



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

David K. Sprague  
Tribal Chairman

Federally Acknowledged  
August 23, 1999

**STATEMENT OF  
JOHN SHAGONABY  
TREASURER, MATCH-E-BE-NASH-E-WISH  
BAND OF POTTAWATOMI INDIANS**

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

**GOVERNMENT-TO-GOVERNMENT CONSULTATION  
BEFORE THE  
NATIONAL INDIAN GAMING COMMISSION**

**JULY 12, 2006**

My name is John Shagonaby, and I am a tribal council member and Treasurer of the Match-E-Be-Nash-E-Wish Band of the Pottawatomí Indians, also known as the Gun Lake Tribe. I would like to thank the Commission for holding these government-to-government consultations. Consultation both respects and reaffirms tribal sovereignty and also acknowledges that each Tribe in the United States has a unique history and relationship with the United States—and this is especially nice to see.

Our Tribal homeland has always been located in Western Michigan. And as the Commission is aware, we are a landless tribe, but have received a final determination of the United States Department of the Interior to place 146 acres of land in to trust in Allegan County, Michigan for the benefit of the Tribe. Unfortunately a private organization has challenged Secretary's decision in federal court and the United States Department of Justice is defending the decision to acquire the lands. Thus, we wait. We wait for the day when we can begin developing our tribal economy, raising our people out of chronic underemployment and protect the health of our elders and future of our children.

Our plan to begin building our Tribe's future includes the opening of casino operations on these newly acquired trust lands in accordance with the Indian Gaming Regulatory Act ("IGRA"). As we look to IGRA and the legal impositions already imposed by this federal statute we find it striking and troubling that the Commission is seeking these regulations. The Supreme Court reaffirmed in *Cabazon* what Indian tribe's nationwide already knew that tribal governments retained an inherent right to conduct gaming activities on tribal lands. There is little debate that IGRA was a direct reaction to this decision. IGRA, while reaffirming tribal sovereignty on one hand, also partially abrogated tribes' inherent authority by imposing federal regulation and also subjecting tribes to the prideful behavior of states if tribes chose to conduct what Congress would call Class III gaming on the other.

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It is in this context as well as nearly twenty intervening years of success of Indian communities pulling themselves out of poverty and creating sustainable, self-sufficient futures and strong tribal governments that this statement is presented. However, we meet in government-to-government consultation today with great trepidation about the regulatory changes being proposed by the Commission. We are concerned because we, like other tribes, view the Commission as a front-line agency implementing and protecting the federal government's trust responsibility toward Indian tribes; but today we believe these regulations unfortunately take a step toward further diminishing tribe's inherent authority to conduct gaming and an unfortunate expansion of regulation without documented need.

Our Tribe is opposed to the proposed regulations because we believe the current regulations at minimum will enable our Tribe to conduct Indian gaming in a manner best suited for economic development. We are, however, also realistic and as governmental entity ourselves, we are cognizant that when considerable time and effort has gone into preparing, drafting, and meeting with tribal officials preparing the proposed regulations, the inertia of the process may make the promulgation of these regulations inevitable. In this light, I highlight the Tribe's primary concerns along with recommendations to the proposed regulations and would like to extend the Tribe's interest and hope that we might work with NIGC on these matters.

#### **I. Proposed Changes to term "Electronic or Electromechanical Facsimile"**

*Federal Register* notice 71 Fed. Reg. 30232 proposes changes to the definition of "electronic or electromechanical facsimile of any game." 71 Fed. Reg. 30232 (May 25, 2006). Specifically, The Commission indicates that the definition of "electronic or electromechanical facsimile" "*has been misconstrued by some allowing for bingo facsimiles*" and therefore the commission offers a proposed change in the definition to "clarify the law. However, the Tribe believes the current definition is working.

Most troubling about this purported need for change in the regulations, and in turn, a fundamental change to IGRA, is that the Commission offers no studies, no evidence that the shows the public or anyone else is supposedly misconstruing the law on this point. In fact, it appears that the Department of Justice and NIGC seems to be misconstruing the terms electronic and electromechanical facsimile. On several occasions circuit court of appeals across the country have rejected 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).

Under IGRA, Indian tribes are expressly permitted to operate Class II gaming with the aid of "electronic, computer or other technologic aids." 25 U.S.C. § 2703(7)(A). Congress' report accompanying IGRA explained that Congress intended that tribes should be permitted to utilize modern technology in conjunction with Class II gaming in

order to maximize player participation and tribal economic development. Sen. Rep. No. 100-446, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075 (Aug. 3, 1988).

The gaming that our Tribe will consider has consistently been upheld by courts to be Class II games and not facsimiles prohibited under IGRA. NIGC's proposed and substantial broadening of the definition will bring Class II gaming that uses electronic gaming in any form to a halt and undermine the purpose of IGRA to promote economic development. Therefore, no change in the definition is required.

## **II. Proposed Changes – Classification Standards and Class II/Class III Demarcations**

The second notice proposes to add a new Part 546 to NIGC regulations. *See* 71 Fed. Reg. 30238 (May 25, 2006). This part is an attempt to draw a clear line of demarcation between Class II bingo, lotto, "other games similar to bingo," pull-tabs or instant bingo played primarily through "electronic, computer or other technologic aids" and Class III "facsimiles of any game of chance." The NIGC purports that these changes are necessary because the advancements and improvements in technology have blurred the Class II/Class III distinction and made it difficult to classify these games when played electronically.

Again any confusion concerning the distinction between Class II and Class III classifications seems to emanate solely from the federal government. The courts and Indian tribes are clear on these distinctions. And there is no evidence nor has there been any evidence offered that the general public is confused or at risk. Therefore, we do not believe changes to the classification standards are necessary.

While NIGC states it is striving to ensure that the three statutory criteria for bingo remains a fundamental principle in Class II game classification the changes proposed are sweeping and restrictive—and appears to reach far more than the three elemental statutory principles of Class II gaming classifications. Our Tribe believes that these proposed changes to the classification standards will have immediate negative economic and social impacts within Indian Country.

Most importantly, our Tribe will be adversely impacted by the proposed classification revisions because the constrictions on classification consequently create two very different economic development plans for the future of our Tribe. One economic development plan assumes a compact is negotiated and signed with the State of Michigan. This plan as the Commission is well aware unquestionably provides solid footing for an economically self-sufficient Gun Lake Tribe for generations. However, the political winds of Indian gaming are unfortunately hitting our Tribe hard and the likelihood of a compact with Michigan is unfortunately a questionable reality. And now we are face with the Class II choice. 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

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will stifle our plan for economic self-sufficiency once again dashing our peoples hope for a brighter future.

In addition, there are several specific provisions from this proposed rule that the Tribe is especially concerned. Below, I provide specific comments concerning those sections.

First, we believe the mandatory changes with regard to one-touch (auto-daub) bingo game system would economically eviscerate Class II gaming and therefore should be stricken from the proposal. *See* 71 Fed. Reg. at 30257. Under the proposed regulations players are required to cover and ‘games may not include a feature whereby covering (daubing) after a release occurs automatically or without overt action taken by the player.’ One estimate suggests that as a result of this requirement, Tribal casinos will experience a 40-50% drop in revenue. A one-touch or auto daub bingo game system can be completed in approximately 2 seconds. The proposed regulations will require that each game require a minimum of 8, and up to 10 seconds for a player to cover. While the actual percentage differential may differ from system to system, depending on the speed of play, the same estimate predicts that casinos will go from the capacity to offer up to 30 games per minute to approximately 6-7.5 games per minute. This is the equivalent of a 75-80% drop in potential Class II revenue per terminal. This figure, along with other market conditions such as player boredom, will dramatically decrease players and tribal investment.

As the Commission is aware, NIGC has only been approving 2 daub games which are not as fast as the auto-daub games. While new technology has allowed these games to take less than 4 seconds, the loss in revenue still amounts to 30%. The end result is that the economic effect of this single provision may destroy the viability and marketability of electronically aided Class II games. We recommend that the Commission revise this timing provision to balance the Commission’s interest in classification demarcation and game profitability.

Next, there are a number, of what the Tribe believes to arbitrary provisions without sufficient and substantial explanation describing their respective derivation. For example, while the Tribe has no problem with a requirement that electronic cards must be displayed and clearly visible at all times and the game may be represented through an alternative display, however the proposal calls for that alternative to take-up no more than 49 percent of the game’s display. NIGC notes that IGRA never required that the Bingo cards be made of paper and by adding this provision it is consistent with case law permitting electronic bingo cards. However, NIGC offers no evidence or explanation why specifically “49 percent” is the screen space that legitimizes the alternative representations.

In another example, the proposal requires the numbers or designations that are to be used must be randomly drawn from a non-replaceable pool containing 75 numbers—this also applies to variants of traditional bingo. While it appears this proposed regulation merely codifies a traditional rule of bingo, this leads to the perception and perhaps rightly so—that NIGC is interested in creating restrictions to Class II gaming that bed notion of

classic or nostalgic ‘bingo’ from our childhood church gymnasiums. The replacement pool figure provision should be removed. Similarly, the requirement that each card must contain a five by five grid of spaces is also arbitrary. While NIGC believed that it was Congress’ intent that when IGRA speaks of tradition Bingo, this is the type of card intended previous NIGC advisory opinions and more importantly court cases are to the contrary. And like the replacement pool provisions such a requirement reinforces that NIGC believes that bingo may only be played in its nostalgic format. Most, importantly, NIGC again offers no substantial evidence or explanation why specifically “49 percent” is the screen space that legitimizes the alternative representations. We recommend striking this provision and creating no restrictions that impact the speed of Class II gaming.

In addition, an arbitrary condition in the proposed regulations is that all technologic aids must display for example: “THIS IS A GAME OF BINGO” or THIS IS A GAME SIMILAR TO BINGO.” Disclaimers on the machines like these, strike tones of paternalism and overprotection. The awesome power of the federal government should not be used to manipulate everyday, mundane decision-making. We recommend striking this provision and believe any proposed regulations should have no restrictions on the display generally.

Finally, the proposed rule also provides for an approval process and verification of electronic and computer or other technologic aids classification. Instead of requesting an advisory opinion from the NIGC, a requesting party must submit to an independent testing laboratory for evaluation and classification. The lab cannot be affiliated with the requesting party. The testing laboratory will then submit a written report summarizing the testing to the client with a copy to the NIGC. Such a proposal offers little recourse. Only the NIGC Chairman may object to the classification, leaving Tribe’s at the behest of what will likely be perceived as politics. Therefore, we believe these provisions are out of line with fundamental principles of due process and undermine Tribal law and regulations of Class II gaming and should be stricken from the proposal.

### **III. Recommendation – Global Consultation at Tribal Leader’s Plenary Session**

Notwithstanding the fact that the NIGC assembled a tribal advisory committee (“TAC”) to participate in the process, the TAC *was not* invited to participate in drafting the proposed regulation. We urge the Commission to work with tribes to draft language if the proposed regulation moves forward that minimizes impacts.

Furthermore, in an effort to examine the broad impacts of these regulations we urge the Commission to hold public hearings on these matters inviting both the public and all tribal leaders to offer ask questions and offer comments for the record.

### **IV. Recommendation – Extend the Comment Period for Proposed Class II Regulations**

NIGC in recent months has indicated that it will offer changes to the technical standards for Class II games; however tribes have yet to see draft provisions. We ask NIGC to extend the comment period for proposed rules for Class II definitions and classifications until NIGC's technical standards regulations are made publicly available and then hold open the comment period for all proposed regulations for 90 days. We believe that the commenting on classification standards as well as technical definitions of devices without first examining proposed changes to technical standards extremely difficult.

## V. **Conclusion**

In January 2005, the NIGC undertook a rulemaking to clarify regulation related to Class II gaming. Although well-intended, we believe that these proposed regulations impose greater restrictions on Class II gaming than exist under current law or the NIGC's present regulations. The rules effectively rewrite the legal standards for establishing that a game and its equipment fall within the definition of Class II gaming. We believe that the proposed regulations will reverse the hard fought victories that Indian tribes have fought and won for over a decade in the federal courts concerning all issues addressed in the proposed regulations.

Tribes have consistently voiced concerns that the proposed rules would undermine the status of tribal governments as the primary regulators of Indian gaming and turn back the clock on the class II industry, particularly with regard to the use of electronic, video and computer equipment. We believe there is a strong likelihood that for many Tribes across the country, the enactment of these regulations bill would sound the death knell for Class II gaming as a viable form of economic development. We oppose the implementation of these proposed regulations and urge the Commission to work with tribes to reduce the impact of any regulations that move forward.