



Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians **GUN LAKE TRIBE**

David K. Sprague
Tribal Chairman

Federally Acknowledged
August 23, 1999

Service Area: Allegan, Barry,
Kalamazoo, Kent, and
Ottawa Counties

December 13, 2006

Philip Hogen, Chairman
National Indian Gaming Commission
1441 L Street, N.W. Suite 9100
Washington, D.C. 20005

RE: COMMENTS ON THE REPORT REGARDING THE POTENTIAL ECONOMIC
IMPACT OF PROPOSED CHANGES TO CLASS II GAMING REGULATIONS AND
SUPPLEMENTAL COMMENTS ON ELECTRONIC OR ELECTROMECHANICAL
FACSIMILE DEFINITION (71 FED. REG. 30232 (MAY 25, 2006))

Dear Chairman Hogen:

On behalf of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (also known as the Gun Lake Tribe), a federally-recognized Indian tribe, please accept these comments on the economic impact study of the proposed rule making regarding Class II gaming. We also provide supplemental comments to the proposed rulemaking found at 71 Fed. Reg. 30232 (May 25, 2006). As we indicated in our July 12, 2006 written statement and during our private consultation with the Commission, the Tribe objects to the proposed rules because we believe they will effectively prohibit us from conducting profitable Class II gaming. These comments expand upon that theme.

BACKGROUND

After gaining federal acknowledgment in 1999, our Tribal Council identified suitable land for economic development, with the intent to acquire the land for gaming purposes. The Tribe submitted its fee to trust application pursuant to 25 C.F.R. Part 151 to the Minneapolis Area office of the Bureau of Indian Affairs on August 12, 2001. Following an exhaustive review of the evidence and the extensive public comment, the Bureau of Indian Affairs concluded that a finding of no significant impact (FONSI) was appropriate. The Bureau of Indian Affairs issued the FONSI on February 27, 2004, over 22 months ago. More than a year later, on May 13, 2005, the Bureau of Indian Affairs

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published in the Federal Register its final determination to acquire the land in trust for the benefit of the Tribe.

Nonetheless, we continue to face delays. Our land would be in trust today but for a lawsuit filed on June 13, 2005 against the Department of the Interior seeking, among other things, to enjoin the Secretary from taking land in trust for our Tribe. The Department of Justice is defending the litigation. The Plaintiff in this action is an anti-gaming group Michigan Gambling Opposition (MichGO). They challenge the February 2004 Environmental Assessment and FONSI, the finding that the Tribe meets the initial reservation exception, and the delegation of authority to the Secretary to acquire the parcel in trust under section 465 of the Indian Reorganization Act. The case is captioned *MichGo v. Norton (Kempthorne)* (D.D.C. 2005). Oral argument of the government's Motion to Dismiss and Summary Judgment was conducted on November 29, 2006. We expect to prevail in this litigation and have our land placed in trust soon.

With this brief history in mind, our Tribe believes that it will be adversely impacted by the proposed regulations because they would unduly constrict the types of machines that can be classified as class II gaming. Those constrictions on classification our Tribe's options for conducting governmental gaming as a means of vital tribal economic development as anticipated by the Indian Gaming Regulatory Act. One option is based on the successful negotiation of a Class III gaming compact with the State of Michigan. This plan unquestionably provides solid footing for an economically self-sufficient Gun Lake Tribe for generations. However, state politics may delay signing prevent the Tribe from successfully negotiating such a compact. Hence, Class II gaming is a necessary option. Under current law, while not as economically profitable for sustained self-governance as Class III, Class II gaming would provide a sound and viable future for our people. However, we believe the proposed regulations will stifle our plan for economic self-sufficiency, once again dashing our 'people's hope for a brighter future.

COMMENTS ON THE ECONOMIC IMPACT STUDY

The conclusions contained in the November 3, 2006 independent report "The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations" by Alan Meister, Ph.D. of the Analysis Group (hereinafter "Meister Report") commissioned and published by the National Indian Gaming Commission validate and affirm Gun Lake's position: *promulgation of these rules would have a disastrous effect upon Indian tribes nationwide.*

In his report, Dr. Meister concluded that the Commission's proposed rule changes would have a significant negative impact on Class II gaming and the Indian tribes that operate Class II facilities. The report identifies a variety of potential negative economic impacts, including: a decrease in gaming and non-gaming revenue; a decrease in the variety and quality of Class II gaming machines; potential temporary or partial gaming facility closures; a decrease in tribal government revenue; an increase in a broad range of costs; and a decrease in the number of tribal member jobs.

In the clearest example, Dr. Meister concluded that a compliant Class II machine would yield 57% less than the actual average revenue per machine in 2005 and given this decrease, he estimated that Class II machine revenue would decrease by \$142.7 million per day. (Meister Report, page iii). He also found that non-gaming revenue would decrease by estimated \$9.6 million per day, and that tribal government revenue would be down by \$17.4 million on a daily basis. (Id.) In one scenario, Dr. Meister found the lost Class II machine revenue (determined as the difference between the actual 2005 Class II machine revenue of \$2,589 billion and expected revenue under the regulations of \$1,106 billion) was \$1.483 billion. (Meister Report, page 37).

Moreover, his estimates on lost gaming revenue are admittedly "conservative". (Meister Report, page 41) The actual impact, which has yet to be realized, may be much more substantial and may be a staggering sum. This study should give the Commission grave concern about moving forward with the rulemaking.

While we certainly agree with Dr. Meister's report, some concerns of our Tribe remain unaddressed by the study. These are as follows:

Meister Report Did Not Evaluate The Proposed Changes To The Technical Standards

First this study is incomplete because Dr. Meister evaluated only the proposed amendments to the definition of "Electronic or Electromechanical Facsimile" (71 Fed. Reg. 30232 (May 25, 2006)) and the Class II classification standards (71 Fed. Reg. 30238 (May 25, 2006)). **He did not study the proposed changes to the technical standards.** (71 Fed. Reg. 46336 (August 11, 2006) (Meister Report, Page 7, footnote 22)). Technical standards govern the implementation of electronic, computer, and other technical aids used in the play of Class II games, and it is these standards that actually govern how a game will be built and played, which in turn determine its player appeal and profitability.

Game manufacturers contend that no existing Class II gaming system would meet the proposed technical standards. (See International Game Technology, November 14, 2006 Comments to NIGC, page 14). Hence, the technical standards in effect require manufacturers to create and develop an entirely new gaming platform. Arguably, the

research and development of new Class II gaming systems constitutes significant economic impact to the manufacturers, an expense that would be passed along to Indian tribe users. (Meister Report, page 15). According to the October 26, 2006 Game Manufacturers Follow up Response Letter to the September 19, 2006 public hearing, this would require a multi-million dollar investment for each vendor. (Game Manufacturers Follow up Response, October 26, 2006, page 6).

Another related issue concerns the timeframe for construction of a new platform. The game manufacturers have indicated that it will take several years to build, test, and receive approval before a viable game system is ready for mass production and distribution to tribes. (Id. page 6). This does not consider the need to customize each game and develop themes for individual Indian tribes. Research and development time means that our Tribe, which has been repeatedly delayed at various stages of the regulatory and judicial processes, will once again be stalled in our efforts at economic development. Such delays easily equate in lost gaming revenue, a delay in the opening of our facility, lost tribal government revenue; an increase in a broad range of costs; and a decrease in the number of tribal member jobs.

Because the Meister Report did not evaluate the economic impact of the technical standards on Indian tribes and manufacturers; Indian tribes do not have a clear picture of the economic impact that awaits them under these regulations. Further study is appropriate.

Meister Report Failed to Identify Cross Impacts on Community and Local Government Impact

The economic engine of Indian gaming does not only impact Indian tribes. Dr. Meister correctly considered gaming revenue, non-gaming revenue, and tribal-government revenue, in addition to increased tribal costs and lost tribal member jobs. These rules will not only impose a significant change to one economic sector of the community (Indian tribes), but may also trigger changes to other sectors of the community as well. The analysis should have been expanded to include impacts within the local community and local government.

For example, if an Indian gaming facility were no longer able to generate sufficient revenue to cover its variable costs of operation, an Indian tribe may be forced to shut down the facility. The result of a facility closure provides real-world consequences for the non-Indian community and local government. These could include substantial decreases in tourism, lost jobs for non-tribal employees, lost vendor and supplier contracts, lost local government contracts for policing, fire protection and emergency services, reduced charitable activity and donations, and the possible failure

of many non-tribal enterprises dependent on the tribal casino. Certainly, this regulatory ripple-effect needs to be addressed by the Commission.

Mesiter Report Reinforces Gun Lake's Concerns About Chilling Technology Development

During the July 12, 2006 Class II consultation with the Gun Lake Tribe, our attorney, Conly Schulte of Monteau & Peebles, suggested that the proposed regulations would have a chilling affect upon Class II technological development. Specifically, he said the proposed regulations "lock tribal Class II gaming into a static position" and prevent "further evolution beyond... 1995 technology." (National Indian Gaming Commission, *Class II Classification Standards Consultation with the Gun Lake Tribe*, page 80 (Washington, D.C., July 12, 2006).

In his study, Dr. Meister "considered various types of Class II machines that have been operated since the emergence of the industry following the passage of IGRA in 1988." (Meister Report, page 33). In order to measure the aggregate decrease in Class II gaming revenue under the proposed regulations, Dr. Meister had to develop a methodology which would rely upon a gaming system. He also stated his "understanding" (presumably provided by the Commission) that "no past or current Class II device would qualify as Class II under the proposed rules. (Id.) Following a comparable analysis of Class II machines, he concluded that the machine which "most closely resembles the requirements of the proposed regulations was MegaMania". (Id.)

As the Commission is aware, Multimedia Games introduced the hallmark Class II gaming terminal, MegaMania, in 1995. In other words, Dr. Meister inadvertently concluded that the regulations would indeed have a chilling affect on the development of technology in that only eleven year old gaming technology could pass regulatory muster. We remain puzzled why the Commission intends to chill the industry's innovation and technological growth – when other areas of society are pursuing rapid technological advancement.

Scenario Three Raises Concerns about the Commission's Objectivity

In the study, Dr. Meister's methodology was used to calculate lost gaming revenue under three scenarios. (Meister Report, pages 36-40) The first scenario looked at all gaming facilities that used Class II machines. (Id.) The second scenario was based on all gaming facilities operating Class II machines without a viable alternative. (Id.) The final scenario focused on all gaming facilities operating Class II machines without a viable alternative and which are not currently operating "illegal" Class II machines, as defined by the Commission. (Id.) As indicated in the report, the third scenario was developed at the request of the Commission and "reflects the NIGC's view that some Class II gaming

machines are ‘illegal’”. (Meister Report, pages 39-40). The result of this scenario was to eliminate 54% of all Class II machines in operation from the study. (See Meister Report, page 40 (finding that “54 percent of the all Class II machines in operation nationwide in 2005 were illegal”). It appears that the purpose of this scenario is to minimize the economic impact on tribes and to skew the results to favor the position of non-significant impact. If so, this is inappropriate and violative of the trust responsibility of the federal government to Indian tribes.

SUPPLEMENTAL COMMENTS ON THE PROPOSED RULEMAKING
FOUND AT 71 FED. REG. 30232

Thank you for extending the comment period for the facsimile definition, the classification standards and the technical standards. Our Tribe appreciates the Commission’s commitment to continue to work with Indian Country to ensure that its concerns in this area are addressed. We have identified another area of concern that was not included in our earlier submissions.

Comment on the Proposed Definition for
“Electronic or Electromechanical Facsimile”

Gun Lake Tribe objects to the Commission’s proposed amendment to the definition of “Electronic or Electromechanical Facsimile” found at 25 C.F.R. 502.8. According to the Commission, this amendment is necessary to clarify “that all games including bingo, lotto, and ‘other games similar to bingo,’ when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game.” 71 Fed. Reg. 30234. We do not believe further clarification is warranted.

In our prior comments and testimony, we highlighted the fact that the Commission has not offered any studies or evidence demonstrating that the public, when playing Class II bingo games, misconstrue them as Class III slot machines. If there is a misunderstanding of the law and practical aspects of the industry, it lies squarely with the Department of Justice and the Commission. Several circuit courts of appeal have rejected the United States’ arguments that are in fact exactly those the Commission is attempting to make the law. *See, e.g., United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003); *Seneca-Cayuga Tribe v. NIGC*, 327 F. 3d 1019(10th Cir. 2003); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000); *Diamond Game Enterprises., Inc. v. Reno*, 230 F.3d 365 (D.C.Cir.2000).

From a practical perspective, our Tribe questions the need to split the facsimile definition into two distinct regulatory proposals. As drafted, the proposed definition found at Section 502.8 provides:

(a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.

(b) Bingo, lotto, and other games similar to bingo are facsimiles when:

(1) the electronic or electromechanical format replicates a game of chance by incorporating all of the fundamental characteristics of the game, or

(2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.

A departure from the 2002 regulations, proposed sections (a) and (b) create separate definitions of a facsimile. As we understand the limiting nature of this amendment, it would effectively constitute a ban on all electronic aids. (See International Game Technology, November 14, 2006 Comments to NIGC, page 4). Although we find the two proposed definitions confusing, the situation is compounded by the recently proposed addition of section (c):

(c) Bingo, lotto, other games similar to bingo, pull tabs, and instant bingo games that comply with Part 546 of this chapter are not electronic or electromechanical of any game of chance.

If sections (a) and (b) do indeed constitute a complete ban on facsimiles, then section (c) seems to reaffirm the Commission's desire to completely eradicate the electronic or electromechanical aspect of Class II altogether. In the end, the result can only be seen as one of manifest confusion and the creation of a significant risk of sanctions. Doubtless, implementation of this provision alone would lead to litigation. Since Courts would be bound to construe ambiguities in favor of the Tribes, this provision may ultimately not withstand judicial scrutiny. *See Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. 2399 (1985). We urge the Commission to retain the current definition of electronic or electromechanical facsimile. This definition is an appropriate representation of case law and provides more than an adequate basis for game classification under IGRA.

**Comment on the Proposed Amendment to Include States
in Class II Gaming Found at 25 CFR §546.9(e)**

On November 30, 2006 the Commission distributed several alternative classification standards proposals to the original submission released in May 2006. Gun Lake Tribe objects to the amendment contemplated for 25 CFR §546.9(e), which is placed under the general heading: *What is the process for approval, introduction, and verification of "electronic, computer, or other technologic aids" under the classification standards established by this part?*

(e) Objections to testing laboratory certifications
(1)(a). Within 30 days of receipt of the certification, a tribe **or state** may object to the certification by submitting a Notice Of Objection to the Commission. The objection shall specify the reasons why the certification is erroneous and shall include supporting documentation, if any. (emphasis added)

If a tribe **or state** timely objects, the Chairman or his designee shall have 60 days from receipt of the object to concur with the object or object to the certification. The Chairman or his designee will notify the testing laboratory, the requesting party and the sponsoring tribe of his concurrence or objection. (emphasis added)

This proposed amendment would invite states to become participants in an area not previously open to them. As the Commission is fully aware, Indian tribes have exclusive jurisdiction over class II gaming. 25 U.S.C. § 2710(a)(2). Congress clearly intended that Class II gaming be subject to federal oversight by the Commission and not the states. 25 U.S.C. § 2710(b)(c). States can only influence class II gaming on Indian lands within their borders if the state prohibits class II games for everyone under all circumstances. *See Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) (citing 25 U.S.C. § 2710(b)(1)(A)). Bringing state involvement in laboratory testing and certification appears to be an *ultra vires* action by the Commission.

Please amend this provision accordingly or provide the Tribe with a reasonable interpretation of law justifying their presence in this regulation.

ADDITIONAL CONSULTATION NEEDED

The proposed classification standards, definitions and technical standards have been developed with tribal consultation. However, there has been no tribal consultation

on how the Commission interprets or plans to use the Meister Report. Simply receiving *public* comment on the Meister Report, which reveals a significant negative impact on *tribal* gaming facilities and *tribal* governments, is inadequate given that the contemplated federal action would regulate Indian tribes. As you are aware, Section 5 of Executive Order 13175 (November 6, 2000) provides specifically that each agency shall,

“have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” Executive Order 13175, Sec. 5.

This Executive Order was reaffirmed in September 2004 by President Bush and remains the policy of the United States. *See* Memorandum, From President of the United States to Heads of Executive Departments and Agencies, “Government-to-Government Relationship with Tribal Governments,” September 23, 2004 (reaffirming government-to-government relationship including the principles of Executive Order 13175).

The Gun Lake Tribe makes the following recommendations in this regard:

First, we urge the Commission to offer Indian tribes a plenary consultation on the Meister Report in concert with United States policy. Second, we recommend that the comment period be extended to accommodate the plenary session and the written comments that will surely follow. A forty five day extension is appropriate here. Finally, we request that every comment received on the Meister Report be published on the Commission’s website prior to the plenary consultation.

CONCLUSION

In sum, the conclusions of Dr. Meister have bolstered our previous arguments to the Commission. We have repeatedly warned that the proposed regulations will have far-reaching consequences on Indian tribes relying in full or in part on Class II gaming. In light of Dr. Mesiter’s conclusions and estimates, we can see no reason for the Commission to proceed with the rule making exercise.

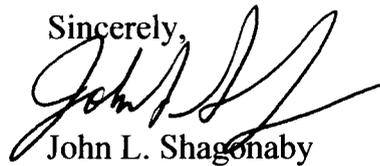
We will continue to assert that the proposed regulations would impose numerous additional and arbitrary requirements on how the game of bingo is defined and played. The regulations would put our Tribe at a significant competitive disadvantage compared to the other Class III operations in Michigan if we are forced to rely on Class II gaming. The games that would be permitted under the proposed rules would be extraordinarily time consuming and expensive to develop, and may have little, if any, commercial

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viability. Furthermore, we are informed that if these rules are authorized, game manufacturers may abandon the Class II platform and leave the market altogether.

Please reconsider your decision to promulgate these regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "John L. Shagonaby". The signature is fluid and cursive, with a large, sweeping flourish at the end.

John L. Shagonaby
Vice Chairman