NATIONAL
INDIAN
GAMING
COMMISSION

February 10, 1994

Mr. Scott Henneman
Vice President & General Manager
Infinational Technologies, Inc.
9335 North 48th St.
Omaha, Nebraska 68152

Dear Mr. Henneman:

We are in receipt of your letter of February 7, 1994, in which you request formal review by the National Indian Gaming Commission (NIGC) of the Oasis Electronic Pull-Tab Network.

Your request for a "formal review" of the Oasis Electronic Pull-Tab Network, including the opportunity to present expert testimony and witnesses, is unnecessary and is therefore denied. You have provided the NIGC with sufficient information for us to conclude that your electronic pull-tab devices are electronic facsimiles and consequently fall within class III gaming.

By letter dated May 25, 1993, to Mr. Mark Stevens of Infinational Technologies, Inc. (enclosed) we advised your company that Oasis Electronic Pull-Tab Network devices are electronic facsimiles of the game of pull-tabs and therefore fall within class III gaming. That determination was based on materials you provided the NIGC. The modifications described in your letter of February 7 "to offer a 'blended game' of both paper and video aided pull-tab in a single serial numbered game" do not convert the pull-tab machine from a facsimile to an aid.

In asserting that Oasis Electronic Pull-Tab machines are technologic aids, you have ignored and mischaracterized the holding of the district court and the court of appeals in Cabazon Band of Mission Indian v. National Indian Gaming Commission, 827 F. Supp. 26 (D.D.C. 1993), aff'd, No. 93-5255 (D.C. Cir. January 28, 1994). Your statement that Oasis Electronic Pull-Tab Network was not among the gaming devices at issue in the case is irrelevant. The Cabazon case involved a challenge to NIGC regulations that adopted the Johnson Act definition of a gambling device, 15 U.S.C. § 1171, to define electronic facsimile. See 25 C.F.R. § 502.8. The district court rejected the tribal challenge to section 502.8, stating: "This definition is the only definition possible in order to implement Congress' explicit intent, as expressed in IGRA." 827 F. Supp. at 31. The tribal plaintiffs chose not to appeal the district court's rejection of their challenge to the NIGC's regulations and the court of appeals affirmed the judgment of the district court.

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If Oasis Electronic Pull-Tab machines are "gambling devices" within the meaning of the Johnson Act, then they are electronic facsimiles and fall within class III gaming. Under the Johnson Act, a "gambling device" means:

> any other machine or mechanical device...designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property...

15 U.S.C. § 1171(a)(2). Without a doubt, Oasis pull-tab devices meet this definition with or without the "modifications" outlined in your letter. Therefore, such devices cannot be electronic aids, but rather, are electronic facsimiles and fall within class III gaming.

Your attempt to narrow the definition of "electronic facsimile" based on an incomplete quotation of a single sentence in the decision of the court of appeals is erroneous and disingenuous.

As we have explained above, the court of appeals affirmed the judgment of the district court upholding regulations of the NIGC. Those regulations defined electronic facsimiles to mean gambling devices. The definition of a gambling device does not require that a game be wholly incorporated into an electronic version. Moreover, the court of appeals stated that "<u>at the least</u> the Act's exclusion of electronic facsimiles removes games from the class II category when those games are wholly incorporated into an electronic or electromechanical version." Slip Op. at 8 (emphasis added). Thus, the court of appeals was not limiting the types of games that constitute electronic facsimiles.

In continuing to supply tribes with gambling devices in states in which there are no tribal-state compacts that authorize such devices, Infinational Technologies has ignored our letter of May 25, 1993. The time has come for you to cease this illegal activity.

Sincerely,

Anthony J. Hope
Chairman

Enclosure