



MUCKLESHOOT TRIBAL COUNCIL

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September 27, 2006

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, Suite 1000
Washington, DC 20005

Re: Proposed Rules Regarding the Classification of Games Under the Indian Gaming Regulatory Act

Dear Chairman Hogen,

Thank you for the opportunity to comment on the National Indian Gaming Commission's ("NIGC") proposed rules regarding the classification of games under the Indian Gaming Regulatory Act ("IGRA") as published in the Federal Register on May 25, 2006. For the reasons expressed in the attached Comment Summary document, the Muckleshoot Indian Tribe objects to the content of these proposed rules and accordingly, asks that they be withdrawn from consideration.

The Muckleshoot Indian Tribe ("Tribe") is located in Auburn, Washington, and operates the Muckleshoot Casino. While our casino consists primarily of class III games, we also operate a number of class II games in an effort to add diversity to our gaming floor. The Tribe recognizes the value of class II gaming, not only as a means of satisfying customer requests for variety, but also as an alternative to the demands of the compacting process. If finalized, however, this rulemaking will not only harm the viability of class II gaming, but will also substantially weaken the bargaining power of tribes as compacts expire and require renegotiation. The Tribe also operates a Bingo facility which has a substantial investment in class II machines. Should the NIGC adopt the proposed rules, the Tribe will likely face a considerable loss in value of this investment.

For all of the reasons more clearly outlined in the attached Muckleshoot Comment Summary document, the Tribe strongly encourages the NIGC to withdraw these proposed rules.

Sincerely,


John Daniels, Jr.
Chairman

cc: Senate Committee on Indian Affairs
House Resources Committee

Enclosures

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MUCKLESHOOT INDIAN TRIBE'S COMMENT SUMMARY

The Tribe's primary objection to this rulemaking is the fact that the agency is abandoning current precedence and overruling all existing NIGC game classification opinions. If finalized, no electronic games currently classified by the NIGC as class II will survive – they will all become class III games. Such an action undermines Congress' intent in enacting IGRA in ways critically important to Indian country, including a complete disregard of Congressional intent "that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development."¹

In enacting IGRA, Congress established a comprehensive regulatory scheme for the conduct of gaming on Indian lands. Congress clearly intended to permit the use of "electronic, computer, or other technologic aids" in the play of class II games. Contrary to assertions made within the preamble to the proposed rule, the differences between such technologic aids and electromechanical facsimiles are not "blurred." A simple review of legislative history shows how Congress both anticipated potential difficulties in distinguishing between the two, and provided direction toward resolution.

Legislative history shows that Congress understood that technology would continue to advance, and expressed the intent that class II gaming likewise evolve and grow through technological advancement. Speaking directly to the use of electronic equipment in the play of class II games, Congress explained:

The [Senate Indian Affairs] 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.²

In an effort to further clarify the distinctions between technologic aids and electromechanical facsimiles, the NIGC first defined these terms in 1992.³ As the courts continued to address these issues, however, it became increasingly clear that these original definitions were not working as intended. Even worse, three United States Circuit Courts of

¹ S. Rep. No. 100-446, at 9 (1988).

² *Id.*

³ 57 Fed. Reg. 12,382 (April 9, 1992). In 1992, electronic, computer or other technologic aid was defined as "a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used: (a) Is not a game of chance but merely assists a player or the playing of a game; (b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and (c) Is operated according to applicable Federal communications law." Electronic or electromechanical facsimile was as "any gambling device as defined in 15 U.S.C. 1171(a)(2) or (3)." A game similar to bingo was defined as "any game that meets the requirements for bingo under §502.3(a) of this part and that is not a house banking game under §502.11 of this part."

Appeal ignored the definitions, with one unmistakably criticizing the NIGC for its lack of guidance in this area.⁴ In response to this criticism, the NIGC revised these definitions in 2002 by codifying the distinctions brought to light by the courts and ten years of experience with the definitions.⁵

Given the clarity brought by the 2002 amendments and the absence of any intervening court decision or congressional enactment, the Tribe is surprised by the NIGC's current proposal. The proposed definition of an electromechanical facsimile in particular not only abandons existing clarity, but takes the industry back in time. Tribes, manufacturers, and others, have made substantial investments in reliance upon current precedence, investments that are now threatened by the uncertainty surrounding this rulemaking. The NIGC's action is especially troubling given the fact that the existing definitions have been accorded deference by the judiciary.⁶

The Tribe is quite angered by the fact that if this proposal becomes final, *all of the class II games within our facility will either have to be replaced or modified* – options that will result in considerable cost to the Tribe. The NIGC has given no support for its attempts to redefine bingo through this rulemaking process. Congress has placed only three requirements on a game of bingo⁷, and the federal courts have consistently held that these three requirements “constitute the sole *legal* requirements for a game to count as class II bingo.”⁸ The NIGC's effort to add requirements to the game not only ignores the holdings of the courts, but also intrudes upon the sovereign right of tribes to operate class II games in accordance with the law, while tailoring them to the demands of their own community and business environments.

⁴ 67 Fed. Reg. 41,166, 41,168 (June 17, 2002) (“*Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994) (holding that the scope of gaming determination at issue in the case could be made by looking to the statute alone and without examining the Commission's regulatory definitions); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) (resorting to the dictionary definition of facsimile as ‘an exact and detailed copy of something,’ rather than using the regulatory definition); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000) (“Boiled down to their essence, the regulations tell us little more than that a class II aid is something that is not a class III facsimile.”)).”

⁵ 67 Fed. Reg. 41,166 (June 17, 2002).

⁶ *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, (10th Cir. 2003), *cert. denied*, March 1, 2004 (“At least six factors support the reasonableness of the NIGC's construction as consistent with IGRA.”) *Id.* at 1042 (“... we conclude that the NIGC's definition of ‘aid,’ which does not include the ‘broaden participation’ requirement, is entitled to full Chevron deference. ... Accordingly, we adopt the standard articulated by the NIGC's regulation...”)

⁷ 25 U.S.C. § 2703(7)(A)(i) (2001). To constitute a games of bingo, the game must first be played for prizes with cards bearing numbers or other designations. Second, the holder of the card must cover numbers or other designations when objects, similarly numbered or designated, are drawn or electronically determined. And third, the game is won by the first person who covers a previously designated pattern on such card.

⁸ *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000) (“IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo. There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. . . . We decline the invitation to impose restrictions on its meaning besides those Congress explicitly set forth in the statute.”) (emphasis in original); *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 723 (10th Cir. 2000) (rejecting the government's argument that game speed, appearance, and stakes defeat classification as bingo so long as the three statutory criteria are satisfied.).

To illustrate this point, we provide the following analysis of the Mystery Bingo game, which is being operated by the Tribe as a class II game in accordance with a game classification opinion issued by the NIGC on September 26, 2003.⁹ Notably, this opinion has not been withdrawn, nor has any indication been given that it is no longer to be relied upon. Nonetheless, Mystery Bingo will no longer satisfy the NIGC's requirements of a class II game if the proposed rules become final. We describe below a number of the characteristics employed by Mystery Bingo that the current proposal overrules.

Prohibition of Random or Unpredictable Prizes

Section 546.4(g) of the proposed rule provides:

“All prizes in the game, except for progressive prizes, must be fixed in amount or established by formula and disclosed to all participating players in the game. Random or unpredictable prizes are not permitted.”

Thus, in order for a game of bingo to be a class II game under the proposed rule, all prizes must either be fixed in amount, or established by formula and disclosed to all players. While unclear within the proposal, additional statements of the NIGC have clarified that disclosure to the player must be made at or before the time the game begins. Mystery Bingo, which the NIGC has found to be a class II game, does not meet this requirement.

Prizes in a game of Mystery Bingo are “not known to the winning player until the balls required to obtain that pattern are drawn.”¹⁰ This, naturally, would not occur until the game is in progress. In its opinion where the NIGC found this attribute to be acceptable in a class II game, the agency noted that, “[a]lthough this is unique [sic] prize structure, the prize is determined by play of the bingo game and not by another element of chance.”¹¹ Because the proposed rules abandon this earlier pronouncement, if they become final, Mystery Bingo will no longer satisfy the NIGC's requirements of a class II game. Mystery Bingo would thus be reclassified as class III gaming. To avoid reclassification, the Tribe recommends that §546.4(g) of the proposed rule be revised to state: “All prizes in the game must be fixed in amount or established by formula.”

Two Second Delay Before a Game of Bingo May Begin

Section 546.6(a) of the proposed rule provides in part that:

“The system must require a minimum of two players for each game, but not limit participation to two players, and must be designed to broaden participation in

⁹ It should be noted that the NIGC reexamined the Mystery Bingo game on May 26, 2004, in response to a request to modify the game, and again found the game to be a class II game as defined by IGRA.

¹⁰ *Sierra Design Group “Mystery Bingo” Game Classification Opinion*, National Indian Gaming Commission, September 26, 2003 (“*Sierra Design*”) at 7.

¹¹ *Sierra Design* at 7.

each common game by providing reasonable and sufficient opportunity for at least six players to enter the game. Games cannot begin until two (2) seconds have elapsed from the time that the first player elects to play, unless six players enter.”

Thus, in order for a game of bingo to be a class II game under the proposed rule, it must: 1) require a minimum of two players; *and* 2) require either a two second delay before the game may begin, or require the participation of six players. Mystery Bingo, which the NIGC has determined to be a class II game, does not contain such a feature.

Instead, Mystery Bingo contains a flexible algorithm that encourages participation by more than two players. As described within the NIGC’s game classification opinion, “[a]dditional players enter the game if they request participation within a set time period. The amount of time available for entry of additional players is a configurable aspect of the software. ... With fewer terminals active, the algorithm lengthens the enrollment period to accommodate more players and thus broaden the participation.”¹² This type of flexibility is in keeping with congressional intent.

Notably, the NIGC’s opinion also provides for alternate ways in which participation may be broadened. For example, “[p]articipation among players is also encouraged by Mystery Bingo’s successive ball releases. By requiring players to participate and actually play the game, rather than simply start the game and complete it in one ball release, Mystery Bingo broadens participation. It requires players to play against each other rather than just against the machine. ... In short, Mystery Bingo’s electronic format broadens the kind of participation that bingo requires. The format does not render the game an electronic facsimile under 25 C.F.R. § 502.8 because it affirmatively enhances the bingo-like characteristics of the game: interactive participation among players, not against the machine.”¹³ Nevertheless, if the current proposal becomes final, Mystery Bingo would no longer satisfy the NIGC’s requirements of a class II game, and thus, would become a class III game.

To avoid reclassification of this game, the Tribe recommends that §546.6(a) of the proposed rule be revised to state: “The system must require a minimum of two players for each game.”

Unnecessary Delays During Game Play

Section 546.6(c) of the proposed rule provides in part that:

“To establish the game as a contest in which players play against one another the game must provide for two or more the [sic] releases of selected numbers or other designations. Each release will provide one or more numbers or other

¹² *Sierra Design* at Pages 11-12.

¹³ *Sierra Design* at 12.

designations randomly selected or electronically determined. Each release must take a minimum of two (2) seconds. Numbers or other designations must be released one at a time.”

Furthermore, §546.5(i) provides:

“A minimum of two (2) seconds must be provided after the completion of each release of numbers or other designations for players to complete each cover (daub) opportunity. The game may not proceed until at least one player has covered (daubed) the selected numbers or other designations appearing on the player’s card, but, in any event may not proceed in less than two (2) seconds.”

Thus, in order for a game of bingo to be a class II game under the proposed rule, it must require: 1) two or more releases of balls; 2) that each ball release take a minimum of two seconds; 3) that each number within a release be released individually; and 4) it must incorporate a two second delay for daubing regardless of whether such a delay is needed. Again, Mystery Bingo does not incorporate each of these features, and, consequently, if the proposed rules become final, Mystery Bingo would no longer satisfy the NIGC’s requirements of a class II game.

While Mystery Bingo does incorporate a minimum of two ball releases, the other restrictions were not previously required. Interestingly, the NIGC states within the Mystery Bingo game classification opinion that “[t]he fundamental idea is that the equipment and the electronic format “broaden” participation, not limit it.”¹⁴ It is the Tribe’s belief that by inserting unnecessary delays into a game of bingo, players will become confused and actually stop playing the game. As a result, the NIGC’s current efforts to broaden participation by delaying game play will, ultimately, have the opposite effect.

To avoid reclassification of Mystery Bingo, the Tribe recommends that §546.6(c) of the proposed rule should be revised to state: “The game must provide for two or more releases of numbers or other designations.” Furthermore, §546.5(i) should be deleted in its entirety.

Other New Restrictions

In addition to the specific requirements noted above, the proposed rule includes many other new requirements that would cause Mystery Bingo to lose its class II status. The Tribe therefore requests that if the NIGC insists on moving forward with this rulemaking, the following requirements be deleted:

¹⁴ *Sierra Design* at 11.

1. Section 546.4(j) of the proposed rule, which requires that “[a] game-winning prize may be less than the amount wagered, provided that the prize is no less than 20% of the amount wagered by the player on each card and at least one cent.”
2. Sections 546.4(d) and 546.7(j) of the proposed rule, which require that both a game of bingo and a game of pull-tabs “prominently display” that the game is either a game of bingo or a game of pull-tabs. “Each letter of the display must measure at least two (2) inches in height.”
3. Section 546.4(b) of the proposed rule, which requires in part that “[w]hen displayed, the game of bingo, or other games similar to bingo, including the electronic card but excluding any alternative displays, shall fill at least ½ of the total space available for display.”
4. Section 546.4(o) of the proposed rule, which requires in part that “[i]n no instance may the alternative display fill more than ½ of the total display space.”
5. Section 546.5(j) of the proposed rule, which requires that “[p]layers must cover after each release in order to achieve any winning pattern, except that a player may later cover numbers or designations slept following a previous release (“catch up”) for use in obtaining the game-winning pattern. Failure to cover after each release results in the player forfeiting use of those numbers or other designations in any other pattern in the game. For bonus prizes and progressive prizes, if a player “sleeps,” i.e. fails to cover one or more numbers or other designations, that player cannot be awarded such prize based on a winning pattern which contains one or more of the numbers or other designations slept by the player. For game-winning prizes, if a player sleeps, the player may later cover the number(s) or other designations and win such prize if that player is the first player to cover all other numbers or designations making up the game-winning pattern.”

Finally, with regard to Mystery Bingo, it should be noted that the apparent “blurring” of the line between class II and class III was a concern of the Commission’s at the time it issued its class II opinion. As the NIGC stated in the opinion:

“Our interpretation is founded on the language of the statute and on Congressional intent that there be some distinction between class II and class III. The Committee Report on the bill that became IGRA noted that ‘both State and tribal governments have significant governmental interests in the conduct of class III gaming.’ However, the lines between what constitute class II and class III games are being blurred by technological advances that Congress could not have foreseen and did not explicitly address in 1988 when it enacted IGRA, with its three simple statutory criteria for what constituted bingo. Companies building and distributing devices for game play strive to use common features and common game themes in their class II and class III products. There is often little

difference in appearance. We nonetheless must continue to distinguish class II from class III games because Congress distinguished between them.”¹⁵

Notably, these concerns are remarkably similar to those raised in the preamble to the current rulemaking. With these same concerns in mind, however, the NIGC went on to find that Mystery Bingo – absent the additional requirements of the proposed rule – was a class II game as defined by IGRA. Again, we ask, what has changed to warrant the imposition of additional requirements on a class II game of bingo? There have been no negative court rulings or enactments of Congress. Absent such actions, such a dramatic change of course is unwarranted.

Reclassification of Other Class II Games

Unfortunately, it is not only the Mystery Bingo opinion that is being overturned by this rulemaking. As noted earlier, *all* existing NIGC game classification opinions are being overturned. No electronic bingo or pull-tab games that are currently classified as class II will survive this rulemaking, and therefore, a Tribal-State Compact will be required for their continued operation. The following discusses some of the other class II games that will be reclassified by the proposed rules.

National Indian Bingo – Determined to be a Class II Game on November 14, 2000

Section 546.5(n) of the proposed rule provides that “[t]he gaming facility or its employees may not play as substitute for a player.” However, on November 14, 2000, the NIGC issued a game classification opinion that permitted such practice within a class II game. The following discussion from the NIGC’s game classification opinion finding National Indian Bingo to be a class II game is particularly interesting:

“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. The ‘holder’ is not defined. The holder in [National Indian Bingo] 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. When the agent plays the [National Indian Bingo] 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.”¹⁶

¹⁵ *Sierra Design* at Page 9.

¹⁶ *National Indian Bingo Game Classification Opinion*, National Indian Gaming Commission, November 14, 2000 (citations omitted) at 4.

Notwithstanding the NIGC's earlier analysis, if the current proposal becomes final, National Indian Bingo will no longer satisfy the NIGC's requirements of a class II game. This game – and any other that permits the use of agents as previously authorized – would be reclassified as a class III game and require a Compact for continued operation. To avoid such a consequence, the Tribe recommends that §546.5(n) be deleted from the proposed rule.

Wild Ball Bingo – Determined to be a Class II Game on March 27, 2001

On March 27, 2001, the NIGC issued a game classification opinion for Wild Ball Bingo, wherein the game was found to be a class II game of bingo. Notably, the bingo card used to play this game contained only four numbers – an element of flexibility that would be overturned by §546.4(c) of the current proposal. Instead, such a game would be reclassified as a “game similar to bingo.” The following discussion from the NIGC's opinion wherein the game was held to be a game of bingo rather than a game similar to bingo is worth noting.

“Non-traditional design

“Although the traditional bingo game may use a card with a grid containing more than four numbers, a minimum array is not specified in the IGRA definition. As the United States Court of Appeals for the Ninth Circuit noted in a recent decision on a similar game:

“Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or hometowns might discover, IGRA's three explicit criteria, we hold, constitute the sole legal requirements for a game to count as Class II bingo....

“Moreover, § 2703(7)(A)(i)'s definition of Class II bingo includes “other games similar to bingo,” § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

“*U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1096 (9th Cir. 2000).

“In light of this case and our own review of the statute and application of our regulations, the fact that the card contains only four numbers rather than a more extensive grid of numbers does not place the game outside the “bingo” definition found in IGRA.”¹⁷

¹⁷ *Wild Ball Bingo (Electronic Version) Game Classification Opinion*, National Indian Gaming Commission, March 27, 2001 (citations omitted) at 4.

Given that games similar to bingo can only be played in a location where bingo is being played, to reclassify Wild Ball Bingo in such a manner would negatively impact the game.¹⁸ Congress intended games similar to bingo to encompass a broader range of games than those satisfying the three specific requirements of bingo. Congress recognized the need to allow for the evolution of the game and to permit certain variations of bingo. This intention was properly captured by the definitions adopted by the NIGC in 2002, and the NIGC should avoid reversing this position. Accordingly, these immaterial distinctions between bingo and games similar to bingo should be removed from the proposal, and the two games viewed as described in the preamble to the 2002 rulemaking.

Nova Gaming Bingo – Determined to be a Class II Game on April 4, 2005

The most recent NIGC game classification opinion finding a game of bingo to be a class II game under IGRA, was issued just over a year ago. As with each of the games cited above, this game – the Nova gaming system – will also become a class III game if the current proposal is finalized.

For example, when the NIGC evaluated the Nova gaming system just last year, a game structure wherein patterns rather than numbers are slept was found acceptable in a class II game – a structure that mirrors the playing of live bingo.¹⁹ No distinction was made for the type of pattern involved, or for whether the player was the first to obtain such pattern. Now, however, the NIGC is asserting that *numbers* rather than *patterns* are slept.²⁰ Even more, the proposal states that slept numbers comprising any pattern other than the game-winning pattern are forfeited, and can never be “caught-up.” While numbers comprising the game-winning pattern may be “caught-up,” this may only be done where that player is the first to obtain the game-winning pattern. Imposing such restrictions on a class II game is without support. Because the Nova system – a game found to be class II just one year ago – does not satisfy these new requirements, it would fail to maintain its current class II status.

The current proposal contains other requirements that were not required last year. For one, there was no requirement that the bingo display “fill at least ½ of the total space available for display.”²¹ Nor was it required that the game “prominently display” that it is a game of bingo.²² No mention was made of restricting the bingo card such that each space contains “a

¹⁸ Importantly, because Wild Ball Bingo also fails to satisfy a host of other new requirements found within the proposed rule, it would lose its class II status as a whole.

¹⁹ “Only numbers successfully daubed are eligible for completing any pattern (interim or game winning). While the player still has the opportunity to daub numbers in subsequent releases, s/he cannot win any prizes that may have been awarded for patterns covered in a slept release.” *Nova Gaming Bingo System*, National Indian Gaming Commission, April 4, 2005, page 11.

²⁰ *Proposed Rule, National Indian Gaming Commission, “Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through Electronic Medium Using Electronic, Computer or Other Technological Aids,”* 71 Fed. Reg. 30238 (May 25, 2006) (“Proposed Rule”) at §546.5(j).

²¹ *Proposed Rule* at §546.4(b).

²² *Proposed Rule* at §546.4(d).

unique number or other designation which may not appear twice on the same card.”²³ Nor was the game required to pause two seconds for players to daub regardless of whether the delay was needed.²⁴ Because nothing has changed in the last year to warrant the additional requirements, these provisions should be removed from the current proposal. The NIGC should avoid restricting the flexibility so obviously intended by Congress.

As each of the above examples illustrates, though couched as an agency rulemaking, the NIGC’s current efforts would in effect be an amendment of IGRA. It is without doubt that the proposed rule places restrictions on the game of bingo not envisioned by Congress. If IGRA is to be amended at all, the proposal should be presented and debated as such. To do otherwise may be seen as an underhanded attempt to circumvent proper procedure, especially when considering that it is doubtful that the game described within the proposed rule can actually be played in a live setting. As a result, some would argue that the NIGC is not clarifying the game of bingo, but instead creating an entirely new game.

Prohibition of One-Touch Play

Finally, the NIGC’s position that one-touch play is insufficient interaction with certain games is both an arbitrary and capricious limitation on the game of Bingo.

Deadline for Compliance

The Tribe is also concerned with the regulation’s deadline for compliance. Section 546.10(e) of the proposed rule states that existing operations such as ours have only six months in which to come into compliance with the final rule. Given, first, that no existing games satisfy the proposed requirements, and, second, that it is likely to take at least this long for compliant games to be developed, six months seems to be an impossible deadline.

Furthermore, §546.10(e)(3) of the proposed rule states that any game placed into operation after the effective date of the final rule must satisfy the rule’s classification requirements before being put into operation. The section further provides that if tribal certification is not provided within six months of the final rule’s effective date, full compliance with the final rule – including lab and NIGC certification – will be required before new games may be placed into operation. Because it is unlikely that compliant games can be developed within six months of the final rule’s effective date, tribes will be forced to await full implementation of the regulation before games may be added. Given the start-up nature of this ambitious certification and approval program, it is likely to take upwards of 12 to 18 months for a game to receive NIGC approval. We find it wholly unacceptable that any tribe may be prohibited from adding any new class II games for this length of time. Consequently, in an effort to prevent additional financial harm during the regulation’s transition period, the six month

²³ Proposed Rule at §546.4(c).

²⁴ Proposed Rule at §546.5(i).

requirement contained within both §§546.10(e)(1) and (2) should be extended to a more realistic 18 months, and §546.10(e)(3) should be deleted entirely from the regulation.

Infinite Ability to Object

The Tribe is also concerned with §546.9(e)(1) of the proposed rule, which provides the NIGC with an unlimited period of time in which to object to a game's class II certification. This provision should be deleted from the regulation so that there is a definitive time at which both the manufacturer and the tribe are certain that the games are permissible. At the very least, parameters should be developed to define "good cause." An objection should only be permitted after 60 days where it is shown that the requesting party misrepresented its product, or the testing laboratory committed a material error in its testing.

Extension of Comment Period and Additional Publication as a Proposed Rule

As a part of this rulemaking, the NIGC is also in the process of developing technical standards for class II games. For obvious reasons, the two regulations are closely related. Because of the relationship between the two regulations, and the fact that one will surely impact the other, tribes should be given the opportunity to review the overall impacts simultaneously. It is therefore requested that the Commission consider a greater extension of the comment period for this regulation so that the two regulations can be reviewed together. It is our belief that additional time is needed in which to jointly review the impacts the regulations may have on one another given the specialized nature of the technical standards.

Finally, given the extensive impacts that these regulations will have on the entire gaming industry, both regulations should again be published as proposed rules before thought is given to finalizing the regulations. These minor delays will permit both the industry and the NIGC to ensure that the least restrictive means are being utilized to accomplish the NIGC's stated goals in drafting these regulations.