



OFFICE OF THE GOVERNOR

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BILL ANOATUBBY
GOVERNOR

November 14, 2006

Mr. Philip N. Hogen, Chairman
Mr. Chuck Choney, Commissioner
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, DC 20005

Dear Chairman Hogen and Commissioner Choney:

Subject: Proposed Definition Amendments and Game Classification Standards

Included with this letter is the Chickasaw Nation's final set of comments on the NIGC's proposed rules regarding the Definition for Electronic or Electromechanical Facsimile and Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using 'Electronic, Computer or Other Technological Aids, as published in the *Federal Register* on May 25, 2006. We also include a copy of our document, Alternative Regulation for the Classification of Games Utilizing Electronic Aids.

Your consideration is appreciated.

Sincerely,


Bill Anoatubby, Governor
The Chickasaw Nation

Enclosures



God Bless America!

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NATIONAL INDIAN
GAMING COMMISSION

Comments of the Chickasaw Nation on the National Indian Gaming Commission's Proposed Rules Regarding the Definition for Electronic or Electromechanical Facsimile and Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using 'Electronic, Computer or Other Technological Aids'

On behalf of the Chickasaw Nation, I am pleased to express our appreciation for this opportunity to provide our final set of comments on the National Indian Gaming Commission's (NIGC) Proposed Rules regarding the "Definition for Electronic or Electromechanical Facsimile" and "Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using 'Electronic, Computer or Other Technological Aids'" (Proposed Rule) as published in the Federal Register on May 25, 2006. While it is our desire to provide constructive comments, the fact is that we are deeply disappointed with the proposed regulation, particularly given that tribal leaders from throughout the nation invested such an enormous effort in providing the NIGC feedback, information, analysis and alternative language with regard to each of the five drafts circulated prior to publication of the proposed rule.

The Chickasaw Nation commented on the drafts; sent a team of representatives to all but one of the advisory committee meetings; and participated in literally scores of other meetings and public functions focusing on the proposed regulation. We would add that this was accomplished at considerable expense. Nonetheless, we, like others, have made every effort to provide in good faith thoughtful comments based on the reasoning and decisions of the federal courts because Class II gaming is so critically important to the social and economic well-being of the Chickasaw Nation and its members.

We note that tribal governments have universally opposed both the substance of the proposed rule and the process utilized by the NIGC in developing it. We are also aware that the tribal advisory committee members have submitted a joint letter objecting to the proposal and noting that the preamble failed to accurately reflect the fact that virtually none of the committee's advice was accepted. We are troubled that the NIGC has elected to disregard the input provided by both the advisory committee and the tribal leadership generally. We have reviewed a substantial portion of the tribal comments submitted thus far, and find the overwhelming majority to be thoughtful, professional and astute.

Like most other tribal governments, our foremost objection is to the fact that the proposed rule appears designed to eliminate the economic viability of Class II gaming, reflecting legal interpretations clearly inconsistent with applicable case law. There is a widespread view in Indian Country that the NIGC has largely yielded to external pressures to apply an interpretation of IGRA in a manner that undermines the carefully crafted balance of interests and regulatory roles that Congress built into the Act, even though the NIGC itself recognizes the injustice of doing so. As the NIGC noted in its March 16, 2005 letter to Attorney General John Ashcroft, quoting an Eighth Circuit decision from 1990, "...Congress intended that Class II gaming be subject to Tribal and Federal oversight, and that the States' regulatory role be limited to overseeing Class III gaming pursuant to a Tribal-state compact." (Citations omitted).

There is no question that the Justice Department's interpretation of IGRA is contrary to Congress' clearly articulated federal Indian gaming policy because IGRA specifically permits tribes to use Class II technological aids. Technological aids by their very nature permit greater player participation both within and between tribal gaming facilities, which is consistent with the policies advanced by IGRA. Furthermore, technological aids are more easily regulated and actually enhance accountability due to the very nature of the computer technology which can precisely record amounts wagered, paid-out and prizes awarded. They also produce higher revenues which enable tribal governments to increase regulatory capacity and invest in more effective security and surveillance systems.

Whether intentional or not, an implication is reflected in the proposed regulation that tribal governments lack either the capacity or the resolve to properly regulate Class II gaming, hence gaming activities that produce substantial revenues, regardless of the actual classification of the game, must be regulated by state governments. This attitude shaped the government's litigation theories for more than a decade and even though clearly rejected by the courts, it appears to have been firmly entrenched in the proposed rule. The irony is that if the NIGC proceeds with a rule so clearly inconsistent with the law, the clarity and stability it desires to establish by means of the proposal will not be achieved. Already, at least one tribal government announced its intention to challenge the regulation through litigation, and we understand that several others are contemplating litigation as well.

The Chickasaw Nation, naturally, would prefer to avoid needless conflict. It is evident in previous statements and correspondence that the NIGC itself recognizes the flaw in the interpretation of IGRA reflected in the rule. We urge the NIGC to correct course rather than proceed with this rule, which we firmly believe reflects a patently incorrect interpretation of IGRA. Even when based on well-meaning policy objectives, a flawed interpretation of the law wreaks great mischief on both the regulator and the regulated, undermining the credibility of the agency and the economic interests of the industry. In contrast, a correct interpretation of the law fosters stability and compliance which serve as formidable deterrents to improper or unlawful conduct.

Had the agency based its initial regulations on a correct interpretation of the law from the outset, the issue of game classification, a matter of foundational importance to the implementation of IGRA, would have been resolved for nearly 20 years. Years of divisive litigation could have been avoided and the industry today would be mature and subject to a much more stable regulatory environment. The confusion, uncertainty and unfair risk that precluded many reputable manufacturers and vendors from participating in the Class II gaming market would never have arisen. More importantly, the time and attention invested in this matter could have been focused on less divisive, more productive interaction between the NIGC and tribal governments.

In our view, IGRA by design was structured as a means of fostering close cooperation and coordination between tribal governments and the NIGC in a system in which both are assigned specific regulatory roles. The very structure of the NIGC and the requirements related to the composition of the commission were designed to ensure that the ultimate decision makers have both the authority and the latitude to act in the best interest of tribal governments by

ensuring that tribes enjoy the fullest benefit of the law as enacted by the Congress as a means of preserving and advancing tribal sovereignty. Congress mandated that at least two of the three members of the NIGC are tribal citizens. This was no mistake. Congress recognized a need to install within the NIGC members who understand that tribal sovereignty is a matter of constitutional import and who will bring this understanding to the table when deliberating on the proper interpretation of IGRA.

If the objective were to advance a policy of federal paternalism, direct federal control over tribal regulators, and an environment of adversity, Congress would not have enacted IGRA. It would not have recognized tribal governments as the primary regulators of gaming. It would have enacted a very different statute. Instead Congress enacted a statute that requires a close and generally positive working relationship between the NIGC and tribal governments. If Congress had intended to create an agency unmindful of Indian law and policy, it need not have created or structured the NIGC as it did.

Perhaps it is because we expect the NIGC to administer and interpret IGRA in a manner that advances the tribal interest and ensure tribes the full benefit of the law that we are so disappointed by the proposed rule. The economic harm that will flow from the rule if it is adopted as proposed would be almost unimaginable and will largely fall on those tribal governments who by a quirk of fate are geographically situated in areas where state and local authorities most resist recognizing the political status of tribal governments and the rights and powers that flow therefrom. The federal courts have provided the NIGC much more than adequate guidance, support and justification for interpreting IGRA in a manner favorable to tribal governments. It is at best difficult to understand why the NIGC would instead choose to promulgate a regulation so wholly unfavorable.

We have on many occasions emphasized that Class II gaming has enabled the Chickasaw Nation to reverse more than a century of poverty. It has provided the Chickasaw Nation the means to strengthen our governmental infrastructure, educate a new generation of citizens and provide a level of services that our people have never enjoyed. The economic viability of Class II gaming is fundamental to the goals and future prosperity of our nation. Tribal sovereignty combined with economic prosperity represents a powerful antidote to the terrible ills that befell our tribe following removal. Again, we urge the NIGC to withdraw the proposed regulation and come back to the table to work collaboratively with the tribal leadership to develop an appropriate process for the classification of games consistent with the overarching policies set forth in IGRA.

We fully agree that the present informal process for the classification of games is unsatisfactory. We further acknowledge the NIGC's interest in ensuring that games are subject to proper classification based on well-defined procedural standards as well as legal standards consistent with case law. We are equally supportive of the concept of utilizing game testing laboratories to ensure that gaming equipment, both technological aids to Class II games and Class III gambling devices, are safe and secure from tampering and cheating. Moreover, testing provides a means for verifying the representations of gaming vendors and manufacturers. In these respects, we believe that the interests of the NIGC and the tribes are clearly aligned. Obviously, we have different views about both substance and procedure, but this does not mean

that these issues are irresolvable were we to come together in good faith to produce a mutually acceptable solution.

Included with these comments is an alternative proposed regulation which we suspect that the NIGC may view as one-sided as we view the NIGC's proposed rule. We do so not to be contrary, but to underscore that there are numerous ways to achieve the objectives the NIGC desires in a manner that offends neither tribal sovereignty nor the principles of fundamental fairness or due process of law. We do not believe that such alternatives have been adequately explored or considered by the NIGC and we would urge the investment of some additional time and effort in order to do so. We note that the NIGC invested more than three-quarters of a year in working with the Justice Department to accommodate its views in a process closed to tribal involvement. We believe that this unfairly interfered with the objectivity with which regulatory agencies are charged in the rulemaking process, but we also believe that it is not too late to correct course.

Toward that end, we urge the NIGC to consider the following specific comments and suggestions:

1) Re-institute a process of tribal consultation that is meaningful and fair.

We are aware that a majority of the members of the NIGC advisory committee assembled for this rulemaking effort have signed a letter of objection with regard to the process, charging that the proposed rule fails to reflect the committee's comments. We are also aware that three tribes instituted a lawsuit challenging the legitimacy of the process. Based on our own knowledge, experience and participation, we too believe that the process was deeply flawed, and we note that these views are readily verifiable through a review of the drafts in successive order. The only significant change from the first draft was structural. Substantively, the only major change from the first through the final proposed rule is that the proposed rule is even stricter and more limiting than the earlier drafts, all of which were highly objectionable.

We urge the NIGC to utilize the services of a third-party neutral in its consultation process through an interest-based negotiations process such as that prescribed by the Negotiated Rulemaking Act. Given the importance of Class II gaming, we believe that the rulemaking committee should be comprised of no less than 15 representatives, including at least one tribal representative from each location in which the pertinent state has either refused compact negotiations or adopted a "one-size fits all compact." We further urge that the committee be comprised of tribal regulatory officials as well as elected tribal officials. Tribal government representatives should be allowed to bring a technical and legal advisor to each consultation session in order that all necessary expertise may be assembled and utilized effectively.

2. Withdraw the proposed change in the definition of "electromechanical facsimile."

We strongly oppose the proposed definition of "electromechanical facsimile" and urge its withdrawal. We view the NIGC's 2002 revised definitions as a correct statement of the law and consistent with the decisions of the federal courts in a series of game classification cases. Contrary to the views we have heard expressed by NIGC personnel, the 2002 definition of

“electromechanical facsimile” provides a proper distinction between an “electronic aid” and an “electromechanical facsimile.” While the definition authorizes the game of bingo and games similar to bingo to be played in a wholly electronic format, it makes clear that only such games that link players and which constitute a competition between players are properly characterized as an electronic aid. Gaming equipment which allows a single player to operate it on a stand-alone basis where there is no competition with another player regardless of the graphic imagery or mechanics used, on the other hand, constitutes a gambling device requiring a compact before it may be offered under IGRA.

Under the 2002 definition, even a game wholly *replicating* bingo, for example, would nonetheless constitute Class III gaming if it does not “broaden participation” beyond a single player. The imagery is meaningless to the distinction between classes of games. The distinction goes to whether a game is being played between players or whether a gambling device is being operated by a single individual. We view the 2002 definitions as reasonable interpretations of IGRA consonant with the decisions of the federal courts.

In stating that “tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development,” Congress made clear its intent that Class II game technology is not to be restricted (Committee Report, 1988 U.S.C.C.A.N. at 3079). The courts have relied on this language to address the distinction between Class II technological aids and Class III electromechanical facsimiles. As a direct result, tribal governments have relied on these rulings to make decisions related to and substantial investments in class II technology as well as in establishing and expanding gaming operations. The NIGC is well aware of these facts and the importance of class II gaming to tribal governments from an economic, social and institutional perspective. The promulgation of a regulation placing strict new requirements and limitations on class II gaming is both unreasonable and fundamentally unfair. We, therefore, oppose the proposed change in the definitions.

3. While there is merit in a policy directed to ensuring that gaming patrons understand the nature of the games offered for play, this can be readily accomplished in considerable less onerous ways than proposed.

Several times the NIGC, Department of Justice, and states have indicated that the current state of the law regarding Class II gaming is a “regulatory nightmare,” making it impossible for government regulators to discern whether a machine is a Class II electronic aid or a Class III electromechanical facsimile. Such position dramatically overstates the difficulty and complexity of the matter. As the day-to-day regulators of Indian gaming facilities that offer Class II electronically aided gaming, tribal regulators understand that differentiating Class II electronic aids from Class III electromechanical facsimiles is as simple as pulling the plug connecting a player terminal to the gaming system. Once the connection is broken, class II player terminals cease to operate. It is hard to imagine a simpler method of determining whether equipment constitutes a gambling device or a player terminal. In fact, most systems display a message on the video screen indicating that the system is awaiting an additional player(s) if only a single player has commenced play.

Additionally, electronically aided bingo games contain clearly visible bingo cards right

on the video display screen, which also displays the numbers in the order drawn. The card lights up when a corresponding number is drawn and daubed. Based on our extensive experience with electronically aided class II games, it is evident our players are well aware that the bingo display is the critical element to the outcome of the game. Nonetheless, the rules of the game are at all times available to even the most inexperienced novice.

4. The unreasonable and arbitrary restrictions on electronic aids to Class II games are inconsistent with the proper interpretation of the law.

The Chickasaw Nation objects to the imposition of greater restrictions on Class II gaming. We strongly believe that the law has evolved to provide clear and appropriate legal standards and the 2002 changes in the NIGC's regulatory definitions based on federal case law have served to provide an even brighter line. In our view, the proposed rule would not only overturn 10 years of case law, it will likely produce even more litigation. *See United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 715 (10th Cir. 2000) ("Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a [C]lass II game, and is played with the use of an electronic aid."); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (rejecting the notion that the Johnson Act extends to technologic aids to the play of bingo); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000) (noting that Class II aids permitted by IGRA do not run afoul of the Johnson Act); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (indicating that IGRA makes the Johnson Act inapplicable to Class II gaming and therefore tribes may use "gambling devices" in the context of bingo). Rather than brighten the line, promulgation of the rule will muddy the waters indefinitely thwarting realization of the objectives the NIGC asserts underlie the proposed rule.

One thing clear from the decisions in the game classification cases is that the three elements of bingo set forth in IGRA "constitute the sole *legal* requirements for a game to count as Class II bingo." *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000). The proposed rule, however, reflects a bold maneuver around both IGRA and the decisions of the federal courts by defining not "bingo," but a "game of bingo," then adding a long and arbitrary list of requirements and limitations evidently designed to undercut the economic viability of electronically aided bingo. In reality, however, bingo is a game, and one specifically enumerated by the Congress as one of several class II games. Hence, the proposed rule would not only reverse federal case law, but would re-write the law as enacted by the Congress.

No matter how ill-advised a federal agency may view a particular statute and regardless of its good intentions, federal agencies lack authority to alter statutory law through the rulemaking process as a matter of constitutional law. The courts accord federal agencies considerable latitude in interpreting, administering and enforcing statutory law, but only where its actions and/or decisions are in accordance with the law and within the scope of its authority. In so determining, federal courts apply a standard of reasonableness in determining whether the agency's actions or decisions offend the "arbitrary and capricious" test. *Overton Park v. Volpe*, 401 U.S. 402 (1971). Although a court does not substitute its judgment for that of the agency, where the Congress has "directly" spoken to the "precise" question and the statute is neither

silent nor ambiguous with respect to the specific issue, then the court is to give effect to the unambiguous expressed intent of the Congress. See, *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

We object to the following restrictions because Congress has already “directly” and “precisely” to the definition of the game of bingo, leaving the NIGC without any “gaps to fill” because the statute is neither silent nor ambiguous with respect to the meaning of bingo. Specifically, the Chickasaw Nation objects to the following aspects of the proposed regulation:

- a. *Pre-Drawn Balls*. The prohibition of using so-called “pre-drawn balls” eliminate games that pre-date IGRA, and run counter to congressional intent and case law directing that no additional requirements be placed on a game of bingo.
- b. *Timing of Card Selection*. The proposal’s restriction on players obtaining a new card once game play begins or joining a game in progress also brings new and unwarranted limits to bingo and games similar to bingo that pre-date bingo—restraints not intended by Congress and rejected by the courts.
- c. *Numbers Comprising the Ball Draw*. The proposal’s mandate on the number of the bingo ball draw at “exactly 75 numbers,” while maintaining a distinct definition for games similar to bingo is also not founded in the law.
- d. *Game Delays*. The proposed rule’s series of delays to bingo daubs, ball releases and player entry into games have no basis in the legal definition of bingo and are unfounded in IGRA.
- e. *Sleeping Provisions*. In direct conflict with the law and the game of bingo, the proposal prohibits bingo players from catching-up on slept numbers that contribute to interim, progressive and/or consolation prizes and prohibits slept numbers that contribute to a game-winning pattern from being “caught-up”—unless that player is the first to cover all other numbers comprising that pattern.
- f. *Auto-Daub Prohibition*. Contrary to the proposal’s auto-daub prohibition, nothing in the law prevents a game of bingo from employing a feature that assists a player in daubing. Moreover, auto-daubing predates IGRA via bingo-minders as technological aids to bingo.
- g. *Prohibition on Diverse Interim Patterns*. No statutory or case law supports prohibiting players who are competing for the same *game-winning* pattern from competing for different *interim* patterns.
- h. *Bingo Card Specifications*. While IGRA requires that bingo be played with cards, no law supports the proposal’s regulation of all aspects of an electronic bingo card; including its size, number of squares and the range of numbers that may appear on the card. The “readily visible” standard should be left unchanged.

- i. Three Number Requirement. The proposal's requirement that at least three (3) numbers or designations-- not counting free spaces-- must be covered to constitute a winning pattern has no basis in the law. The NIGC must retain its current requirement that only more than one number constitutes a pattern.
- j. Prize Limitations. The proposal's restrictions on the amount and types of prizes are unfounded and have no basis in the law and should be removed.
- k. "Uniformity" Participation Broadening Standards. The proposed rule's assertion that technologic aids must broaden participation is not founded in law. Broadened participation is merely an indicator that equipment constitutes an aid-- it is not determinative.
- l. Johnson Act Evaluation. Because the courts have determined that IGRA game classification does not include analysis of whether equipment falls within the Johnson Act's definition of "gambling device," the NIGC must remove any notion that the Johnson Act should be included in a game classification.
- m. Games Similar to Bingo. Because Congress intended that the term "games similar to bingo" allow for "maximum flexibility" in the innovation of new bingo-like games, we disagree with the proposed limitations on "games similar to bingo."
- n. Electronic Pull-Tabs. The proposal's requirement of a tangible medium for pull-tabs is outdated and not supported by either IGRA or more current court decisions. See, *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019 (10th Cir. 2003), cert. denied, *Ashcroft v. Seneca-Cayuga Tribe of Oklahoma*, 540 U.S. 1218, 124 S. Ct. 1505, 158 L.Ed.2d 153(2004); and *U.S. v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), cert. denied, *U.S. v. Santee Sioux Tribe of Nebraska*, 540 U.S. 1229, 124 S. Ct. 1506, 158 L.Ed.2d 172 (2004).
- o. Lotto. The proposal's definition of lotto wrongly equates lotto with bingo, which, by listing it along with bingo, Congress clearly deemed as distinct from bingo.

Because the above listed provisions are not founded in the law and run counter to NIGC and federal court precedent, the NIGC must strike them from the proposed regulations.

5. If enacted, the proposed rule would eliminate every Class II aid available in the marketplace today, resulting in tremendous economic hardships.

Despite the thoughtful comments of numerous tribes, many of the most troubling provisions remain. The proposed rule would effect a reclassification of all games that the federal courts, tribal gaming commissions and the NIGC itself have previously determined to be Class II. Consequently, all existing Class II games will become Class III and require a tribal-state compact for their operation. Because these and other newly created provisions will have a devastating impact on the availability and viability of Class II games, all such requirements and restrictions must be deleted from the proposed rule.

6. The deadline for compliance is unworkable, unreasonable and unrealistic.

We are concerned about the proposed rule's six-month deadline for compliance. Not only will all existing games in use become Class III games upon finalization of the proposed rule, manufacturers have indicated that they will likely not be able to develop and manufacture a market-worthy variety of compliant games by the deadline. The implementation of the NIGC's certification program (and the anticipated flood of initial submissions) will certainly lengthen the time between the deadline and making compliant games available to the public. Tribes will not be allowed to offer Class II aids during this time period, effectively stripping them of their rights under IGRA.

7. The proposed rulemaking constitutes agency usurpation of the legislative process.

The proposed rule distorts the game of bingo to such a degree that the resulting game is not bingo at all. In fact, the proposed regulation effects an amendment to the definition of bingo as contained in IGRA. The restrictions, limitations and requirements contained in the proposed rule go far beyond a simple interpretation of the law; rather they reflect a usurpation of the legislative prerogative of the Congress through the regulatory process. In so doing, the NIGC is exceeding its regulatory authority, unlawfully usurping the legislative authority of the Congress and thwarting Congress' intent to authorize tribes to use technologic aids in the play of bingo. The proposed rule so fundamentally alters the game that it unlawfully deprives tribal governments of the full benefit of the law.

8. Devastating Loss of Tribal Government Revenue and Costly Unfunded Mandates

Conservative, unofficial projections (no official economic impact analysis exists to date) reveal that tribal governments stand to lose over **\$1 BILLION** of direct revenue a year if the proposed rule becomes final. With approximately 50,000 Class II games in use today generating over \$2 billion of revenue annually, a prime source of funding for tribal programs will be destroyed. These figures do not account for the thousands of lost jobs and wages, investment losses, transition costs, costs of legal and professional services (which are already significant), retooling and redesigning of games to meet compliance, reduced spending in local economies, and other direct and indirect negative economic impacts and unfunded mandates sure to come from this rulemaking. All of these losses and costs-- especially associated with a rulemaking that is completely unsupported by law-- are unacceptable.

9. The proposed rule offends basic notions of fundamental fairness and due process of law.

The proposed rule fails to resolve the basic problems associated with the NIGC's existing game classification process and omits any meaningful role for tribal regulators-- the primary regulators of Indian gaming under IGRA-- in game classification. The proposal creates an ongoing relationship between the NIGC and gaming laboratories which excludes the tribes. No statutory authority exists for the NIGC to usurp Indian government authority and become the sole selector of gaming laboratories qualified on technical matters-- nor the legal matter

of the classification of games. Perhaps more importantly, the proposal lacks an appropriate mechanism for a tribe or its regulatory agency to challenge the classification of a game on a government-to-government basis. Such procedures are essential to ensure basic due process in a process that has a significant and lasting impact upon tribal governments. We object to the absence due process in the proposal and request that the NIGC include such procedures.

10. At least some of the rationale used to justify ignoring the tribal views in the drafting of the proposed rule is based on a false premise that the restrictive approach will satisfy the Justice Department's adherence to its theories opposing electronically aided Class II gaming and shield tribal governments from adverse actions.

While the NIGC has often insisted that the proposal serves as a means of curbing the so-called proliferation of un-compact Class III devices, thereby protecting tribes from Department of Justice prosecutions under the Johnson Act, the fact remains that such prosecutions will continue to be possible even if tribes are fully compliant with the proposed regulations. There have been incidences in the past wherein the Justice Department ignored the NIGC's views and disregarded its opinions, choosing instead to prosecute or continue prosecuting tribal governments over the NIGC's objections. The rulemaking process is not the appropriate forum for sorting out these issues. These are issues for the federal courts or Congress to resolve. It is the duty and obligation of the NIGC to interpret IGRA fairly, honestly, and consistent with congressional intent.

In previous multiple losing arguments before the federal courts, previous public statements, and by means of its legislative proposals, the Department of Justice has indicated that it is not satisfied with even the present proposal. The Department of Justice's unwavering position on this issue indicates that despite its losses, it can and will continue to adhere to its theories notwithstanding the commands of the courts. Thus, the notion that the proposed regulations would somehow shield tribes from the Justice Department's wrath is mistaken. Instead of protecting tribal interests, the proposed rule effects injury by failing to interpret the law in a manner consistent with case law as well as fundamental principals of federal Indian law and policy. *See, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-768 (1985)). Worse, it vindicates the Justice Department's erroneous legal theories and could well weaken the position of tribal governments in litigation.

11. Rather than effect clarity, the proposed rule restores an environment of legal uncertainty.

The proposal's rigid, top-down approach proclaims what is not permitted in Class II gaming instead of shedding light on what is. This negative approach makes it exceedingly difficult to garner any basic principles of broad application, which is exactly what legal standards should do. The NIGC should refrain from returning Indian country to a state of legal uncertainty, which the federal courts have largely resolved after a decade of litigation.

If finalized, the proposed rule will devastate tribal economies, especially those that depend largely on Class II gaming revenues to fund vital tribal governmental programs,

infrastructure and other essential community needs. The NIGC should refrain from taking actions that will have such an impact, and instead honor both the spirit and the language of IGRA, the hard-fought victories of Indian country in the federal courts, and the NIGC's own regulatory framework. Until this is done, we insist that the NIGC withdraw the proposed rule in its entirety.

**Alternative Regulation for the Classification of Games
Utilizing Electronic Aids
Submitted by the Chickasaw Nation**

Sub-Part A --- Purpose and Scope

1.0 What are the purposes of this Part?

The purposes of this part are to: 1) establish an appropriate analytical framework for the classification of game under the Indian Gaming Regulatory Act in order to clearly distinguish between Class II games utilizing electronic aids and Class III electromechanical facsimiles of games of chance; 2) to establish a formal process for classifying games in order to ensure that games are appropriately classified; and 3) to establish technical standards to ensure that II electronic aids are subject to testing, inspection, and certification in order to ensure that such equipment does not pose a safety threat to persons coming into contact with it; operates in accordance with the manufacturer's specifications and representations; and contains appropriate safeguards to prevent tampering or cheating.

1.1 What is the Scope of this Part?

This part applies only to the classification of games utilizing electronic or electromechanical equipment..

Sub-Part B ---Classification of Games

1.0 Must all games be formally classified before they may be offered for play in a tribal gaming facility?

No. Where the appropriate classification of a gaming activity is evident, such as the operation of a compacted game or live-play bingo, for example, formal classification is unnecessary. Formal classification is required only where a Class II game is played with an electronic aid(s) that simulates the appearance of a slot machine or where it is necessary to examine the architecture of the gaming platform in order to verify that the gaming system supports a Class II game, and thus does not constitute an electronic facsimile of any game of chance.

1.1 Who is responsible for classifying games under this Part?

Classification determinations under this Part shall be made by a Tribal Gaming Regulatory Agency (TGRA). If a TGRA wishes, it may request joint government to government game review with the NIGC.

1.2 Must the TGRA always prepare a formal written classification determination in order to classify a game?

No, a formal written game classification determination is only required under this subpart where:

1. The game has not otherwise been determined to constitute Class II gaming by: 1) the TGRA; 2) the NIGC; 3) a decision of the federal courts; 4) by another tribal gaming jurisdiction; or 5) tribal attorney opinion.
2. The game is played in a manner so novel as to warrant a formal classification determination is necessary.

1.3 How would a TGRA verify whether a game has already been formally classified?

The TGRA will create and maintain a data base of all electronically aided games determined to come with Class II gaming. The data base will be updated no less than monthly and will contain a description of the game and its operational characteristics, the formal classification determination, the rules of play, a description of the associated electronic or electromechanical aid used in the play of the game; the game testing laboratory certification, if any, the method used for wagering, betting, and paying winners, and all other supporting documentation, and other tribal locations where game is played as a Class II game. To the extent practicable, the data base will also list the jurisdictions in which the game(s) is or has been played.

1.4 What procedure must be followed to secure a game classification determination?

Applications directed to a TGRA shall conform to the forms and procedures prescribed by the TGRA, provided that applicants must provide the TGRA:

1. Written Description. A written description of:
 - a. the game;
 - b. its operational characteristics;
 - c. Rules of Play; and
 - d. the method used for wagering, betting, and paying winners; and
 - e. laboratory reports on game evaluation.
2. Certification For Play. An affirmative statement identifying whether and in which jurisdiction the game is licensed for play.
3. Legal Opinion. The proposed game shall be accompanied by a legal opinion from a reputable law firm stating the opinion can be relied upon by the TGRA and with attached concurrence in legal reasoning by the tribe's legal counsel. The opinion shall contain:

- a. Description of the game and the manner in which it is played to constitute lawful gaming;
- b. Description of the player terminal and all of its components comply in all respects with the specifications and standards set forth in this Part; and
- c. Description of how the game system complies with all applicable regulations and Minimum Internal Control Standards.

4. Supporting Documents. Copies of any other legal opinions, court decisions or other materials which support the requested classification determination; and

5. Other Information. Any other information required by the TGRA which may include but not be limited to testing by tribe's gaming laboratory or other gaming laboratory selected by tribe.

1.5 Must the application for game classification contain a written certification by a game testing laboratory that the electronic or electromechanical aid and its components comply with the technical standards contained in this part at the time of submission?

No, the application process may be initiated in the absence of a report from a game testing laboratory, provided that the application shall not be deemed complete and no classification determination will be issued until the applicant submits the laboratory report to the TGRA.

1.6 What is the purpose of the requirement for laboratory review?

The purpose of the laboratory review is to facilitate the classification of electronically aided games by providing a means for the TGRA to verify that the game:

- a. plays as represented by the vendor or manufacturer;
- b. conforms with the minimum technical standards required by the TGRA;
- c. does not pose a safety risk to persons or property; and
- d. contains appropriate safeguards to prevent tampering or cheating.

1.7 May the game vendor select the laboratory for testing?

Yes, the gaming vendor may choose any game testing laboratory authorized by the TGRA.

1.8 What actions will be taken once the sponsoring applicant submits a complete application to the Tribal Gaming Commission?

Once the application is complete, the TGRA will verify the information submitted and proceed with all such steps needed to analyze the game and complete the classification determination.

1.9 What are the legal standards applied to the classification of games under this Part?

The following legal standards will apply in determining whether a game utilizing electronic or electromechanical aids constitutes Class II gaming:

a) Only those games enumerated in IGRA are eligible for designation as Class II games. These games include:

- (i) Bingo
- (ii) Lotto
- (iii) Pull-tabs
- (iv) Tip jars
- (v) Punch boards,
- (vi) instant bingo,
- (vii) other games similar to bingo, and
- (viii) certain non-banking card games

b) If competition is facilitated by use of a Class II electronic or electromechanical aid, the aid must:

- (i) Assist a player or the playing of a game as is lawful in the class;
- (ii) Operate in accordance with applicable Federal communications law; or
- (iii) Enable and/or not prevent a player to play the game(s) with or against other players.

1.10 What is the difference between an electronic aid to a Class II game and an electromechanical facsimile of a game of chance?

The difference between electronic aid to a Class II game and an electromechanical facsimile of game of chance is that an electromechanical facsimile:

(a) Replicates the play of a game of chance in every respect by electronic and/or mechanical means or a combination thereof; and;

(b) permits a player to compete only against the machine rather than with other players.

An electronic aid to a Class II game, in contrast, utilizes electronic or electromechanical technology to facilitate the play of a class II game and/or facilitates competition between multiple players by providing players access to a named Class II game or games,

1.11 May any Class II game other than bingo be played using electronic aids?

Yes, all Class II games identified in IGRA may utilize electronic aids.

1.12 Is there a difference between a pull tab dispenser and a pull tab reader?

Dispensers and readers may constitute distinct types of electronic aids or a single electronic aid or a single unit may perform both functions.

1.13 What is the difference between a pull tab dispenser/reader and an electromechanical facsimile of a pull tab game?

The key distinction between an electronic aid to the game of pull tabs and an electromechanical facsimile of a pull tab game is that neither pull tab dispensers nor readers create the pull tab deal. An electronic aid to a pull tab game merely facilitates play of the game of pull tabs drawn from a pre-existing deal of pull tabs whereas an electromechanical facsimile of a pull tab game contains a random number generator that creates electronic pull tabs, some of which contain winning combinations and some of which do not, based on a pre-programmed retention ratio, thereby operating on the same basis as a slot machine..

1.14 May the NIGC object to a TGRA classification determination?

Yes, the NIGC may object to a TGRA classification determination.

1.15 What process will the NIGC follow if it objects to a tribe's classification determination?

If the NIGC objects to a tribe's classification determination, the Chairman must notify the tribe and the tribe's TGRA, in writing, of its objection setting forth in particular the basis for such objection. Upon receipt of such notice the tribe or its TGRA may:

- a. Reconsider and/or withdraw its classification determination;
- b. Seek a government-to-government consultation with the NIGC concerning the game classification determination; and/or
- c. Seek a declaratory determination from the full Commission as to the class of the game in question. The determination of the full Commission shall constitute final agency action.

1.16 What process will the NIGC utilize in reaching a declaratory classification determination?

If a tribe seeks a declaratory classification determination, the NIGC shall conduct a hearing on the record presided over by the full Commission. Prior to such hearing, and at least 14 days in advance of such hearing, the NIGC shall send written notice to the objecting tribe and shall simultaneously publish such notice on its web page. Any other tribe which has issued or is in the process of considering the issuance of a classification determination with regard to the game at issue will be allowed to participate as a party to the hearing, provided that any tribe will be allowed to submit a brief supporting its position with regard to the classification of the game for the NIGC's consideration.

1.17 How long will it take the Commission to issue a declaratory classification determination?

The Commission will issue a declaratory classification determination no later than 30 days from the date of the hearing.

1.18 What must the declaratory classification determination contain?

The classification determination must contain the Commission's findings of fact and conclusions of law with regard to the classification of the game in question. It must be signed by at least two members of the Commission, and any dissent must be attached thereto. In order to be binding on any other tribe or party, the declaratory classification determination must be published in the Federal Register within fourteen days from the date of issuance. The declaratory classification determination must also contain a statement that it constitutes final agency action. The NIGC shall also publish a copy of the declaratory classification determination on its web page.

1.19 What happens if the NIGC Commissioners issue a declaratory classification determination adverse to the party or parties?

If the NIGC Commissioners issue a declaratory determination adverse to the Tribe, affected party, or any other other affected tribe, such tribe, party or other affected tribe may seek judicial review of the NIGC's classification determination, provided that such appeal must be filed within 30 days from the date the declaratory classification determination is published in the Federal Register.

1.20 May the affected tribe(s) continue to operate the game while an appeal of an adverse declaratory determination is pending?

The affected tribe and any tribe offerering the game for play prior to the Commissioners' issuance of an adverse declaratory classification determination may continue to offer the game for play until all judicial appeals have been exhausted, but no tribe shall be permitted to place the affected game into play on its gaming floor subsequent to the publication of the declaratory classification determination in the Federal Register.