinning reels or a one-touch game but should look like bingo to a player.
- The rules have not gone far enough and these non-bingo games must be reserved to tribal-state compacts.
- No court case or decision concludes that any other graphic display would be considered a “technological aid” to playing bingo. Mechanical reels or similar displays only confuse the player and do not “aid” Bingo. The clear intent of the “technological aid” provisions would be to facilitate play or allow other players to participate, not to change the appearance of what is being played.
- Any display that appears to the players as anything but bingo misrepresents the game and does not comply with IGRA.
- While a bright line is necessary, the proposal does not sufficiently address problems of fraud and consumer protection inherent in Class II and Class III games when random outcomes are converted to displays of spinning reels.
- The NIGC should clarify the differences by proceeding with enforcement actions against those who they think crossed the line or by issuing classification regulations as a bulletin.
- The distinction between Class II and Class III already exists. Class III allows a player to play against the machine with an infinite set of possible outcomes while Class II provides players the ability to play against others with a finite set of possible random outcomes.
- IGRA makes no distinction between bingo played live and bingo played with aids. The regulations make this distinction and are therefore arbitrary and capricious.
- It is unfair of NIGC to change the rules mid-stream.
- The NIGC is using tribal fees to work against tribes.
- The regulations are restricting how games are played rather than providing clarity.
- These regulations will prevent the tribes from advancing technology, and it is not clear how the regulations will keep up with technological changes.
- The regulations should allow Class II games that play and feel like Class III.
- The NIGC should only enact technical standards for Class II games that involve working with labs to review games.

- The NIGC should drop the classification regulations and do technical regulations.
- So long as the game of bingo is in the box, it doesn't matter how the game is played.
- The existing regulations don't make clear the difference between a Class II game and a casino slot machine. Not sure if the proposal will state the difference clearly.
- Drawing a bright line is not possible – Class III operations will blur any line drawn by copying or making facsimiles of successful Class II games, *viz.* server-based games.
- The regulations are satisfactory the way they are.
- It is not necessary to draw a bright line between Class II and Class III.
- The proposal flies in the face of the Republican tenets of less government and less regulation.
- Patrons need to be trained to play the Class II machines.
- The NIGC should interpret ambiguities in favor of the Tribes.
- IGRA does not require that Class II and Class III games should be distinguishable from the floor. Classification system is merely for regulatory purposes.
- The proposed standards prevent electronic aids to session bingo from being played in a purely electronic medium, unless they conform to the restrictions being imposed on Class II machines.
- If finalized, no electronic games currently classified by the NIGC as class II will survive – they will become Class III games.
- It is not reasonable to justify the elimination of the class II industry on the basis that tribes can simply fall back to compacted gaming.
- It is manifestly unjust to render that which is lawful unlawful due to political pressure brought by another federal agency displeased with the concept that tribal governments have been recognized as possessing the sovereign authority to establish and regulate a successful and lucrative industry without state interference.
- The bright line between Class II and Class III should be whether or not the game is house banked.

- Can drawing a bright line be done other than by regulation and thus without threat of fines or closure?
- To ensure a bright line, players should be required to daub each number individually and alternative displays should be prohibited.
- The proposed rules fail to recognize the interests of individual states in the gaming activities of their Indian tribes. The proposal should be amended to give states due notice as to the gaming activities within their boundaries. The preamble fails to recognize the required judicial determination that the state has refused to negotiate a compact with the tribe in good faith.

Compact Negotiations

- The proposal decreases tribes' leverage in compact negotiations. Having viable Class II games is leverage against states.
- The NIGC is siding with states in the compacting process.
- Some state compacts limit the number of machines; thus to expand, Tribe needs to rely on Class II machines.
- NIGC policy is now to assist states in participating in gaming revenue.
- NIGC has an obligation to restore the balance between tribes and states by making a viable Class II game.
- Why take away CA tribes' leverage to solve a problem that seems to exist primarily in OK?
- Why take away OK tribes' leverage for a CA problem?
- The state of OK used the possibility of these regulations as leverage against the tribe in compact negotiations.
- These regulations will hinder tribes' ability to negotiate compacts with states and in some cases bankrupt tribes.
- Lack of clarity in Class II devices is one of the greatest culprits and most widely used vehicles employed by tribes and Las Vegas management companies when seeking to force states to accept a compact.
- Tribal leaders and their Las Vegas investors have become so brazen in their threats to open casinos with or without state approval, citing the self proclaimed inevitable Class II fall-back option and warning of "no

revenue sharing, no state control” as a means of intimidating states to enter Class III compacts.

Congressional Intent/Prior Case Law

- The proposal is not consistent with Congressional intent, prior Commission interpretations, and prior court cases.
- The proposal is unnecessary because the only requirements are the 3 statutory criteria set by Congress and that the aid is readily distinguishable from a facsimile.
- The term “game of bingo” should not be redefined because Congress only placed three requirements on a game of bingo.
- The “readily distinguishable” language does not apply as Congress’ reference to it was simply an example that applied only in narrow circumstances.
- Congress didn’t intend to limit bingo to its classic form. That’s why the NIGC cannot limit cards to 5x5 cards with 75 balls.
- The NIGC’s regulatory scheme would limit bingo and games similar to bingo to a narrow, technologic format, contrary to Congressional intent and holdings of cases.
- Tribes should be allowed to enjoy the benefits of advances in technology rather than being punished.
- The NIGC’s attempt to justify an unnecessarily constricted view of Class II gaming does not “promote tribal economic development or tribal self-sufficiency,” a principal goal of IGRA.
- Senator McCain has made the comment that the machines that are out there today are not what the Congress intended. We think the Senator should focus less on the machines and more on the goal of IGRA to advance economic development in Indian country.
- Megamania wouldn’t fit within proposed regulations for the following reasons: 1) arbitrary value of game winning prize; 2) for ante up games, requiring refund if everyone drops out; 3) length of time for ball release; 4) screen display requirements.
- The five circuit courts of appeal decisions were based on the fact that the NIGC considered the games in question to be class III, but yet these court decisions rejected the NIGC’s definitions.

- The games that tribes are offering have consistently been upheld by the courts to be Class II gaming and not facsimiles prohibited under IGRA.
- Any confusion between what is class II and class III only lies with the NIGC and DOJ. Tribes, courts, and the public are clear about the distinctions.
- These regulations are an administrative reversal of judicial decisions.
- The proposed regulations undermine congressional intent that Tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development.
- The legislative history shows that Congress understood that technology would continue to advance, and expressed the intent that class II gaming likewise evolve and grow through technologic advancement.
- The NIGC uses court cases selectively in supporting its position.
- Tribes have manipulated the definition of Class II gaming and the clear objective of IGRA by introducing slot-machines that inappropriately bypass the original intent and definition of Class II bingo-style gaming.
- When Congress approved the definition of Class II gaming in 1988, a bingo-hall meant a traditional bingo-hall, not a casino-style resort with so-called Class II bingo machines that look like, act like, and sound like Class III slot-machines.

Generally Pro Classification Regulations

- It is important to distinguish between Class II and Class III games. Interchangeable Class II and Class III games undermine IGRA's requirement for compacting and intent that states have a say about impacts on them from Indian gaming.
- The NIGC's proposed reforms to the Class II are a promising step in the right direction toward a comprehensive overhaul of Indian gaming laws that are outdated, broken, and being manipulated by special interests.
- It is important to not allow the current wide open definitions that are in place. They work against the intent of IGRA by assuring regulation through tribal-state compacts.
- We support your effort to better define the distinction between Class II and Class III games as well as the use of electronic, computer, or other technologic aids at tribal gaming facilities.

- We have no strong objection to removing the term “house banked” from the definition of a “game similar to bingo.”
- How can you logically tie an electromechanical facsimile of the game of bingo with any ancestral game? Therefore, I am opposed to any changes to the proposed regulations that would expand Class II gaming to allow games to be played on devices resembling slot machines, or that are in fact electronic facsimiles of non-ancestral games.
- The proposed standards separate electronic aides to legitimate games as defined in the Indian Gaming Regulatory Act from an electronic or electromechanical facsimiles of games of chance, which I consider to be critical to the intent of the establishment of Class II gaming.
- New advances in gaming make the interpretation and understanding of “technological aids” verses “electromechanical facsimiles” more difficult.
- If the state is not making any money and we do not make them a partner because we are arguing that everything out there is Class II, eventually they are going to question why they are giving us Class III. There needs to be some clarification.
- The proposed rule represents an improvement over the current rule. The ability to distinguish between “aids” and “facsimiles” remains an important issue to some States, as the latter devices, along with “slot machines of any kind,” are by definition Class III gaming devices and require a tribal-state compact for their lawful use on Indian lands.
- While we support the steps the NIGC is taking to identify and define Class II games, we are not in agreement that these rules have gone far enough to be effectively implemented. We are greatly concerned that less than adequate rules will, by regulation, allow machines that we believe to be precluded by IGRA into Class II environments.
- In the State of Montana a large number of electronic gambling devices referred to as Class II are now in play on several reservations, which machines in every rational respect appear to be – and are played by customers as – Class III gambling devices. These alleged Class II devices are in truth nothing more than slot machines and, in fact that is how they are advertised. Because NIGC has not acted to rein in such practices, some tribal operators have been emboldened to stretch the “Bingo” latitude even wider.
- Regulations would properly classify many bingo games as Class III, requiring a compact for play.

Economic Impact

- Tribes may have to close if you implement these regulations.
- Regulations would deprive tribal casino operations of all economic value and thus be an improper regulatory taking without due process in violation of the 5th amendment.
- Using a game similar to the proposal produced 20% of floor average win per unit.
- A new category of “games similar to bingo” creates problems for some tribes whose facilities are uniquely situated and cannot play “games similar” in the same location where we play bingo.
- Tribes should be able to play “bingo” in the same manner as the State plays it pending Secretarial procedures or a compact.
- Tribes will lose players if we slow down the bingo games.
- The proposal will make it impossible to compete with Class III.
- Tribes may have to close their facilities if the NIGC implements these regulations.
- Tribes need machines that are good to play because some tribes cannot get a compact.
- Economic impact includes reduced player appeal and the time it will take to retrofit existing machines or get new ones. Tribes will lose players if the regulations slow down the bingo games.
- Eliminating the auto daub feature will cause a significant economic impact.
- The regulations lock Class II into a static position and prevent any further evolution beyond existing technology. Non-Indian gaming is not so limited.
- The proposed regulations limit the kinds of Class II games available for play.
- Many tribes have planned development in reliance on the existing Class II games.
- The proposed regulations will only produce litigation and uncertainty, and so the cost of money goes up.
- The proposed regulations will prevent financing for new facilities.
- The games under the proposed regulations will be less entertaining.

- In areas that have slots and the tribe is in an isolated location, it is hard to get customers to come back with existing Class II machines. Therefore, the proposed changes would devastate the operation.
- Sitting beside a Class III machine, the Class II machine is not going to be as popular. People need to be trained on the Class II machines; they become more popular; despite that, the Class II machines only make about ½ of what a Class III slot makes.
- Patrons have to be trained to use Class II machines.
- Machines based on General Counsel opinions are a viable alternative for a Tribe with a ceiling on its Class III games.
- As a general matter, none of the machines in play now would meet the requirements of the regulations. All of our tribes' machines would either have to be modified or replaced.
- Existing machines should be grandfathered to reduce economic impact of proposal.
- An economic impact study should be done before adopting regulations.
- Reduced income means reduced economic development.
- Reduced income from regulations disproportionately affects smaller Oklahoma tribes / operations.
- Part of the economic impact for some tribes is that each is limited a certain number of Class III machines. Consequently, to expand, tribes need appealing Class II machines to supplement their Class III games.
- The proposed changes will make it very difficult to get Class II machines designed, built and provided.
- Existing machines do not meet the regulations and will need to be modified.
- Slowing down the game will make them less appealing and will generate less money.
- Games under these regulations will not be profitable.
- The regulations essentially bar tribes from playing bingo – which is not their intended result.

- The regulations force OK tribes to pay a tax to the state as they are left only to offer compacted games.
- Eliminating Class II games also affects manufacturers. Some will be put out of business. Other will lose business.
- One Tribe has had several Class II games side by side. The older, slower games bring in an average of \$14 a day. The older took about 10 seconds to play. The newer, faster games bring in \$70 a day per game. They are one-touch games. Tribe has taken out the older games. Based on the differences, the Tribe expects to lose \$96,000 a month if it has to go back to the slower games. Tribe has committed funding to expansion and would expect to be wiped out if it lost this income.
- Under conservative projections, tribes stand to lose over \$1 billion a year based on 50,000 Class II machines. This also impacts the Tribe's ability to pay back loans.
- The Class II revisions would have an adverse cascade effect on tribal services and tribal businesses and the neighboring economy.
- The delay in instituting these regulations has allowed for wide open illegal gaming and the delay is adversely impacting the 2000 non-tribal operators in Montana who are limited to 20 machines and \$800 payouts.
- Part of the appeal of the Class II games is that the machines can take money; can have a large progressive jackpot; can have higher wagers.
- The economic impact of the proposed regulations would be \$1 billion a year. That figure was based on its operation receiving \$185 a machine; its neighbor tribe receiving \$300 a machine; at 365 days a year for \$50,000 machines in Indian country; plus a local multiplier because every local area would be affected.
- Generally, the Tribes in Idaho do not play Class II. They want such games available, however, if necessary.
- The NIGC should evaluate and release the revenue numbers for Class II gaming as distinct from overall gaming revenue to properly assess the economic impact.
- The proposed rules constitute a serious threat to a growing industry that has brought jobs, economic development, health care and higher standards of living throughout Indian country.
- Tribe will be unable to fund its tribal programs, which are now almost solely funded by the casino.

- The NIGC does not have the resources to implement the enforcement mechanisms for the proposed rules, and has admitted such, which ensures even greater delay and cost to the tribes.
- If new regulations are enacted some tribes would not be able to enter gaming on equal footing with other tribes.
- If these regulations are implemented the entertainment value of the game will be diminished.
- If these regulations are enacted our Class II machines would not be able to compete with the Class III machines that are near our facility.
- The increase in time it takes to play the game would diminish the Tribes income by 40 - 60% thereby having a devastating impact on tribal programs.
- The proposed regulations unnecessarily restrict the types of game we can offer and go far beyond the line drawn by Congress and would have a dramatic effect on our revenues.
- Changing the regulations will not only have an effect on our tribe but on the larger community that relies on the tribal gaming commission for jobs.
- These regulations will result in further litigation for tribes and the government.
- Many tribes have invested in an expansions of facilities based on the revenue that can be generated from the machines that are in play today. If these machines are outlawed we may lose our investment.
- Our facility is in a remote location and if you slow the game down it will be less attractive and fewer people will make the trip to play.
- The casino is the only source of income for the tribe so any loss of revenues will have a devastating effect on tribal programs. It is used to fund health care and education. These programs are barely funded now, if the changes went into effect we could no longer sustain them.
- The proposed regulations will have devastating economic impacts on both the Tribe and the City of San Pablo as all of the Class II devices currently being operated would be prohibited. The Casino provides 500 jobs to the local community and the financial assistance provided by the Tribe accounts for 67% of the City of San Pablo's general fund.

- If you slow the game down to three times the speed of a slot machine the player will simply get bored and leave thus further reducing the tribal revenues.
- According to industry experts, the implementation of the proposed rule would result in at least a 60-75% reduction in our gaming revenue given that class II gaming represents substantially more than three-quarters of our gaming activities.
- These regulations could force tribes into a default situation with regards to loans and financing agreements.
- Massive layoffs affecting thousands of employees are foreseeable.
- Approximately half of our patrons set a dollar limit on spending in our facilities ranging from \$50 to \$200 on average. In experimenting with the introduction of compacted games, we experienced a reduction in the average hold of the compacted machine in comparison to the class II gaming terminals that were replaced.
- There seems to be a myth that the playing of electronic bingo games at a faster pace allows tribes to make as much money as slot machines. This is simply not true. We operate our game along side slot machines at present. Our games play very close to the same speed, but generate less than half the revenue in most cases.

Tribal Sovereignty

- The proposed regulations essentially remove control of the regulation of Class II gaming from tribal gaming commissions, shifting authority to the NIGC.
- The proposed regulations take a step toward further diminishing tribe's inherent authority to conduct gaming.
- The regulations are an unnecessary extension of Federal authority that infringes on tribal sovereignty.
- The effect of proposed regulations is that the NIGC supplants tribes as primary regulator of this kind of Class II game.
- The regulations invade tribal sovereignty and the right to exercise authority over tribal affairs.
- Tribes should be able to classify games. Proposed rule gives too much power to the NIGC.

- Tribal gaming authorities could make classification determinations as necessary, pursuant to legal standards allowing wholly electronic technologic aids. The NIGC may object and the objection may be resolved by reconsideration, government-to-government negotiations, or formal NIGC declaratory decision.
- Tribal gaming commissioners should be responsible for evaluating and approving Class II games.
- Self-regulated tribes should be allowed to classify games and certify labs and that NIGC should limit itself to objections similar to the employee licensing requirements.
- The proposed NIGC regulations forebode a new Federal termination policy.
- By having these government-to-government consultations the NIGC is reaffirming our tribal sovereignty.
- This as a paternalistic attempt to keep Indian nations down.
- The regulations are another attempt to take away gains and successes the tribes have achieved.
- This NIGC proposal reflects a profound mistrust of tribes and their gaming agencies as well as a deliberate disregard of tribal sovereignty and self-determination.

Consultation

- The comment period must be extended once again consistent with the recent *Yankton Sioux* case to give tribes time to comment on our economic analysis.
- The NIGC should restart the process using negotiated rulemaking.
- The NIGC should consult with manufacturers and labs.
- Need more consultations in more states and true government-to-government consultations.
- The manufacturers should have been consulted during the process.
- The regulations should be sent to tribes before they go final.
- A one month period in six locations is insufficient consultation.

- The makeup of the TAC did not adequately represent all tribal interests; many tribes thus felt a lack of involvement in the consultation process.
- The consultations and TAC participation were not meaningful because regulations were revised so little.
- The rulemaking process lacked meaningful consultation because the TAC was not invited to participate in the drafting process and little if any TAC input was incorporated in the proposed rule.
- Tribal comments submitted during the drafting process should have been made public by the NIGC.
- The NIGC did not comply with its own consultation policy because it did not engage in meaningful government-to-government negotiations with Tribes.
- The NIGC should be required to hold public hearings on the regulations with comments and submissions recorded as part of the administrative record.
- The NIGC should extend the comment period so that Tribes have the opportunity to view both the Technical and Classification standards during the same period.
- The NIGC found the tribal consultation process to be problematic, noting that there were many times during the development of the proposed regulations that the tribal committee representatives strongly disagreed with decisions made by the Commission. Common sense suggests that consultations and deliberation would involve disagreement. It is only through proper negotiation and respect for the status of tribes as sovereign nations that the best interests and longevity of tribes are properly represented.
- Many of the Tribal Advisory Committee comments and suggestions were not included in the proposed regulation.
- One meeting with the Tribe is not meaningful consultation.
- Insufficient time was set aside for consultation with each tribe; this was “collusion” on the part of NIGC to keep tribes away from one another.
- The consultations were not meaningful because tribes did not have enough time to comment and because they are only comment sessions not collaborative sessions.
- The consultations were “ceremonial.”
- The consultations were a mere “formality.”

Compliance with other Federal Statutes/Executive Orders

- The NIGC has failed to produce any economic assessment in accordance with the Regulatory Flexibility Act.
- The NIGC has failed to produce an economic assessment in accordance with the Small Business Regulatory Enforcement Fairness Act.
- The NIGC has failed to produce an economic assessment in accordance with the Unfunded Mandates Reform Act.
- The NIGC has failed to provide a takings assessment in accordance with Executive Order 12,630.
- The NIGC has failed to adhere to any meaningful government-to-government consultation in accordance with Executive Order 13175.
- The NIGC failed to provide a tribal summary impact statement under Executive Order 13,175.

Department of Justice

- The fact that the NIGC engaged in negotiations with the DOJ regarding class III classification standards is a fundamental breach of the IGRA.
- The proposal seems to be intended to merely appease the DOJ and its extreme and losing views.
- The tribe has a real concern about DOJ's influence in the process.
- The NIGC should not acquiesce in DOJ's interfering in its area of responsibility.
- The regulations should not proceed until DOJ makes certain its Johnson Act position. Otherwise, regulations will only produce litigation, not add clarity or stability.
- The NIGC should not be working on behalf of DOJ to the detriment of tribes.
- Because the United States Department of Justice still contends the proposed regulations concern games that violate the Johnson Act, even tribes and game manufacturers that fully comply with the NIGC proposal could still face civil enforcement actions or even criminal proceedings brought by the Department of Justice.

Bingo - Auto-Daub

- Auto-daub is an acceptable technologic aid because daubing at the time of release is not a fundamental characteristic of the game.
- There is no legal basis for the prohibition on auto-daub, which is permitted in live play through out North America.
- The prohibition on auto-daub unnecessarily slows down the game.
- Auto-daub does not satisfy the requirement that numbers be covered when called.
- The prohibition on auto-daub makes the game less attractive to players.

Bingo - Display

- It doesn't matter whether a player knows if he's playing Class II bingo or a Class III slot.
- "This is a bingo game" display requirement is paternalistic.
- A bingo card must merely be present and legible.
- The NIGC should define alternative display to clarify what must be displayed.
- It is unclear whether the video display was supposed to be 50% bingo card or bingo game.
- Two inch high letters stating that "This is a bingo game" do not have anything to do with classification of a machine.
- Display of bingo game makes "This is a Game of Bingo" requirement unnecessary. Regardless, the requirement is arbitrary.
- The requirement for ½ screen display is logical but there is no case law that supports allowing a spinning reel or other display. Such displays merely confuse the player rather than facilitate play, as aids are intended.
- Remove the two-screen and multiple-card display requirements. They are unnecessary.
- There's nothing in IGRA that requires that you know whether you are playing bingo.

- We do not understand or agree that 51% of the screen needs to be devoted to the Bingo display or to the bingo card.
- The regulations are not clear that the notification stating, “This is a Game of Bingo” needs to be part of the display or just on the cabinet.
- No matter what the outside looks like, if the game is bingo then the machine is class II.
- Because of varying screen sizes, some manufacturers would be denied certification even though they have devoted more of the screen space to the bingo display than other manufacturers who have decided to produce devices with smaller displays.
- Based upon the refresh rate of many monitors being used today, you can expect to get one ball about every one-tenth of a second. On a 75 ball release the time of the game would be extended at least seven seconds.
- IGRA does not require machines be distinguishable on their face as Class II machines.
- The size of the cards has nothing to do with whether it is Class II or Class III.
- You state that the card shall be at least 4 square inches. Our card is that size so what else constitutes the game of bingo? Does the button panel since it has daubing buttons? Does the bingo call board? There needs to be some clarity as to what is included in this “game of bingo.”
- As alternative language, the entertaining display can be limited to no more than X% of display.
- Merely labeling a game – “This is a game of bingo” – indicates that the Commission is improperly focused on perception, rather than reality, of the game itself.

Bingo - Player Participation

- The player only needs to play against one player to be Class II and the requirement of a 2 second wait for more is without legal basis.
- The broadening of participation is not a requirement for technical aides.
- By requiring only those games using the same common pays, patterns, and probabilities to play together, machines on the floor using different

payback percentages will not be available for common play. This will reduce the potential field of players eligible to be in a common game.

- The regulations should require a minimum of 2 players and be designed to provide an opportunity for more.

Bingo - Play of Game

- There is no logical basis for permitting bonanza bingo in live play but not electronic. There is only one form of bingo, both are live.
- Lotto is a separate game from bingo, as evidenced by its listing in IGRA as a separate game.
- Issues such as penalties for not daubing, sleeping, and catching up if you sleep are all house rules, not a fundamental part of what constitutes bingo and should be left to the operator.
- The sleeping rule should be revised to allow players to catch-up.
- The proposal's restrictions on players obtaining a new card once game play begins or joining a game in progress brings new and unwarranted limits to bingo and games similar to bingo.
- It is unclear from the regulations whether numbers need to be released one at a time from the server to the terminal or if it is the intent that numbers be released one at a time on the display.
- No statute or case law supports prohibiting players who are competing for the same game-winning pattern from competing for different interim patterns.
- The proposal's requirement that at least three numbers or designations be covered to constitute a winning pattern has no basis in law.
- Multiple ball releases are not necessary.
- Two second rule, number of people who play, display requirements, restrictions on pre-drawn numbers have nothing to do with classification or the fundamental characteristics of the game.
- Several provisions are simply arbitrary: 1) five grid card; 2) 75 balls; 3) elimination of pre-drawn numbers; 4) 2 second delays; 5) multiple ball releases; and 6) prohibition of one-touch auto-daub, and should be deleted.

- A variation in card size and the number of balls allows for a more enjoyable game which broadens participation and is permitted in session bingo and internationally.
- Limiting bingo cards to the 5x5 cards and placing all others into a game similar to bingo is inconsistent with the General Counsel's March 27, 2001, Wild Ball Bingo opinion.
- There is no legal basis for requiring cards to be 4 square inches.
- The requirements for multiple ball release and the *seriatim* release of numbers has no basis in law.
- Requiring that numbers rather than patterns are slept is inconsistent with the General Counsel's April 4, 2005, opinion on Nova Gaming Bingo.
- The NIGC should rely on the reasoning in the NIGC Mystery Bingo opinion that allowed for a flexible algorithm to encourage participation of more than two players rather than establish a time certain of 2 seconds for persons to enter a game. Therefore Section 546.6(a) should read: "The system must require a minimum of two players for each game."
- Pre-drawn numbers should be allowed.
- Pre-drawn numbers should not be allowed.
- The proposal would no longer allow agents as authorized under a November 14, 2000, General Counsel Opinion on National Indian Bingo.

Bingo – Game Timing

- Setting time for participation or other events in the game is not a means for drawing a line between Class II and III.
- There is no value in waiting for six players.
- Facilities that are not linked to other facilities may not be able to get 6 players at some times during the day and players would be left waiting for a game to begin.
- The two second delays are burdensome and potentially confusing if a daub is not met with a response from the game.
- By adding a two second waiting period at the beginning of the game, players will become bored and not pay attention to the game.

- Sections 546.6(c) and 546.5(i) which refer to the 2 second delays should be deleted and replaced with a new 546.6(c) which states: “the game must provide for two or more releases of numbers or other designations.”
- Slowing the game or specifying time it takes to daub or play does nothing to highlight the distinction between Class II and Class III.
- The two second delay will force synchronicity between players and will remove the spontaneity of the games.
- The two second delay requirement is completely arbitrary.
- The game should proceed immediately after all players daub.
- The issue involving timing between enrollment and ball release will make the game commercially unacceptable.
- It appears the rule is trying to say that a game should take 6 seconds. However, the play of the game could and most likely will take upwards of 15 seconds.
- A player comes into a gaming environment with a predetermined amount of money to play with. In most cases that is all they will spend and it is our job to give them a fair amount of entertainment time for that money. If you slow the game down too much they will never spend their predetermined amount because they become bored and leave.
- Why should an arbitrary amount of time be placed on the bingo game as long as you have the element of players playing against each other and not the machine?

Bingo - Prizes

- The minimum 1 cent prize makes sense.
- The 20% requirement for the winning prize would make the interim and consolation prizes much smaller.
- The 20% wager requirement, the prominent two inch display, the display requirement of ½ of available space for the bingo game, and the forfeiture of slept numbers are all inconsistent with the Mystery Bingo opinion.
- 20% requirement is appropriate.
- Different interim patterns should be permitted in a common game because the game is still won by the first player to get the game winning pattern. The

proposed rule may limit participation because it creates a grouping of like games on the server.

- The game should not have to return a prize of at least 20% for it to be Class II. This requirement is unsupported in law.
- It is not possible to always get a 20 percent payout. It might be better to say an average 20% payout.
- The proposal that the game winning prize must be at least 20% will require a high level and complete redesign of our bingo games.
- It is stated that the game winning prize should have a significant value. The term significant is open for interpretation.
- We have expended great financial resources in designing our math pay table across some 70 game titles at various denominations. It will take us many months to recalculate this math with no assurance that any of it will play.
- The requirement in 546.6(n) that a slept award be available to a subsequent winner encourages collusion and cheating.

Bingo - Prohibition of Random or Unpredictable Prizes

- Nothing in IGRA prohibits random or unpredictable prizes.
- Mystery Bingo, a bingo game that is the subject of a General Counsel advisory opinion, does meet this requirement. Delete the prohibition.

Ante Up Bingo

- The ante up provision does not allow the player to win the first prize. Since no one person can win on the first drawing, it is impossible for games to be played for a prize.
- Requirement that money be returned to all players if all leave ante-up game before a game winning pattern is achieved is unclear. What happens if interim patterns are hit? This requirement is inconsistent with the *Megamania* case.

Pull-tabs

- Bingo can be wholly electronic; therefore, pull-tabs should be too. Old court cases that conclude otherwise have been overturned by the bingo cases.

- The prohibition on credits is inconsistent with court decisions that the game is in the paper.
- The collecting of credits does not change a game from an aid to a facsimile.
- Inability for player terminal to accumulate credits or award cash hinders player flexibility and use of current cashless technology.
- The requirement of a tangible medium is inconsistent with 9th and 10th Circuit holdings permitting electronic cards.
- It is not necessary to take a paper pull-tab to a cashier. Instead, have the machine accumulate the prizes.
- Commenter concurs in pull-tab classification criteria.

Game Certification Process

- No finality under the regulations – any positive determination by a lab or tribe can be overturned by Chairman at any time.
- Certification determination is a vested property right, the undoing of which by the Chairman after deadline requires due process.
- The “good cause” standard for rejecting lab certification is undefined, but should not be.
- NIGC should not be able to raise objections at any time after a game is certified.
- The Commission has an infinite ability to object to a classification. An objection should only be permitted after 60 days where it is shown that the requesting party misrepresented its product or the testing laboratory committed a material error in its testing.
- Regulations are not clear that you can rely on the game certification done for a different tribe.
- Under the proposal, tribes are prohibited from establishing their own testing labs.
- NIGC’s opportunity to revise a classification decision after 60 days would cause uncertainty.
- Regulations should allow for the redacting of reports to protect confidential commercial information. As proposed, vendors do not have the opportunity to object to release.

- It is inappropriate to have independent testing labs assessing and enforcing legal standards.
- It appears that there is a conflict of interest if labs do work for the tribes and the NIGC.
- NIGC issuing standards for labs create a monopoly for only a few labs.
- States should have a role in Class II classifications.
- States should be notified of submission, allowed to make its own review, and object to the certification.

Certification Appeals

- Under the proposed regulations tribes have no opportunity to appeal adverse classification discussion. Process would require tribes to suffer an enforcement action in order to seek court review.
- There should be a process for tribes to appeal negative classification decisions.
- The proposed rule provides no ability to seek review or appeal of a testing laboratory's negative findings.

Laboratories

- The NIGC should not certify laboratories.
- Laboratories will lose their independence if they are licensed.
- The proposed regulations might make testing labs beholden to NIGC and its approval, leaving questions as to whether testing labs can maintain objective and independent reports.
- There are no definable standards for testing laboratories which will submit evaluations of the devices they test.
- NIGC licensing labs usurps the authority of primary Class II regulators.
- NIGC's jurisdiction over third-party labs is questionable.
- The regulations create potential conflict with Tribe's compact obligations to license labs.

- The requirement for lab review is, in fact, superfluous, since the tribe has an independent gaming commission.
- The certification process is, at best, uncertain given the ability of the NIGC Chair to object to an issued certification at any time.
- If the proposed rules are intended to end confusions as to where class II ends and class III begins, why the need for an independent certification system.
- An independent certification system is needed to ensure that the Classification regulations are being interpreted in a correct and consistent manner. An independent certification system is needed to foster public confidence in Indian gaming.
- The proposed regulations do not contain any provisions that would protect proprietary information that may be contained in a certification report.

Compliance

- Grandfather all games already approved by the NIGC or grandfather all games already in play.
- Provide a four year moratorium on application of regulations for any tribe that has recently made a significant investment in a facility that would be adversely affected by the regulations.
- The NIGC should grandfather all of the games it has previously approved as well as the games that the Federal Courts have approved.
- The machines that are in the market today should be available in the future.
- Permit tribes who have Secretarial procedures pending to continue to operate the games they have now.
- Self regulated tribes should be excluded from these regulations.
- Extend the transition period. Recommendations ranged from 18 months to 36 months given commercial realities of designing, manufacturing, shipping, and testing new games.
- The time requirement to certify the games can be many more months than the 6 months in the proposal.

- Recommends striking 546.10(e)(3). The effective date and compliance deadlines are inadequate. Games will not be ready for installation in 6 months. Since new games cannot be placed in a casino without full compliance, tribes will be forced to wait in line for new games. Once commenter recommends a tiered system for implementation.
- The six month compliance period is too short for vendors to be able to get machines on to the casino floors.
- The period for coming into compliance should be extended so that some tribes would not be on unequal footing if new Class II machines were not available.
- It will take longer than 6 months to make changes. We first have to redesign the currently approved NIGC approved Bingo engine and redesign the cabinet. Then we can submit to the lab and hope that they are not backlogged with everyone else submitting at the same time in addition to their other business that is not Class II related.
- The 6 month implementation period would leave a vacuum in available class II devices with the largest portions of available machines going to the larger facilities.
- Under these regulations the Lucky Tab, Mega-Mania, and Magic Irish machines would not be Class II games.
- Tribe presently operates close to 4,000 games and none of these will be compliant.
- Affixing a seal serves no purpose as the requirement is already done by tribal gaming authorities and is overly intrusive.
- There is no provision for a governor, or any other state official, to be notified of the types of games that a tribal gaming regulatory authority has determined to be Class II games and offered for play in the state or to be provided with copies of any testing procedures, protocol or results.

Miscellaneous

- The proposal should require that Tribes own the Class II machines.