Picayune Rancheria
of the

CHUKCHANSI INDIANS

46575 Road 417 • Coarsegold, CA 93614 • (559) 683-6633 • FAX (559) 683-0599

November 14, 2006

Philip L. Hogan
National Indian Gaming Commission
1441 Street, Suite 1000
Washington D.C. 20005

RE: Proposed Rules Regarding Classification of Class II Games under the Indian Gaming Regulatory Act

Dear Chairman Hogan:

On behalf of the Picayune Rancheria of the Chukchansi Indians, we would like to again thank you for providing the Tribe the opportunity to consult with your office concerning the Proposed Class II amendments Re: electromagnetic facsimiles. Per your request, we hereby provide the following comments concerning the Proposed Class II amendments and the affect the amendments may have on Indian tribes in general and our tribe in particular.

1. **The Proposed Class II Amendments are Inconsistent with the Indian Gaming Regulatory Act's (IGRA's) Native American Economic Policy**

The Indian Gaming Regulatory Act's ("IGRA") primary policy goal was to promote economic development, self-sufficiency and strong tribal governments. The NIGC proposed regulations will destabilize these emerging gaming economies by decreasing revenues and eliminating jobs, which will create a downward spiral within these tribal communities. Logically, when the Indian community suffers, local government and government services suffer as well. Further, the effects of Class II gaming itself should not be viewed with a narrow lens, specifically focused to the Indian community, but with a broad lens as gaming has lifted up many non-Indian local communities, local governments and economies. Thus, if Class II gaming is, due to the proposed regulations, considered economically nonviable, grave social, political and economic ramifications are foreseeable upon Indian communities in general and upon non-Indian communities by proxy.

2. **The Proposed Class II Regulations Act as a Unconstitutional Amendment of the IGRA**

The proposed regulations alteration of the game of bingo act as an illegal amendment to the IGRA. Thus, in changing the game of bingo to its "original" form the NIGC is altering the statutory definition of the game of bingo and thus legislating as opposed to simply interpreting the IGRA. By legislating the NIGC is unlawfully

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usurpi g the authority of Congress and undermining Congresses' intent to grant tribes the benefi of using technological aids to assist bingo play. Additionally, the proposed regula ns go much farther than simply clarifying the definition of bingo enumerated by Cong s in the IGRA, it fundamentally alters the game in a manner as to unlawfully depri tribal governments of the full benefits provided to them under IGRA.

3. he Proposed Class II Amendments Will Negatively Effect Tribal Government Building

ne of the most significant effects of the IGRA is the ability for tribes to build effect , responsive government institutions. Although gaming in general has provided Class gaming tribes the ability to build effective tribal governments, Class II gaming specif lly has allowed tribes in jurisdictions that do not offer Class III gaming, or in jurisd ions where compacts have been unobtainable the ability to develop, manage and regula a thriving economic enterprise. Revenues from gaming operations have provi the economic stimulus for building tribal government infrastructure, which in turn i eases tribal responsiveness and effectiveness. Effective and responsive tribal gover ce in return garners respect within federal, state and local government bodies that a often suspicious or hold naïve notions of Native American governance. We believ hat these regulations will lead to dramatically reduced revenues which in turn will hi der if not eliminate tribal government building. Congress and specifically the NIGC ould consider all available alternatives to the present Class II regulations prior to imple nting regulations that will diminishment the revenues and incentives for tribes to build ong government institutions.

4. he Proposed Class II Regulations Development Process was Indifferent To ribal Interests and Concerns

lthough our tribe has a good working relationship with the NIGC, we are sorely disap nted that there was not more communication between the Commission and tribes in dev ping the proposed regulations. In spite of assurances by the NIGC that its advis committee process would be transparent, virtually all drafting of the proposed regula ns was conducted behind closed doors without Advisory Committee involv ent. A review of the five previous drafts of the regulations through to the prese roposal demonstrates that the consultative process has failed. We can infer this result cause although the Advisory Committee unanimously objected to unreasonable restric ns on Class II games, none of the significant objections were accepted by the NIGC Unfortunately, the same can be said of recommendations made by tribal gover ents and organizations in written comments on the various regulation drafts, as none re accepted or retained in any of the drafts. As members of the class of tribes over ch these regulations will govern, all tribes should have been provided, at a minin n, a sincere commitment to meaningful dialog with the NIGC in the development of the esent Class II amendment proposals.

5. The Proposed Class II Amendments Will Remove the Only Incentive States have to Bargain with Tribes in Good Faith

In addition to promoting Indian economic development, another primary purpose of the IGRA was to ensure that State governments bargained in good faith with tribes over the rights to engage in Class III gaming. (cite testimony). Further, appellate court precedent requires that statutes pertaining to Indian tribes must be interpreted to the "benefit of the Indian." Although IGRA's language concerning the regulation of Class II gaming was specifically drafted to fill the vacuum of power States wield over tribes concerning negotiating Class III gaming compacts, appellate courts have interpreted the IGRA to the benefit of Tribe's concerning good faith negotiations. Thus, the only substantial bargaining chip tribes have to offset the states power is the Class II gaming option.

As we have seen in cases such as Florida v. Seminole Tribe, the good faith bargaining requirement has been diminished substantially. Across the land we have seen on countless occasions State governments extort unreasonable requirements on tribes in exchange for the right to conduct Class III gaming. Many state governments will not even come to the table at all. Our tribe is currently in compact re-negotiations concerning our obtaining an additional 200 gaming machine licenses allowed under our 1999 Tribal State Compact. However, even without the proposed NIGC regulations in effect the State of California refuses to bargain in good faith over these additional machines. We believe the proposed regulations not only attempt to finish what the Court in Seminole Tribe began, but will effectively eliminate any good faith bargaining requirement imposed on states by the IGRA, by removing any viable option of Class II gaming. In the absence of the Class II option, tribes will be at the will of State governments, which as history tells us, is not a place where tribes can expect justice or good faith.

6. The Proposed Class II Regulations are Unnecessary Because There Exists No Evidence Suggesting that Gaming Clients have problems distinguishing between Class II and Class III gaming devices

Aside from creating regulations in the absence of meaningful tribal input, the NIGC has produced absolutely no evidence demonstrating that gaming clients are confused, being deceived or being misled due to Class II gaming electronic aids. We believe that before the NIGC or Congress moves forward with these regulations that they must carry their burden to demonstrate the need for these proposed regulations. At a minimum, those promoting the need to draw a distinction between Class II and Class III gaming devices must demonstrate the basis for these regulations. In the absence of proof that gaming clients are being harmed by these games, confused or misled, Johnson Act concerns, or rather the policies evoked by the Johnson Act, should be disregarded. Conversely, these regulations appear to be drafted to address the concerns and beliefs held by the Department of Justice. However, almost every time the DOJ has challenged tribes or manufacturers concerning gaming device electronic aids, they have lost. Further, the Supreme Court of the United States' denial of certiorari to former Attorney General John Ashcroft's request in Seneca Cayuga Tribe of Oklahoma to hear a case

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specif lly addressing the DOJ's Johnson Act concerns is telling.[1] We believe that the Supre Court's rebuke of the DOJ is further evidence that there exists no controversy worth olving concerning the issue of what constitutes permissible electronic aids utilize n Class II gaming. As we have seen no evidence demonstrating the gaming public confused or being harmed by the use of electronic aids in Class II gaming, and the D and NIGC have produced no evidence necessitating regulatory change, the propo d regulations are unnecessary and unjustified.

7. The Proposed Class II Amendments Strip Important Court Victories Won by Tribes Identifying Acceptable Class II Gaming Electronic Aids

Over the last ten years tribes have prevailed before the Ninth and Tenth Circuit Court Appeal concerning permissible Class II gaming device electronic aids. In case after e, the Courts have emphatically held that tribes are not limited to "traditional" bingo mes played with cards and bingo balls. The courts have confirmed that tribes have same right to take advantage of technological advances as do normal business consu rs.[2] The proposed NIGC regulations, however, will remove a tribes ability to engag n a profitable technologically advanced bingo games and instead force upon it draco n requirements that will essentially eliminate player incentives and along with it, bingo ofitability.

n addition to overturning federal court precedent, the proposed regulations disreg l the NIGC's own advisory opinions. To date none of these opinions appear to have i erpreted the IGRA loosely, with many considered unduly narrow or excessive. Howe , under the proposed regulations we anticipate that not a single bingo game previo ly approved by the NIGC will pass muster. Based on this belief we consider the propo d regulations unreasonable, unnecessary and unduly burdensome on tribes.

8. The Proposed Class II Amendments Will Usurp The Authority of Tribal Gaming Agencies

The proposed regulations intrude upon tribal sovereignty by usurping the role of tribal vernments as regulators of tribal gaming under the IGRA (25 U.S.C. 2701 (b)(1) Under the proposed regulations tribal governments will be excluded from any meani ful participation in the classification of gaming devices and, for all practical purpo , stripped of the authority to make critical legal determinations concerning game classi ation. Moreover, under the proposed regulations, gaming device classification will b ransferred, not to a tribal agency, but to "independent" game testing laboratories. Altho n these independent testing laboratories will be under the control of the NIGC, we be ve that the additional step in the classification process included in the proposed amen ents not only intrudes on the authority of the gaming agency, but will likely result a lengthy certification process, that will, again, affect only the tribes.

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[1] See (n D. Ashcroft, Attorney General et al. v. Seneca-Cayuga Tribe of Oklahoma (2004) 540 U.S. 1218 (orari denied))

[2] See (ted States v. 103 Electronic Gambling Devices (9th Cir. 2001) 223 F.3d 1091; United States v. 162 M aMania Gambling Devices (10th Cir. 2000) 231 F.3d 713.

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Finally under the proposed regulations only the NIGC would be permitted to challenge gaming device classification determinations. Aside from the fact that the IGRA does not confer the NIGC jurisdiction over device testing laboratories, the regulations provide no means for tribes to independently challenge gaming device determinations. Although, during our NIGC consultation, Chairman Hogan outlined a gaming device classification appeal process the right to appeal a determination affecting a tribe after the determination has been made is our primary concern. In short, we would appreciate being part of the initial classification process, and not be placed in a position of defending our rights after the classification determination is deemed final.

9. The Proposed Class II Amendments Will Negatively Affect Class II Gaming Client Retention

The proposed regulations include what we believe to be draconian and unlawful restrictions on Class II gaming devices. Although the proposed regulations would not prohibit electronic aids entirely the games that would be permitted would be exceedingly slow, aesthetically less attractive, less enjoyable and far less appealing then what present Class II gaming clients are accustomed to. Thus, the regulation ultimately lead to Class II gaming devices that are much less profitable that those presently in use. Further, our gaming experience informs us that the regulations elimination of the "auto daub" function and the requirement of eight seconds to complete each game will be challenging to clients. Perhaps one unintended consequence of these regulations would be to change the play of the game from a game of chance, to a game of skill.[3] This is due to the proposed regulations altering of the games characteristics and the knowledge a player must have in order to have a chance to win.

The regulations requirement for identifying a "winner" distinct from a progressive prize or bonus prize will also add confusion to gaming clients. Additionally, game math, the game-winning prize as well as the requirement that all players must play for the same set of winning patterns (i.e. no random prizes) will also affect gaming machine playability and gaming profits. One of the most confusing regulations is the requirement that advertising cannot take up more than 49 percent of screen gaming space. We do not understand how the NIGC came up with this figure, nor have we been provided data demonstrating that this percentage of screen space has any effect, positive or negative, on Class II bingo games. We also do not understand the regulations limitations on advertising and visual display images. We view these regulations as having less to do with operating gaming fairness, the alleged reasoning for these regulations, than they do with intruding upon a tribes gaming marketing strategy. In short, we consider these regulations overbroad.

[3] We believe that by eliminating the "auto-daub" function, winning at bingo will depend on knowledge of when to daub as opposed to focusing on the bingo numbers pulled from the hopper. Thus, in altering the game, players with knowledge that they must daub will more likely winners then those who are unaware they are required to daub after each number is released.

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10. The Proposed Class II Amendments Will Result In Substantial Economic Harm to Tribes

Presently, the 50,000 Class II games in use generate over $2 Billion dollars in annual revenue. Based on conservative projections, tribal governments anticipate losses in excess of $1 Billion (one billion dollars) dollars a year under the proposed regulations. This revenue loss will be directly attributable to the regulations unfair and arbitrary restrictions on Class II gaming devices. Additionally, tribes also expect an increased financial outlay fort the purchase of new "permissible" Class II games because of the likelihood than none of the games presently in use will pass muster under the proposed regulations. It is estimated that the games permitted by the proposed regulations will result in a net win that is 50% less than the revenue generated by the games presently in play. The above anticipated reduction will result in one thing-many smaller Class II tribes going out of business. Additionally, the above projections only address net revenue losses, it does not include collateral losses such as jobs, wages, investment losses, transitions costs, reduced spending by local communities and other direct and indirect negative impacts.

11. The Proposed Class II Amendments Will Lead to Diminishment of Tribal Sovereignty

The proposed regulations, as set forth above, will undoubtedly lead to the diminishment of tribal sovereignty. While Chairman Hogan, during our consultation alluded to the IGRA as being "an intrusion into tribal sovereignty," the promises made within the IGRA legislation were fully discussed and vetted by all interested parties in a transparent legislative process, and agreed upon and passed by the United States Congress as a statute both houses of Congress could live with. The same cannot be said of the proposed Class II regulations because the regulation development process was not transparent, not fully vetted by all interested parties and as the regulations are written certainly are not regulations we can live with.

If you have any questions concerning these comments, please do not hesitate to contact us at (619) 642-3681.

Sincerely,

Joyce Dure

Joyce Dure
Tribal Secretary

PICAYUNE RANCHERIA
OF THE
CHUKCHANSI INDIANS -

CHUKCHANSI ECONOMIC DEVELOPMENT AUTHORITY
P.O. BOX 1060 • Coarsegold, CA 93614 • (559) 642-3681 • FAX (559) 642-3683

FACSIMILE COVER SHEET

TO: **Philip N. Hogan**
National Indian Gaming Commission (NIGC)

FROM: **Joyce Burel, Tribal Council Secretary**
Picayune Rancheria of the Chukchansi Indians

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