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September 21, 2006

*VIA FACSIMILE 202-632-0045*

Comments on Class II Classification Standards  
Attn: Penny Coleman, Acting General Counsel  
National Indian Gaming Commission  
1441 L Street, NW, Suite 9100  
Washington, DC 20005

Dear Chairman Hogen:

This letter provides the Confederated Tribes of the Colville Reservation's (CCT) response to the National Indian Gaming Commission's (NIGC) proposed Class II Classification Standards. At the outset, we want to convey our deep concern about both the content and process of this rulemaking. We believe that 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. 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.

IGRA recognizes tribes as the primary regulators of tribal gaming and tribes have a proven track record of being capable regulators. However, with this proposal, NIGC signals its intent to replace tribes in significant aspects of tribal gaming, a major shift in its role as a federal agency under IGRA. This regulatory paternalism is neither needed nor desired.

Part I provides the CCT's general comments on the proposed regulations and Part II provides section-by-section comments.

## I. GENERAL COMMENTS

- **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.**

In direct contravention of congressional intent in enacting IGRA, these proposed rules would unnecessarily impose additional restrictions on Class II gaming, thus (1) diminishing the commercial viability of Class II tribal gaming, (2) expanding state authority in their dealings with sovereign tribal governments and (3) assisting USDOJ in criminalizing the transport of Class II games which are currently authorized for tribal gaming.

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Congress was very clear in expressing its intent about Class II gaming:

[T]he Committee intends ... that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. **The Committee specifically rejects any inference that tribes should restrict class II games to existing game sizes, levels of participation, or current technology.** *The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility....* such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

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The distinction [between certain card games regulated as class II or class III games] is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker.... No additional restrictions are intended by these [IGRA] subparagraphs.

S. Rep. No. 100-466, at 9 (1988) (emphasis added).

Congress understood that a Class II technologic aid would assist in the play of the game and broaden potential participation in a common game. In contrast, a Class III facsimile was a self-contained copy of the underlying game. With Class III facsimiles, the player is limited to playing against the machine and does not play with or against other players. Federal courts have been able to distinguish Class II technologic aids and Class III facsimiles (see discussion below). However, CCT was told by Commissioner Choney in Tacoma, Washington, that the NIGC does not understand these differences. CCT representatives responded that the tribes and the federal courts understand Class II and Class III, citing the aphorism, "If it isn't broke, don't fix it!" It appears that the NIGC has issued this proposed rule for the benefit of federal and state agencies, *not* for tribes, the primary regulators of tribal gaming under IGRA and the beneficiaries of the federal trust responsibility.

Federal courts have focused on whether an electronic device makes the game available to multiple players. The Ninth and Tenth Circuits ruled that Mega Mania is not a Class III facsimile (as claimed by USDOJ) because the game of bingo is independent from the EPS, so the players are competing against other players in the same bingo game and are not simply playing against a machine. See U.S. v. 103 Electronic Gambling Devices, 223 F.3d 1093, 1100 (9<sup>th</sup> Cir. 2000); U.S. v. 162 Mega Mania Gambling Devices, 231 F.3d 713, 724 (10<sup>th</sup> Cir. 2000). Similarly, in the Lucky Tab II cases, federal courts determined that the game was the deal of paper pull-tabs, which was available to many players and thus not wholly incorporated into the device. See Diamond Game Enterprises v. Reno, 230 F.3d 365, 370 (D.C. Cir. 2000); U.S. v.

Santee Sioux Tribe, 174 F. Supp. 2d 1001, 1008 (D. Neb. 2001) (noting that “the use of the machines in theory facilitates greater participation, since more participants are able to play at the same time”).

Federal courts have distinguished between Class III facsimiles and Class II technologic aids by asking whether a game played with an electronic aid is self-contained or provides players with the opportunity to play against each other in a common game. Federal courts have *rejected* USDOJ’s argument that the *appearance* of the game display should determine whether the game is Class II or Class III. NIGC’s proposed rule attempts to overrule federal courts by echoing USDOJ’s failed argument of placing appearances above substance.

By proposing unnecessary and inappropriate restrictions on Class II gaming, the NIGC contravenes one of the principal goals of IGRA “to promote tribal economic development, tribal self-sufficiency and strong tribal government.” 25 U.S.C. 2701(4). In theory, if not in practice, the NIGC represents the United States in its role as trustee, with responsibility for protecting tribal gaming assets and promoting tribal interests. The NIGC’s duties as trustee presents the following question: why is the NIGC attempting to overturn both federal case law and clear congressional intent with this proposed rule?

- **These proposed regulations benefit states, not tribes.**

Federal law has long recognized that Tribes and States often have opposing interests, and the federal government has therefore had a longstanding policy of protecting Tribes from unwarranted intrusions by state government. States gain additional leverage if currently viable Class II tribal games are emasculated and/or essentially redefined as Class III. IGRA places all Class III gaming under Tribal-State Compact requirements (including limits on the number of Class III games). However, the United States Supreme Court’s Seminole decision gutted the premises of IGRA, making it impossible for tribes to call states to account for bad faith negotiations in Class III compacts. In states, which have refused to negotiate Tribal-State Compacts, tribes are limited to Class I and Class II gaming. This proposed rule would destroy the safety net that Class II gaming has provided all tribes, including the CCT. NIGC authority is dramatically increased and state authority is enhanced, all at the considerable expense of tribes.

These proposed regulations effectively strip Tribes of any protection from overreaching states, and leave those Tribes located in states without any Class III gaming with virtually no tools for economic survival. These proposed regulations, when combined with the proposed changes to IGRA currently pending in Congress, will destroy years of economic progress for Tribes and breach fundamental tenets of federal Indian law.

- **These proposed regulations benefit the federal government, not tribes.**

In the preamble to the proposed rule, the NIGC states that USDOJ concerns have taken priority over the previous five drafts of this proposed rule. The federal government (through USDOJ) gains additional leverage if current Class II tribal games played with technologic aids are effectively eviscerated. In response to lawsuits brought by USDOJ or tribes (under threat of USDOJ prosecution), federal courts have read IGRA and the Johnson Act together to allow a

Johnson Act exemption for Class II games played with technologic aids. See U.S. v. 103 Electronic Gambling Devices, 223 F.3d 1093 (9<sup>th</sup> Cir. 2000); U.S. v. 162 Mega Mania Gambling Devices, 231 F.3d 713 (10<sup>th</sup> Cir. 2000). However, this proposed rule would enable USDOJ to threaten further prosecutions by arguing that federal criminal jurisdiction has been extended to current Class II games. NIGC's proposed rule exceeds authority under IGRA and overrules federal case law, attempting to accomplish what USDOJ has been unable to do through litigation and proposals to amend the Johnson Act.

The NIGC benefits from this regulation by increasing its Class II authority to the detriment of tribes. The agency can then claim a corresponding need for more staff to carry out the additional responsibilities and pass those higher costs on to tribes. By ramping up its Class II role, the NIGC can also recoup some of the regulatory authority it unsuccessfully claimed in Colorado River Indian Tribes v. NIGC, 2005 WL 2035946 (D.D.C. 2005).

- **The NIGC used the Tribal Advisory Committee and a flawed “consultation process” to facially support a predetermined outcome.**

Although the NIGC claims to have extensively consulted with tribal governments, the process utilized by the NIGC in establishing and conducting meetings with the Tribal Advisory Committee (TAC) violated the Federal Advisory Committee Act, 5 U.S.C. App. 2. As Commissioner Choney admitted in Tacoma, the NIGC has kept no record of its discussions with the TAC or USDOJ. This lack of record deprives both Congress and the tribes of critical information on the genesis of these proposed changes.

Notwithstanding NIGC's claim of extensive tribal consultations and multiple drafts of this proposed rule, the NIGC has provided a small number of “window dressing” events at the eleventh hour for regional tribal “consultations” and one “public hearing” in Washington, D.C. These actions effectively repudiate Executive Order 13175, issued by President Bush on November 6, 2000. This Executive Order calls for “meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications...” The Administrative Procedures Act and NIGC's own consultation policy have also been set aside (or used as a smoke screen) in a rush to finalize this rulemaking process. NIGC has not provided tribes sufficient information about the pre-publication rule-making. The NIGC's Tribal Advisory Committee (TAC) process is currently in litigation, as tribes attempt to correct the NIGC's failure to comply with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App.2. Confederated Salish and Kootenai Tribes, et al., v. NIGC, Civil Action No. 05-495 (RWR), (D.D.C. 2005). By its own admission, NIGC has *not* conducted an economic impact study to determine just how devastating this proposed rule would be in Indian country.

CCT hereby reiterates a request made by the CCT delegation in Tacoma on July 25th: that the NIGC publish a list of tribes who participated in formal government-to-government consultations and tribes which were not afforded that opportunity, including smaller tribes who could not afford to send a delegation to Washington, D.C., or to selected regional locations.

- **The NIGC has not provided sufficient time for tribes to prepare comments to the proposed technical standards published on August 11, 2006 and to**

**receive information from the public hearing on September 19, 2006.**

CCT recommends that the NIGC extend the time (as described below). With only ten days from the public hearing on September 19, 2006, to NIGC's deadline for tribal comments, there is no time for tribes to incorporate additional information into their written response. Additionally, this single public hearing in Washington, D.C., at the convenience of NIGC, effectively eliminates participation by most tribes while providing cover for yet another NIGC claim to a "meaningful consultation."

Additional public hearings should be held in geographic locations, which maximize tribal participation. (We note Quinault's suggestion that the NIGC use its own regional offices.) Notice should be given well in advance of hearings. Information should be provided about how the public record of hearings will be made and when it will be disseminated. A report should be issued which provides an explanation with reasons why the NIGC has decided to reject or include tribal recommendations in its proposed rule. Finally, the NIGC's report and a record of the hearings should be provided with adequate time for tribal response.

- **The NIGC has not made a determination about the actual impact of this regulation on tribes.**

Although IGRA has been the single most successful economic development legislation ever passed by Congress, Indian Tribes stand to lose considerable revenue under this proposed rule. NIGC's proposal will devastate the economies of Tribes that depend primarily on Class II gaming for revenue to fund vital tribal governmental programs, infrastructure, and other essential community needs. Furthermore, other smaller Tribes who have not yet ventured into Class II gaming would likely be precluded from doing so because of the unfeasibility of less than appealing casinos and machines; the games would be exceedingly slow, less attractive aesthetically, and less enjoyable. These proposed changes therefore would have a substantial, unwarranted economic impact throughout Indian Country.

CCT is located in a rural, low-income region and does not have the advantages of tribes with casinos along interstate corridors or near urban areas. After the CCT Compact became effective in 2004, CCT lost \$4 million in gaming revenue. This proposed rule would severely limit our opportunity to install economically viable Class II machines, preventing CCT from recouping post-Compact losses and resulting in a substantial economic loss in our governmental income. CCT gaming revenues fund essential governmental services to more than 9,100 tribal members and several thousand non-members.

The NIGC has glossed over the true impact of these proposed regulations in a superficial attempt to comply with the Unfunded Mandates Reform Act, the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. The CCT recommends that a comprehensive impact analysis be prepared and published well ahead of any final rule, one which includes the *actual costs to tribes* in terms of lost employment, tribal regulatory costs (including potentially higher NIGC assessments), capital equipment, including the costs of a new testing hierarchy and increased manufacturing costs, as well as lost revenue. *CCT recommends that the NIGC stop the current regulatory train, take into consideration all of the tribal*

*comments received through September 30, 2006, conduct a thorough economic analysis of the impact of this proposed rule and then decide whether to issue a revised proposal for additional tribal comment.*

## **II. SECTION-BY-SECTION COMMENTS**

As explained in Part I, above, CCT does not believe that that NIGC should proceed with this rulemaking. The CCT offers the following section-by-section comments on these proposed regulations in support of CCT's position:

### **PART 502 – DEFINITIONS OF THIS CHAPTER**

#### **Section 502.8 Electronic or electromechanical facsimile.**

#### **Section 502.9 Other games similar to bingo.**

NIGC's definition is circular in that it requires that such a game meet all the elements of bingo. Additionally, NIGC has taken the unnecessarily restrictive position that bingo sub-games may be played only where *paper* bingo games are played. IGRA requires that pull-tabs, lotto, punchboards, tip jars, instant bingo and other games similar to bingo be played in the same location as bingo but does not add the *paper* requirement. 25 U.S.C. 2703(7)(A)(i)(III). This requirement should be deleted.

### **PART 546 – CLASSIFICATION STANDARDS FOR BINGO, LOTTO, OTHER GAMES SIMILAR TO BINGO, PULL TABS AND INSTANT BINGO AS CLASS II GAMING.**

#### **Section 546.1 What is the purpose of this part?**

"These standards ... are intended to ensure that Class II gaming ... can be distinguished from forms of Class III gaming ...."

The real purpose of this new Part 546 is to gut Class II viability.

#### **Section 546.2 What is the scope of this part?**

#### **Section 546.3 What are the definitions for this part?**

- (a) What is a "game" of bingo or other game similar to bingo?
- (b) What is "Lotto?"
- (c) What is a "bonus prize" ...?
- (d) What is a "progressive prize" ...?
- (e) What does it mean to "sleep" in the game of bingo ...? (failure to

cover/daub... or failure to claim the prize – thereby forfeiting the prize)

Issues such as penalties for not daubing, sleeping, catch-up abilities if a patron “sleeps” in the game of bingo – all of these are house rules issued by the casino, partly as a marketing decision, partly as a game rule, but NOT fundamental to whether or not it is a game of bingo.

- (f) What is the “game of pull-tabs?”
- (g) What is an “electronic pull-tab?”
- (h) What is “instant bingo?”

**Section 546.4 What are the criteria for meeting the first statutory requirement that the game of bingo, lotto, or other games similar to bingo be “played for prizes, including monetary prizes, with cards bearing numbers or other designations?”**

**Subsection (b):** Electronic cards must be displayed prominently on a video screen – at no time shall an electronic card measure less than 2 (two) inches by 2 (two) inches or 4 (four) square inches.... The electronic card(s) “shall fill at least ½ of the total space available for display.”

These requirements relate to superficial appearances and are unnecessarily limiting. The specific electronic card size and half-screen requirement should be deleted. The multiple card display requirement should also be deleted.

**Subsection (c):** Five by five grid cards (25 spaces) is another arbitrary requirement, which should be deleted.

**Subsection (d):** “Each technologic aid shall prominently display the following message: ‘THIS IS A GAME OF BINGO’ or ‘THIS IS A GAME SIMILAR TO BINGO.’ Each letter of the display must measure at least two (2) inches.”

This puerile reduction to measuring the letters in a Class II display is demeaning and superfluous. It should be deleted.

**Subsection (o):** “In no instance may the alternative display fill more than half of the total display space.”

Alternative displays are unrelated to the game being played and do not require this level of regulatory scrutiny. This half screen limitation on alternative displays is punitive and serves no constructive purpose. It is the game itself that is of concern to regulators, not the alternative display. It should be deleted.

**Section 546.5 What are the criteria for meeting the second statutory requirement that the game of bingo, lotto or other games similar to bingo be one “in which the holder of the card covers such numbers or other designations when objects similarly numbered or**

**designated are drawn or electronically determined?”**

**Subsection (a):** Delete the limitation of 75 numbers or other designations, yet another arbitrary requirement.

**Subsection (d):** This proposed rule would forbid “pre-drawn” balls, thereby banning electronic play of “Bonanza Bingo.” Pre-drawn numbers should be allowed.

**Subsection (g):** Delete the prohibition of auto daub.

**Subsection (i):** Delete the 2-second rule.

**Subsection (l):** Delete the requirements for “sleeping.”

**Section 546.6 What are the criteria for meeting the third statutory requirement that bingo, lotto, or other games similar to bingo be “won by the first person covering a previously designated arrangement of numbers or designations on such cards?”**

**Delete “two-second” rules:** Federal courts did not agree with claims by USDOJ about the need to replicate a slower rate of speed, more akin to “bamboo fishing.” The mandatory time periods (e.g., the “two-second” rules) in this section reflect a blatant attempt to create languid and boring Class II games. There is no statutory basis for these restrictions and they do not address a regulatory function. They are clearly designed to diminish the efficacy of Class II gaming for tribes. They should be deleted.

**Subsection (a):** Delete the requirement of more than one player.

**Subsection (b):** These requirements serve to limit rather than broaden participation, critically impact game play and decrease flexibility for the tribal operator. They should be deleted.

**Subsection (c):** Delete the requirement of multiple ball releases.

**Subsection (l):** These requirements serve to limit rather than broaden participation, critically impact game play and decrease flexibility for the tribal operator. They have the potential to destroy the viability of Class II machines in the market place and should be deleted.

**Section 546.7 What are the criteria for meeting statutory requirement that Class II pull-tabs or instant bingo not be “electronic or electromechanical facsimiles?”**

IGRA does not distinguish Class II and Class III by *appearances*, e.g., size of letters (“at least two (2) inches in height”) and size of font (“no smaller than an 8 point font”). These restrictions should be deleted from subsections (j) and (k).

Two or more releases are required by this proposed rule, with each taking a required minimum of two (2) seconds. These arbitrary and unrelated requirements should be deleted.

**Section 546.8 When is a pull-tab or instant bingo game an “electronic or electromechanical facsimile?”**

There is no case precedent for additional restrictions which:

- Hinder player flexibility
- Hinder player use of current cash technology

All such restrictions should be deleted.

**Section 546.9 What is the process for approval, introduction and verification of “electronic, computer, or other technologic aids” under the classification standards established by this part?**

As primary regulators, Tribal gaming commissions are in a unique position to evaluate and approve Class II operations for their own facilities. NIGC’s certification of gaming labs should be deleted.

**Subsection (e).** The discretionary 60-day objection period by NIGC must be made mandatory.

Tribes should also have opportunity to challenge classification decisions without having to first subject themselves to enforcement actions. There should be a clear due process provision for tribes to appeal a negative classification decision. The individual who issues an adverse decision (i.e., the Chairman) should NOT be a part of the entity that hears the appeal (i.e., the three-member Commission – or perhaps only two members when there is a vacancy).

All provisions under which the NIGC attempts to replace tribes and assert jurisdiction over private, third party gaming laboratories should be deleted.

**Section 546.10 What are the steps for a compliance program administered by a tribal gaming regulatory authority to ensure that “electronic, computer, or other technologic aids” in play in Class II tribal gaming facilities meet the classification standards of this part?**

**Subsection (e)(1)** Six months is not a feasible time period for completing all of the changes required by this proposed rule. This should be changed from 6 months to a minimum of 24 months.

**Subsection (e)(3)** The effective date/compliance deadlines are inadequate to allow tribes and manufacturers to design, certify and implement games, which are compliant. This should be deleted.

Under this proposed Class II rule, it will be very difficult for manufacturers to obtain necessary funding to design, build and lease new machines. Additionally, the regulation would only allow NIGC to challenge laboratory determinations. The NIGC would give itself the right to

reverse a favorable laboratory determination and sanction such laboratory by removing it from the list of approved game-testing laboratories.

Because the NIGC's proposed rules leave it with a "pocket veto" of any new development because of its hold on gaming laboratories, manufacturers will be unwilling to invest in new technology, and new games. No Tribe will be able to develop its own technology for the same reasons. Besides the fact that IGRA provides no authority for the NIGC's assertion of regulatory jurisdiction over testing laboratories, the regulations appear to be calculated to prevent tribal governments from challenging classification determinations. Result: more litigation costs.

A tiered implementation of regulations should be inserted, allowing for tribal determinations, an orderly transition and sufficient time for a change of equipment.

Once again, CCT urges the NIGC to delete the many details that the NIGC has grafted onto fundamental IGRA requirements. They are not essential characteristics of bingo and they only serve to make the game less profitable. How the machine looks on the outside, the size of the letters or bingo card and other cosmetic features are irrelevant. IGRA is the law, enacted by Congress to promote [not destroy] tribal economic development and self-sufficiency.

No one has a greater interest in the integrity of Indian gaming than tribes. CCT is dedicated to building and maintaining a strong regulatory system because our sovereign authority, the public trust, government operations and critical resources are at stake. Under IGRA, we are the primary day-to-day regulators, working with the NIGC and the Washington State Gambling Commission to safeguard CCT tribal gaming. We urge the NIGC to withdraw this proposed rule, stop carrying firewood for USDOJ and return to a regulatory partnership with tribes. Tribes need the NIGC as a federal partner and not as the adversarial, extralegal super regulator reflected in this proposed rule.

We appreciate the opportunity to provide comments to the proposed rule. If these CCT comments are used in the NIGC published response, we ask that you not paraphrase them, so that their intent and spirit are not lost.

Sincerely,

  
Michael E. Marchand, Chairman  
Colville Business Council

cc: Colville Tribal Business Council  
Office of the Reservation Attorney (Rit Bellis)  
Colville Tribal Gaming Commission (Mike Somday, Chair)  
Commission Attorney (Judy Leaming)  
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