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November 9, 2006

Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

Re: Proposed Definition Amendments and Game Classification Standards

Dear Chairman Hogen and Commissioner Choney:

We write to oppose the National Indian Gaming Commission's (NIGC) Proposed Rules regarding the "Definition for Electronic or Electromechanical Facsimile" and "Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using 'Electronic, Computer or Other Technological Aids'" (Proposed Rule) as published in the Federal Register on May 25, 2006.

In light of the unanimous opposition voiced by Tribal Leaders at the NIGC's public hearing on September 19th, we request that if the NIGC decides to move forward with this rulemaking, a revised draft should be released, an economic impact analysis should be prepared and the comment period extended before the regulation is finalized. Furthermore, we urge you to announce your intent to publish a revised draft before the end of the current comment period to ensure an adequate opportunity for Tribal comment and to fulfill the Commission's obligation to engage in meaningful consultation with Tribal Governments.

We present the following comments regarding the Proposed Rules and Definitions:

1) Lack of Meaningful Consultation and Indifference to Tribal Interests and Concerns

To date, the NIGC has not released an updated version of the proposed rules that take into account Tribal objections. Further, Class II game manufacturers publicly testified that the rules, as written, would devastate the Class II industry. Unfortunately, because the NIGC has not proceeded with meaningful consultation prior to issuing the Proposed Rule, the Rule reflects an absence of consideration for the role of both tribal governments and tribal regulators by divesting them of any meaningful role in the game classification process.

2) Amended Game Classification Definitions Contrary to IGRA.
We are strongly opposed to the proposed definition of "electromechanical facsimile." The NIGC's claim that facsimiles are presently permitted class II game has no merit. Because Congress clearly intended "that tribes have maximum flexibility to utilize games such as

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bingo and lotto for tribal economic development," Congress intended that class II game technology not be restricted. The courts have agreed, clarifying the distinction between class II technological aids and class III electromechanical facsimiles. Due to the substantial investments made in reliance on the law, the definitions should be left unchanged.

3) Unreasonable, Arbitrary, and Unlawful Restrictions.
We object to the proposal's imposition of greater restrictions to currently available class II gaming than exist currently, and in the process, overturn ten years of case law. Federal courts have held that bingo's three requirements "constitute the sole *legal* requirements for a game to count as class II bingo."

We object to the following arbitrary restrictions because they are not founded in the law:

a. *Pre-Drawn Balls*. The prohibition of using so-called "pre-drawn balls" eliminate games that pre-date IGRA, and run counter to Congressional intent and case law directing that no additional requirements be placed on a game of bingo.

b. *Timing of Card Selection*. The proposal's restriction on players obtaining a new card once game play begins or joining a game in progress also brings new and unwarranted limits to bingo and games similar to bingo that pre-date bingo—restraints not intended by Congress and rejected by the courts.

c. *Numbers Comprising the Ball Draw*. The proposal's mandate on the number of the bingo ball draw at "exactly 75 numbers", while maintaining a distinct definition for games similar to bingo is also not founded in the law.

d. *Game Delays*. The Proposed Rule's series of delays to bingo daubs, ball releases, and player entry into games have no basis in the legal definition of bingo and are unfounded in IGRA.

e. *Sleeping Provisions*. In direct conflict with the law and the game of bingo, the proposal prohibits bingo players from catching-up on slept numbers that contribute to interim, progressive, and/or consolation prizes and prohibits slept numbers that contribute to a game-winning pattern from being "caught-up"—unless that player is the first to cover all other numbers comprising that pattern.

f. *Auto-Daub Prohibition*. Contrary to the proposal's auto-daub prohibition, nothing in the law prevents a game of bingo from employing a feature that assists a player in daubing. Moreover, auto-daubing predates IGRA via bingo-minders as technological aids to bingo.

g. *Prohibition on Diverse Interim Patterns*. No statutory or case law supports prohibiting players who are competing for the same *game-winning* pattern from competing for different *interim* patterns.

h. *Bingo Card Specifications*. While IGRA requires that bingo be played with cards,

no law supports the proposal's regulation of all aspects of an electronic bingo card; including its size, number of squares, and the range of numbers that may appear on the card. The "readily visible" standard should be left unchanged.

i. *Three Number Requirement*. The proposal's requirement that at least three (3) numbers or designations—not counting free spaces—must be covered to constitute a winning pattern has no basis in the law. The NIGC must retain its current requirement that only more than one number constitutes a pattern.

j. *Prize Limitations*. The proposal's restrictions on the amount and types of prizes are unfounded and have no basis in the law and should be removed.

k. *"Uniformity" Participation Broadening Standards*. The Proposed Rule's assertion that technologic aids must broaden participation is not founded in law. Broadened participation is merely an indicator that equipment constitutes an aid—it is not determinative.

l. *Johnson Act Evaluation*. Because the courts have determined that IGRA game classification does not include analysis of whether equipment falls within the Johnson Act's definition of "gambling device," the NIGC must remove any notion that the Johnson Act should be included in a game classification.

m. *Games Similar to Bingo*. Because Congress intended that the term "games similar to bingo" allow for "maximum flexibility" in the innovation of new bingo-like games, we disagree with the proposed limitations on "games similar to bingo."

n. *Electronic Pull-Tabs*. The proposal's requirement of a tangible medium for pull-tabs is outdated and not supported by either IGRA or more current court decisions.

o. *Lotto*. The proposal's definition of lotto wrongly equates lotto with bingo, which, by listing it along with bingo, Congress clearly deemed as distinct from bingo.

Because the above listed provisions are not rooted in the law and run counter to NIGC and federal court precedent, the NIGC must strike them from the proposed regulations.

4) Elimination of Current Class II Aids

Despite the thoughtful comments of numerous tribes and industry leaders, many of the most troubling provisions remain. As a result, the Proposed Rule would reclassify *all* games that the federal courts, tribal gaming commissions, and the NIGC itself have previously determined to be class II. Numerous Tribal leaders testified at the NIGC's public hearing in Washington, D.C., that all existing class II games will become class III and require a Tribal-State Compact for their operation. Because these and other newly created provisions will have a devastating impact on the availability and viability of class II games, all such requirements must be deleted from the Proposed Rule. At the very least, a grandfather provision must be added to permit the continued play of currently operated class II aids.

5) Unworkable Compliance Deadline
We are concerned about the Proposed Rule's six (6) month deadline for compliance. Manufacturers have publicly testified that they will likely not be able to develop and manufacture a market-worthy variety of compliant games by the deadline. The implementation of the NIGC's certification program (and the anticipated flood of initial submissions) will certainly lengthen the time between the deadline and making compliant games available to the public. Tribes will not be allowed to offer class II aids during this time period, effectively stripping them of their rights under IGRA. As a result, the six (6) month deadline must be extended.

6) Regulatory Usurpation of Statutory Law
We are also convinced that the Proposed Rule distorts the game of bingo to such a degree that the resulting game is not bingo at all. Thus, the NIGC is amending the statutory definition of bingo contained in IGRA rather than simply interpreting it through the regulatory process. In so doing, the NIGC is exceeding its regulatory authority, unlawfully usurping the legislative authority of the Congress, and thwarting Congress' intent to authorize tribes to use technologic aids in the play of bingo. The Proposed Rule so fundamentally alters the game that it unlawfully deprives tribal governments of the full benefit of the law.

7) Devastating Loss of Tribal Government Revenue and Costly Unfunded Mandates
Conservative, unofficial projections (no official economic impact analysis exists to date) show that tribal governments stand to lose over **$1 BILLION** of direct revenue a year if the Proposed Rule becomes final. With approximately 50,000 class II games in use today generating over $2 billion of revenue annually, a prime source of funding for tribal programs will be ravaged. These figures do not account for the thousands of lost jobs and wages, investment losses, transition costs, costs of legal and professional services (which are already significant), retooling and redesigning of games to meet compliance, reduced spending in local economies, and other direct and indirect negative economic impacts and unfunded mandates sure to come from this rulemaking. All of these losses and costs–especially associated with a rulemaking that is completely unsupported by law–are unacceptable.

8) Proposal Fails to Ensure Basic Due Process for Tribes
The Proposed Rule fails to resolve the basic problems associated with the NIGC's existing game classification process and omits any meaningful role for tribal regulators—the primary regulators of Indian gaming under IGRA—in game classification. Perhaps more importantly, the proposal lacks an appropriate mechanism for a tribe or its regulatory agency to challenge the classification of a game on a government-to-government basis. Such procedures are essential to ensure basic due process in a process that has a significant and lasting impact upon tribal governments. We object to the absence due process in the proposal and request that the NIGC include such procedures.

should do. The NIGC should refrain from returning Indian country to a state of legal uncertainty, which the federal courts have largely resolved after a decade of litigation.

As testified to at the September 19th public hearing in Washington, D.C., the Proposed Rule will devastate tribal economies that depend largely on gaming revenues to fund vital tribal governmental programs, infrastructure, and other essential community needs. The NIGC should refrain from taking actions that will have such an impact, and instead honor both the spirit and the language of IGRA, the hard-fought victories of Indian country in the federal courts, and the NIGC's own regulatory framework.

Sincerely,

THE SNOQUALMIE INDIAN TRIBE

Matthew Mattson

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