

**TESTIMONY OF ELIZABETH LOHAH HOMER
HOMER LAW, CHTD.**

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Chairman Hogen, Vice-Chairman Choney:

Thank you for inviting me to speak before you today to present my views about the proposed regulations establishing classification standards and the accompanying definitional change. I am especially pleased to address this issue as it has occupied a substantial amount of my attention for the past six years. Most here today are aware that I am former member of the NIGC and played a role in revising the regulatory definitions adopted by the NIGC in 2002. I come before you today not to defend these definitions, but to encourage the Commission examine the soundness of the analytical framework they represent and to urge the withdrawal of the proposed classification standards and facsimile definition.

The 2002 definitions replaced three key definitions originally adopted by the NIGC in 1992, which met with substantial disapproval in several important game classification rulings handed down by the federal courts in the 1990s and early 2000s. Suffice it to say that the federal courts were not impressed with the NIGC's 1992 regulatory definitions, particularly its definition of the term "electromechanical facsimile, even when ruling in the Commission's favor with regard to a particular application. In 1994, the D.C. Circuit Court of Appeals ruled that the scope of the gaming determination at issue in the case could be made by looking to the statute alone and without examining the Commission's regulatory definitions (*Cabazon v. NIGC*). That same year, the 9th Circuit did not even bother applying the NIGC regulatory definitions, but chose instead to simply apply the dictionary definition of the term "facsimile." (*Sycuan v. Roache*). The D.C. Circuit Court of Appeals was harsher in its criticism stating that "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 (*Diamond Games v. Reno*)."

As members of the Commission, we found these decisions deeply troubling. In the first place, it was obvious that the courts found the 1992 definitions so useless that the NIGC was accorded no deference at all under the Chevron doctrine. Next, the NIGC found itself unable to apply its own regulations and reach decisions in conformity with the rulings of the federal courts. This not only created a legal void, but one that threatened the very integrity of the Act. The Commission had little recourse other than to revise its regulatory definitions consonant with the interpretation provided by the courts.

Like you, the previous Commission recognized that there must be a clear and legally supportable distinction between Class II "aids" and Class III "facsimiles." After careful deliberation, we determined that obscuring this distinction was the unfortunate entanglement of IGRA and the Johnson Act reflected in the 1992 facsimile definition.

By defining a facsimile as a “gambling device as that term is defined in the Johnson Act,” the NIGC had inadvertently created an untenable and nonsensical analytical framework for the classification of games under IGRA, which blurred the distinction between electronic aids and facsimiles.

Under the Johnson Act, the term “gambling device” is so broad that its sweeps into its ambit any equipment or component used in connection with gambling, even the type of aid without which a class II game could not be played such as a bingo blower. The 10th Circuit in particular noted this problem and ruled that “absent clear evidence to the contrary, it would not ascribe to Congress the intent both to carefully craft through IGRA this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by the statute.”

The 2002 definitions were carefully crafted to provide clear and proper elements, consistent with principles set forth in case law and capable of being consistently applied to various types of equipment for purposes of classification. We took care to craft these definitions so as to ensure a proper starting point for the analysis. In doing so, we specifically noted that IGRA is about games, not equipment. The Johnson Act is about equipment. In order to conduct a proper analysis under IGRA, the starting point is with the game. Is the game a Class II game? If so, does the use of the electronic equipment aid the play of the game between multiple players? If so, then the equipment constitutes an aid. If not, then the next issue in the analysis is whether the equipment permits a player to play any game chance on a stand alone basis in which the player is competing against a machine rather than against other players.

Like the 1992 regulations, the proposed regulations create an analytical framework that begins at the wrong starting point. I would further note that it reflects the rather simplistic notions urged by the government in litigation and rejected by the courts; to wit: if electronics are used and the equipment looks, acts, feels, and makes money like a slot machine, then it must be a slot machine or a facsimile. In the 1998 MegaMania decision, the district court held that the fact that the electronically enhanced bingo game “was designed to look like a slot machine, the odds involved, the gambling motivators the game was designed to tap into, and psychological analysis of the effect of [the game]... [are not] factors ... relevant to the determination of whether a game is bingo or similar to bingo United States v. 103 Elec. Gambling Devices, 1998 U.S. Dist. LEXIS 19135, 24 (N.D. Cal. 1998). In affirming this decision, the 9th Circuit added, “All told... the definition of bingo is broader than the government would have us read it. We decline the invitation to impose restrictions on its meaning besides those Congress explicitly set forth in the Statute. Class II bingo under IGRA is not limited to the game we played as children.” United States v. 103 Elec. Gambling Devices, 223 F.3d 1091, 1097 (9th Cir. 2000).

Many, including myself, disagree with the proposed rule. We believe that the proposed rules reflect an incorrect interpretation of IGRA, aligning with legal theories advanced by the government in the same litigation that resulted in the utter dismissal of the NIGC’s pre-2002 definitions as well as the holdings in the two game classification decisions handed down after the regulatory definitions were published. As a basis for its proposal the Commission has stated that a ‘clear line’ needs to be drawn between Class II

and Class III games. The courts, on the other hand, have not found it nearly so difficult to distinguish between an electronic aid and an electro-mechanical facsimile.

The fact is that the classification of games is a legal question. The proposed classification standards do not represent proper legal elements, rather they impose restrictions and requirements legally insignificant to the classification of games as a matter of law. Bingo by operation of IGRA is a class II game and all of the legal elements essential to determining whether a game constitutes bingo are set forth in the statute. It is not legally relevant to the classification of bingo whether electronic aids are used to facilitate play so long as the statutory criteria are met. Electronically aided bingo is not a facsimile unless the game is wholly replicated electronically on a stand alone basis in which there is no competition between players.

Modern Class II gaming under IGRA has evolved beyond traditional live-call bingo played in densely packed halls. Today's bingo players are able to compete against other players on sophisticated electronic terminals housed in cabinets with a video display monitors that simulate the spinning reels of a slot machine through electronic graphic imagery. Pull-tab dispensers represent another type of electronic aid to a Class II game that simulates the look and feel of a slot play or electronic card game through video imagery. These aids increase the excitement and enjoyment of players and the popularity of this type of equipment has significantly enhanced the economic viability of Class II gaming.

The proposed rule without question will render unlawful virtually every electronically aided class II game in play today, including those specifically sanctioned by the courts as well as those approved by the NIGC. How such an action is consistent with NIGC's obligations to tribes and in keeping with the policy objectives set forth in IGRA is a question many of us have been pondering since this rulemaking began.

As an independent regulatory agency of the United States entrusted with the responsibility to administer IGRA, the NIGC has an obligation to fairly interpret the law and should do so in accordance with the canons of construction applicable to legislation enacted for the benefit of Indians and Indian tribes. Its rules should be rationally related to the purposes for which the law was enacted and narrowly tailored to achieve rational objectives without undue harm to the industry. Indian Country looks to the NIGC to exercise its authority in a manner that accords tribes the full benefit of the law as enacted by the Congress.

Thank you again for inviting my comments and allowing me this time. I would like to reserve the right to submit additional comments in writing.