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Via email only – info@nigc.gov

Philip H. Hogen, Chairman
NATIONAL INDIAN GAMING COMMISSION
1441 L. Street NW
Suite 9100
Washington, DC 20005

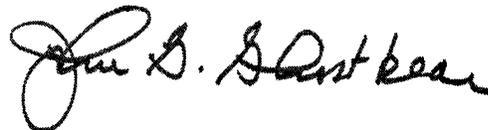
**RE: *EASTERN SHAWNEE TRIBE OF OKLAHOMA
COMMENTS ON NIGC PROPOSED CLASS II REGULATIONS***

Dear Chairman Hogen:

Attached are the Eastern Shawnee Tribe of Oklahoma comments and suggestions on NIGC's proposed Class II regulation changes.

The Tribe's financial analysis will follow under separate cover since we understand that the submittal deadline to NIGC has been extended through December 15, 2006.

Very truly yours,



JOHN G.GHOSTBEAR

JGG/db/enc.

Cc: Mr. Chris Sample
Mr. Mario Hernandez

**EASTERN SHAWNEE TRIBE OF OKLAHOMA
COMMENTS AND SUGGESTIONS TO THE
NATIONAL INDIAN GAMING COMMISSION (NIGC)
PROPOSED CLASS II REGULATION CHANGES**

**I.
INTRODUCTION**

The Eastern Shawnee Tribe of Oklahoma (“the Tribe”) expresses its appreciation to the National Indian Gaming Commission (“NIGC”) for extending to the Tribe the opportunity to consult with the Commission in Oklahoma City on August 9, 2006. Further, the Tribe expresses its appreciation for the opportunity to provide written comments on NIGC’s proposed Class II regulation changes - Part II, Department of Interior Definition for Electronic or Electromechanical Facsimile Proposed Rule 25 CFR Part 502 - 71 F. Reg. 30232; and, Part III, Department of Interior Classification Standards; Class II Gaming: Bingo, Lotto, et al.; Proposed Rule 25 CFR Parts 502 and 546 - 71 F. Reg. 30238. The proposed changes were first published in the *Federal Register* on May 25, 2006.

The proposed Class II regulation changes referenced above, if adopted in their current form and as published in the *Federal Register* on May 25, 2006, will eliminate Class II electronic gaming as a significant revenue stream for the Tribe. Rather than elaborate on each change to existing regulations, the Tribe will (i) discuss briefly how the new proposed regulations will significantly slow the play of electronic bingo; (ii) discuss how existing regulations have been, and are, adequate to regulate Class II gaming; (iii) recommend a modification to existing regulations to proceed with game classification regulations incorporating a portion of existing regulations and a portion of the proposed new classification procedures set forth in Part 546.9; and, (iv) express concern with NIGC’s reference to government-to-government consultation with

tribes, generally, and the Eastern Shawnee Tribe, in particular. By establishing this new set of classification regulations, the tribes, NIGC, as well as the Department of Justice (“DOJ”), may seek and establish bright-line tests to acknowledge existing case law Class II characteristics. All interested parties, including input from manufacturers and vendors, may flush out new characteristics and standards of Class II gaming and, specifically, lawful electronic Class II technological aids.

Currently, existing regulations found at Parts 571, 573, 575, and 577, afford the NIGC and tribes a piecemeal process to establish classification standards. By modifying these regulations partially along the lines of proposed Regulation Part 546 and, specifically, Section 546.9, the NIGC may establish a classification system similar to what has been used since 1994 when the regulations were first published.

The existing classification standards initially adopted in 1994 and amended in 2000, although not perfect, have been adequate for both gaming tribes and NIGC for the last 18 years. As the NIGC knows, tribal gaming, including Class II gaming, has experienced substantial and significant growth.

The Tribe submits that the existing Class II regulations have been, and are, acceptable and workable with the adoption of a classification procedure as described, generally, in Paragraph V of these comments.

II. ADVERSE CONSEQUENCES TO ELECTRONIC CLASS II BINGO

After consulting with the Tribe’s Gaming Commissioner, the Tribe’s Bordertown Bingo and Casino General Manager, key employees, and various Class II vendors, it is the consensus of the above individuals that the new proposed Class II regulations adversely affect play of Class II

electronic bingo, and if adopted in its present form, will eliminate Class II electronic bingo games as a source of any significant revenue.¹

After discussing the affects of the proposed Class II regulations, comments from the above individuals and representatives conclude that the following factors will have a significant adverse affect on the marketability of electronic Class II bingo. The factors include, but are not limited to:

1. The method of play and the number of times a player must depress a button required to play a game of bingo is unnecessarily lengthened.

a. A player must depress a start button in order to enter a bingo game. A bingo game will not start until six players have depressed a start button to enter the game or until the lapse of two seconds, whichever event occurs first.

b. Once the game has commenced, the first ball draw will not result in a game-winning pattern. The first ball draw will require a minimum of two seconds. Then a player is allowed two additional seconds to daub.

c. The second ball draw must take no less than two seconds. When a player receives a game-winning pattern the player is required to use an additional two seconds to daub and claim a prize.

d. The final ball draw allows the remaining players an opportunity to win a consolation prize. The game must allow the remaining players additional time to daub and claim the consolation prize.

The total time to play an electronic bingo game, under the proposed regulations, could take between ten and twelve seconds. The winning player would be required to daub four times. All other players would be required to daub five times.

¹ The Tribe will submit its economic impact analysis on or before December 15, 2006, under separate cover.

Currently, electronic Class II bingo games may be played in approximately three seconds. Thus, the new proposed regulations would require the player to spend four times the amount of time as the player would expend under current electronic Class II bingo games to collect their prize(s).

2. The proposed new Class II regulations prohibit a vendor from offering a player bonus rounds for additional entertainment perks. For example, if a winning pattern resulted in the winning bingo player going to a bonus round, the other player or players would be required to wait until the bonus round is completed before the next ball draw is released. This additional delay could result in an additional five-second delay.

3. Several electronic bingo vendors indicate a concern that, under the proposed regulations, a player may “sleep a bingo”. They indicate such a characteristic of an electronic bingo game would be unique in that they are unaware of any player who places a wager - wins the game - but, is not rewarded for winning the game. The Indian Gaming Regulatory Act (“IGRA”) definition of bingo fails to require a “claim” action by the player. Thus, imposing an additional claim requirement is contrary to the IGRA criteria for bingo.

4. The proposed Class II regulations prohibit “proxy play”. This language is contrary to an NIGC advisory opinion found at National Indian Gaming Commission Opinion dated November 14, 2000.²

² “Use of Agents to Play Game

IGRA contains no statutory prohibition on the use of agents to play the game of bingo. The bingo definition contained in IGRA requires only that the “holder of the card” cover the numbers. 25 U.S.C. § 2703 (7)(A)(i)(II). The “holder” is not defined. The holder in NIB is either the player or the player’s designated agent. Although the bingo definition in the NIGC regulations replaces the word “holder” with the word “player,” this is a distinction without a difference when the law of agency is applied to the analysis. It is a fundamental tenet of the law of agency that the acts of the agent are deemed to be the acts of the principal. *See* 3 Am. Jur. 2D Agency § 2 (1986); *See also* Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F2d 250, 272 (5th

III.
**THE PROPOSED CLASS II REGULATIONS FAIL TO
ACKNOWLEDGE CHARACTERISTICS OF ELECTRONIC CLASS II
GAMING ESTABLISHED BY FEDERAL CIRCUIT COURTS**

In 2000, both the Tenth and Ninth Circuits decided cases brought by the United States against a particular electronic bingo game popularly referred to as MegaMania. *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000) (MegaMania); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000) (MegaMania). These two circuit court decisions provide definitive standards for electronic technological aids to Class II bingo games. Although the NIGC has accepted the *MegaMania* decisions as establishing basic and elementary bright-line standards, the DOJ has reluctantly agreed to any interpretation by federal courts as to an expanded view of electronic gaming favorable to tribal gaming facilities. In 2003, the Eighth Circuit and Tenth Circuit ruled that characteristics of an electronic gaming device, commonly known as Lucky Tab II bingo, was similar to a gambling device prohibited by the Gambling Devices Act, 15 USC §1171 *et seq.* (“Johnson Act”). The Eighth Circuit determination was contrary to that of the Tenth Circuit. *U.S. v. Santee Sioux Tribe*, 324 F.3d 607 (8th Cir. 2003) and *Seneca Cayuga Tribe v. National Indian Gaming Commission*, 327 F.3rd 1019 (10th Cir. 2003), respectively.

The DOJ asked the US Supreme Court to take a narrow view of the Lucky Tab II electronic bingo game. Despite the DOJ’s Petition for Certiorari, the Supreme Court denied the DOJ’s position advanced in its Brief in Support of DOJ’s Petition for Writ of Certiorari. *United States v. Santee Sioux Tribe of Nebraska*, 124 S. Ct. 1506 (March 1, 2004) cert. denied; *Ashcroft*

Cir. 1980); *U.S. v. Sylvanus*, 192 F.2d 96, 108 (7th Cir. 1951); and *Lux Art Van Service, Inc. v. Pollard*, 344 F.2d 883, 887 (9th Cir. 1965). When the agent plays the NIB card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent *is* the player. Therefore, the use of agents violates neither IGRA’s provision regarding the holder nor NIGC’s regulations that discuss the player.”

v. Seneca-Cayuga Tribe of Oklahoma, 124 S. Ct. 1505 (March 1, 2004) cert. denied. This is not the first and only time NIGC has been required to consider DOJ's narrow view of Class II electronic bingo. On March 16, 2005, NIGC Chairman Philip N. Hogen, notified the Attorney General of his concern over the narrow interpretation of the Johnson Act by the DOJ and the more restrictive view of the application of the Johnson Act by NIGC to Class II electronic gaming. NIGC's view of the application of the Johnson Act to electronic bingo devices was, and is, more favorable to the interests of tribes engaged in gaming. On the same day, two separate counsel representing different branches of the DOJ, recommended that Chairman Hogen and NIGC meet with DOJ representatives to advance a single government position. Hence, NIGC's proposed technical standards and game classification regulations were placed on hold.

Only after the DOJ proposed expanded application of the Johnson Act to electronic Class II bingo games did NIGC withhold publishing proposed Class II game classification and technical standards in the *Federal Register*. On August 4, 2005, District Judge John D. Bates ruled against the NIGC to exercise authority to audit and regulate Class III gaming at tribal casinos. *Colorado River Indian Tribes v. NIGC*, 383 Fed. Sup. 2d, P 123 (D.D.C. 2005).

In a letter from Chairman Hogen addressed to all gaming tribal leaders dated August 30, 2005, he indicated strong opposition by the NIGC to Judge Bates' opinion. In opposition to Judge Bates' opinion, Chairman Hogen stated, **"...the NIGC will not be extending the application of this recent decision beyond its application to the Colorado River Indian Tribes gaming operations (emphasis added)."** See Chairman Hogen's letter of August 30, 2005.

In September of 2005, at the Global Gaming Exposition in Las Vegas, Nevada, the DOJ, through US Attorney Tom Heffelfinger, unveiled the DOJ's proposed restrictive amendments to

the Johnson Act. In a joint letter dated October 17, 2005, Chairman Hogen on behalf of NIGC, and Tracy Toulou, on behalf of the DOJ, invited all tribal gaming leaders, or their representatives, “...to participate in a consultation process regarding proposed amendments to the *Gambling Devices Act*, 15 USC, §1171, et seq., commonly known as the Johnson Act.”

Due to strong tribal and congressional opposition to the proposed restrictive Johnson Act amendments, the DOJ has withdrawn these proposed amendments to the Johnson Act, for the time being. Other Federal Circuit Court decisions have been ignored or otherwise not considered by the proposed Class II regulations. See *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 367 (D.C. Cir. 2000); *U.S. v. Santee Sioux Tribe*, 324 F. 3d 607 (8th Cir. 2003), **cert. denied**, 124 S. Ct. 1506 (March 1, 2004); and *Seneca Cayuga Tribe v. National Indian Gaming Commission*, 327 F. 3d 1019 (10th Cir. 2003), **cert. denied**, 124 S. Ct. 1505 (March 1, 2004).

**IV.
THE PROPOSED NEW CLASS II REGULATIONS FAIL
TO IMPLEMENT CONGRESSIONAL INTENT IN ENACTING IGRA**

Without quoting from NIGC’s legislative history, it is widely recognized and understood that Congress sought to establish a framework within which Indian tribes and the federal government might establish parameters for conduct of gaming on tribal lands.

In the Declaration of Policy of IGRA, Congress provided,

“The purpose of this chapter is –

(1)provide a statutory basis for the **operation** of gaming by Indian tribes as a means of promoting tribal economic development...”

(2)....provide a statutory basis for the **regulation** of gaming by an Indian tribe...(emphasis added)”

25 USC § 2702

Congress determined by the language of IGRA that tribes are to be the primary regulators of their Class II gaming activity at *25 USC 2710(b)*. At *25 USC §2710 (b)(1)(B)*, Congress granted enumerated powers to the Chairman. Further, Congress granted enumerated powers to the Commission (NIGC), at *25 USC §2706*. The legislative scheme established by Congress recognizes the right of tribes to engage in and regulate Class II gaming, provided such Class II gaming is conducted in a state which permits such gaming for any purpose, provided further, that the tribe adopts a law establishing a criteria to operate and regulate such gaming. The tribal gaming ordinance must be approved by the Chairman of NIGC. The Chairman must approve a tribal ordinance which establishes the conduct and regulation of Class II gaming provided the tribal gaming ordinance meets certain enumerated criteria within IGRA.

The Eastern Shawnee Tribe of Oklahoma has operated a lawful Class II gaming facility on its tribal lands since approval of its Tribal Gaming Ordinance by the Chairman on April 7, 1995.

In the event NIGC adopts the proposed Class II regulations, the Tribe's revenue realized from Class II gaming will shrink and will no longer be a source of revenue available to operate tribal programs and provide benefits to tribal members. All revenue generated by the Tribe from Class II gaming and, Class II electronic gaming in particular, is used for lawful purposes allowed the Tribe, pursuant to *25 USC § 2710 (b)(2)(B)*. Also, the Tribe pays its proportionate fee as required pursuant to *25 USC §2717*.

V.
**NIGC, IN PROPOSING NEW CLASS II REGULATIONS,
FAILS TO RECOGNIZE THE SOVEREIGNTY OF THE
EASTERN SHAWNEE TRIBE, AND FAILS TO RECOGNIZE THE TRIBE AS A
GOVERNMENT, PURSUANT TO THE NIGC’S
GOVERNMENT-TO-GOVERNMENT TRIBAL CONSULTATION POLICY**

A.
Government-to-Government Tribal Consultation Policy

On March 31, 2004, the NIGC published its Government-to-Government Tribal Consultation Policy in the *Federal Register*. Excerpts from that Policy acknowledge:

At Part I, Sub-Paragraph B, Section 2, the Policy states,

“IGRA recognizes and provides that the **operation of gaming on Indian lands is primarily** a function of **tribal sovereignty**.(emphasis added)”

At Part I, Sub-Paragraph A, Section 2,

“A principal goal of **long-standing federal Indian policy is to support the federally recognized sovereignty of Indian tribes** by promoting tribal economic development, tribal self-sufficiency, and strong tribal governments and self-determination over their internal affairs...” (emphasis added).

At Part II, Sub-Paragraph A, Section 3, the Policy further states,

“...Indian tribes retain and exercise **primary sovereign authority** and responsibility **with respect to the day-to-day** operation and **regulation** of gaming on their tribal lands under IGRA...(emphasis added).”

The above three passages from the NIGC Government-to-Government Tribal Consultation Policy reiterate the long-standing federal policy of supporting the sovereignty of Indian tribes. However, the passage quoted below from the NIGC Government-to-Government Tribal Consultation Policy completely removes any substance to the recitals, listed above which acknowledge the long-standing federal policy toward tribal governments.

At Part V, the Policy states,

“This policy **is not intended to nor does it create** any right to administrative or judicial review, or any other right, benefit, trust responsibility, or cause of action, substantive or procedural, enforceable by any party against the United States of America, its departments, agencies or instrumentalities, its officers, or employees, or any other persons or entities.

This policy is not intended to create a forum for resolution of specific disputes or issues that are the subject of litigation between the NIGC and a tribe(s) nor is it meant to replace presently existing lines of communication (emphasis added).”

What is the policy the Tribe should take away from this consultation language other than “flowery” lip service.

B.

Colorado River Indian Tribes v. NIGC, 383 Fed. Sup 2d, P 123 (D.D.C. 2005)/; Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134 (D.C. Cir. 2006).

On October 20, 2006, the D.C. Circuit Court affirmed Trial Judge Bates’ opinion in *Colorado River*. The Chairman expressed the NIGC’s strong opposition to Judge Bates’ opinion, and in the Chairman’s letter dated August 30, 2005, he spoke on behalf of the full NIGC Commission when he stated, “....**the NIGC will not be extending the application of this recent decision beyond its application to the Colorado River Indian Tribes gaming operations** (emphasis added).” See Chairman Hogen’s letter of August 30, 2005.

A review of NIGC’s Government-to-Government Tribal Consultation Policy published in the *Federal Register* on March 31, 2004, some seven months before the Chairman’s official declaration that the full NIGC would not apply the Federal District Court’s decision except to the tribe bringing suit against NIGC. All gaming tribes must skeptically consider NIGC’s Government-to-Government Tribal Consultation Policy in light of Chairman Hogen’s limited acknowledgement of a federal court opinion.

Further, those of us who participated in the consultation process jointly called by the Chairman and the DOJ, as well as the Government-to-Government Tribal Consultation Policy offered the Oklahoma tribes on August 8th and 9th in Oklahoma City, and considering the manner in which the “consultation process” was conducted, as well as the methods employed by both the NIGC and the DOJ, it is simply asking too much of tribal governments to extend any weight or credence to the Government-to-Government Tribal Consultation Policy. The tribes were directed to show up and afforded only minutes to express their feelings and comments. To the Tribe’s knowledge, the NIGC has yet to retract or amend Chairman Hogen’s declaration that a Federal District Judge’s order and decision would be ignored by NIGC except for the one tribe involved in that litigation. No retraction has been made by NIGC of Chairman Hogen’s precipitous action in writing his letter of August 30, 2005. These actions speak much louder than the flowery language recited in the beginning of NIGC’s specially adopted Government-to-Government Tribal Consultation Policy.

VI. RECOMMENDATIONS TO NIGC

The Eastern Shawnee Tribe of Oklahoma recommendations to NIGC (and the DOJ) are as follows:

1. NIGC should immediately publish a notice to withdraw the proposed Class II regulation changes – in total – published in the *Federal Register* on May 25, 2006;
2. Modify current regulations found at Parts 571, 573, 575, and 577. Also, adopt certain language and provisions in the proposed Part 546.9, whereby all these parts, as modified, adopt a classification procedure similar to what has been used since 1994 when IGRA regulations were first published. Also, significantly expand upon the considerations

recited in Section 575.4, whereby a tribe may not be subject to the maximum civil fine of Twenty-Five Thousand Dollars (25,000.00) per violation. Modify existing parts to define in greater detail the conduct of hearings as well as expand the alternatives to the parties to enter into consent orders or settlements;

3. NIGC should expressly adopt Federal Circuit Court decisions which have already established parameters for expanding upon IGRA's definition of what constitutes Class II gaming.
4. Publish in the Federal Register NIGC's desire to accept comments to establish a classification process as generally outlined above;
5. The new proposed regulations should expand the participation in the classification procedures to include one or more manufacturers or vendors of Class II electronic bingo games. Such expanded participation may, at the tribes and NIGC's discretion, include representatives from the DOJ ;
6. Work with tribal gaming managers and consultants, including tribal attorneys, to flush out the classification procedure suggested above and agree to limit, or waive, the imposition of fines or closure orders during the classification procedure suggested above.
7. Institute regional consultation meetings whereby tribes may consult with NIGC for significantly greater periods of time and the parties may carry on a meaningful dialogue rather than short 30-minute spurts;

VII. CONCLUSION

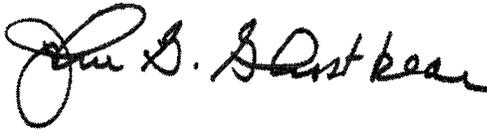
Most tribes have received grandiose promises and pledges from federal and other governmental officials throughout their relationship with one another. Unfortunately, a significant number of federal officials, and other governmental personnel's representations have not been carried out – at best. The Government-to-Government Tribal Consultation Policy sounds very honorable. However, actions speak louder than words.

In reviewing the last two paragraphs of NIGC's Government-to-Government Tribal Consultation Policy, the Policy appears hollow. When NIGC's Chairman vows not to recognize a Federal District Judge's opinion and order and fails to rescind such opinion after a Federal Circuit Court affirms the District Judge's opinion, when the opinions were directed at the agency he heads, it is difficult for tribal officials to accept federal representative's official representations.

However, by withdrawing NIGC's proposed Class II regulation changes and acknowledging existing Federal Court decisions, the NIGC, tribal governments, manufacturers and vendors of Class II electronic bingo games, as well as the participation of DOJ, will establish "bright-line" characteristics in minimum game classification standards. By proceeding in this fashion, tribes may continue with the operation of Class II bingo, including electronic bingo aids and games until the parties agree on other classification standards or, as a last resort, Federal Courts establish classification standards if NIGC and tribes cannot agree.

On behalf of the Eastern Shawnee Tribe of Oklahoma, we ask you to seriously consider the recommendations set forth herein.

Very truly yours,

A handwritten signature in black ink that reads "John G. Ghostbear". The signature is written in a cursive style with a large, looping initial "J".

JOHN G. GHOSTBEAR, Gaming Attorney for the Tribe

On behalf of:

EASTERN SHAWNEE TRIBE OF OKLAHOMA and
BORDERTOWN BINGO AND CASINO