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S. HRG. 110–405

# THE NATIONAL INDIAN GAMING COMMISSION

## HEARING

BEFORE THE

## COMMITTEE ON INDIAN AFFAIRS
## UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

APRIL 17, 2008

Printed for the use of the Committee on Indian Affairs

U.S. GOVERNMENT PRINTING OFFICE

42–319 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
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# THE NATIONAL INDIAN GAMING COMMISSION

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**THURSDAY, APRIL 17, 2008**

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
*Washington, DC.*

The Committee met, pursuant to notice, at 10:30 a.m. in room 562, Dirksen Senate Office Building, Hon. Jon Tester, presiding.

## OPENING STATEMENT OF HON. JON TESTER, U.S. SENATOR FROM MONTANA

Senator TESTER. [Presiding.] I would like to call the Indian Affairs Committee meeting on the oversight of the National Indian Gaming Commission to order. We have a great panel to hear from today. The panelists can go ahead and take your respective seats now. I have a quick opening statement and then we will get to the testimony and the questions and answers shortly thereafter.

I want to welcome everybody, especially the panelists, to the Committee meeting today. I want to thank you for being here to visit about the National Indian Gaming Commission's consultation processes. As everybody in this room knows, Indian gaming is a dual-edged sword. On one side, the Indian gaming represents the most significant economic development system since the treaties were made. On the other side, gaming carries the possibility of fraud, corruption and abuse.

To help ensure gaming contributes more positive than negative to Indian Country, Congress established the NIGC. According to the Indian Gaming Regulatory Act, the NIGC role is to shield tribes from organized crime, ensure that Indians are the primary beneficiaries of gaming, and ensure gaming is conducted fairly.

It is undisputed that NIGC is a big job to do. More than 400 gaming enterprises on 230 reservations in 30 States generated about $26 billion in 2006. To complicate matters, each tribe is an individual nation with unique goals and needs. The NIGC is a relatively young entity as far as Government agencies go, and it is reasonable to expect a few growing pains along the way.

We are here today to ensure that the NIGC and Indian gaming overall are accomplishing its missions to improve Indian Country with meaningful, safe and fair economic development. I have several concerns about the process today and hope this hearing helps clarify the issues for everybody here. I want to be sure that the NIGC is spending more of its time to ensure Indian Country is successful with gaming, rather than merely building bureaucracy.

Along those lines, however, I am concerned that this very important job is in the hands of only three people, but right now it is in the hands of only two people because one of the positions has not been filled and both those people are Republicans. I want to be sure that the consultation it does is meaningful. The tribes have reported that although the NIGC announces its proposed rules and collects comments from the tribes, that the NIGC is merely going through more than just the motions. The comments have little influence on its decision-making process. Along these lines, I would like to get your thoughts about the Rahall bill that is currently before the House of Representatives regarding consultation, H.R. 5608.

I am also concerned about the recent controversy surrounding the proposed Class II regulations. With an estimated $1 billion to $2 billion loss at stake in an industry created to provide economic benefit to Indian Country, we need to be very, very careful about how we proceed. I am particularly concerned because tribes are fairly new to the gaming regulations and business enterprise, and only giving them one month to analyze the economic impact statement and no time to analyze the cost-benefit analysis is contrary to NIGC's mission.

That is why Senator Baucus, my comrade from Montana, and I wrote you a letter, Mr. Hogen. In that letter, we had asked you to extend that comment period until tribes had an opportunity to analyze the important aspects and comment appropriately. It is vital for you to understand the impact of this decision will have on Indian Country and avoid losses if at all possible.

And finally, with all the criticisms we have heard about the NIGC, I also want to be sure that gaming operators understand that it is not fair to complain about the NIGC process just because they don't happen to agree with the rule or regulation. The NIGC has a big and very complicated job to do with limited resources. It is important that we all work together.

So in closing, I want to thank you all for being here today. I look forward to this discussion. We are here today to ensure that as we grow, we continue to adhere to the goals identified by Congress. Working together, we truly can improve Indian Country through economic development and gaming can be a contributor.

I want to welcome the panelists here today. It is great to have you. I will introduce you and then we will go in the order of introduction.

We have the Honorable Phil Hogen, Chairman of the National Indian Gaming Commission right here in Washington, D.C., formerly out of the great State of South Dakota. We have the Honorable Delia Carlyle, Chairwoman of the Arizona Indian Gaming Association, Chairwoman of the Ak-Chin Indian Community Council of Phoenix, Arizona. We have the Honorable J.R. Mathews, Board Member and Vice Chairman of the Quapaw Tribe of Oklahoma, Quapaw, Oklahoma. He is accompanied by Mark Van Norman, Executive Director of the National Indian Gaming Association, Washington, D.C.

We have Brian Patterson, the President of the United South and Eastern Tribes of Nashville, Tennessee; and Kurt Luger, Executive Director of the Great Plains Indian Gaming Association, Bismarck,

North Dakota. And finally, last but certainly not least, we have Kathryn R.L. Rand, accompanied by Steven Light, Co-Directors, Institute for the Study of Tribal Gaming Law and Policy, University of North Dakota, Grand Forks, North Dakota.

Welcome, all.

We will start with you, Mr. Hogen.

**STATEMENT OF PHILIP N. HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION**

Mr. HOGEN. Good morning, Senator. Thank you for inviting the National Indian Gaming Commission to testify. With me today here seated behind me is Norm DeRosier, who is the Vice Chair of the Commission, and as you observed, the other member of what ordinarily is a three-member commission.

It is really important and timely that the Senate from time to time look at agencies like ours. Getting ready for these hearings is kind of like doing my income tax. I don't look forward to its preparation, but once I get done with it, I am really better off because I can put things in better perspective and identify some areas where I probably could have done things a little better.

With respect to Indian gaming, I want to say at the outset and remind everybody Indian gaming is not a Federal program. Indians invented Indian gaming. It has been working great. Our job is to be part of the solution, not part of the problem.

The growth of Indian gaming revenues continues to increase. I think with the economy slowing up a little bit, the growth rate might slow down a little, but it is getting bigger and it is doing great things for meeting Indian needs.

NIGC's role, very generally, is to ensure ongoing integrity in this industry. We need to do that so the public will perceive that there is integrity and they will continue to come to tribal gaming facilities. We need to do that to make sure that the tribal assets, the tribal gaming revenues are protected and go to the right place.

But most important, in looking at the regulation of Indian gaming, we need to bear in mind that the tribes do the heavy lifting. The tribes are there all day, every day, 24/7, 365 days a year. If they fall down on the job, then the thing is going to have trouble. Our job is to try and assist them in that regard.

We do that primarily in three ways. We help to assure the suitability of the people they hire to run the place. That is, they license the tribal gaming employees and we help them going to the FBI to check the fingerprint base and so forth do that. We also help them assure that the play at the tribal gaming facility, the casino or the bingo hall, is fair, fair to the players, fair to the tribal gaming facility.

And thirdly, we want to make sure that the dollars that come in the door and are eventually supposed to end up in the tribal bank account get there, so that the developers and the contractors don't get an unfair share along the way or something doesn't fall through the cracks. So internal controls and various mechanisms permit them to do that.

With respect to our agency, we have our headquarters office here in Washington, D.C. We have five regional offices out in the Country, so to speak, and one region is served from our D.C. office. We

have currently 416 tribal gaming operations out in Indian Country operated by 230 tribes. We try to do our job with a staff of 104 staff members.

We have several divisions that we are broken into. We have an audit division that, first of all, looks over the audits that are done by outside accountants for tribal operations, and then sent to the NIGC, and we go out and do audits with respect to the performance or the compliance with the tribe's internal control standards, and in the case of Class II gaming, the NIGC internal control standards.

We have a contracts division that reviews and recommends approval or disapproval of proposed management contracts the tribes enter into with outside developers and so forth. In connection with that, they do background investigations of those folks who tribes interface with. That contracts division also participates in the background investigation role the NIGC plays to support tribal gaming commissions as they license their employees.

And of course, we have an enforcement division. We have investigators who look to make sure that the Indian Gaming Regulatory Act, the NIGC regulations, the tribe's gaming ordinance, and the tribal-State compact are being complied with. To do this, we need some legal advice. We have an office of general counsel. I think we have 17 staff within that office. We often get sued for one reason or the other. They defend that litigation with the Department of Justice, and they advise the rest of the Commission. And then to do the job, of course, we have a division of Administration.

One of the events that was significant in the life of the National Indian Gaming Commission was the ruling in what is called the CRIT case, Colorado River Indian Tribes case, that challenged NIGC's application of minimum internal control standards to Class III or casino gaming. That part of the Indian gaming, the casino gaming, represents 90 percent of that $26 billion that is generated, but the court decided that we had gone too far as we attempted to apply those regulations. So we have necessarily modified what we do and how we do it in that connection.

We still maintain minimum internal control standards, and we do that of course because they still apply to Class II gaming. And in a number of cases, those MICS have been adopted by tribal-State compacts, so they need to stay current with technical advances and so forth.

Recently, a number of tribes have amended their tribal gaming ordinances to adopt or incorporate the NIGC MICS with respect to Class III gaming and to recognize the NIGC's role to monitor that to take enforcement action if there are violations.

So while we have changed after the CRIT decision, it hasn't been a drop in the interest in the minimum internal control standards. There are a number of tribes, knowing that the CRIT decision took that jurisdiction away from us, would like some help and have invited us to come in, look at their Class III mixed compliance, and we are doing that.

Senator TESTER. Chairman Hogen, one thing that I didn't state, and goes to all, we are going to try to limit you to five minutes. Your complete testimony will be a part of the record, so continue

on and if you can wrap it up in the next two or three minutes, it would be much appreciated.

Mr. HOGEN. Okay.

We are funded not with any taxpayers' dollars. We are funded with fees that we assess on tribal gaming. We recently set the rate for that fee, and it will be .057 percent. We reduced the rate from what it had been in the prior year, and that will collect about $15.4 million based on our projections. That is an increase from the previous year's budget.

In addition to the fees, we also collect money with respect to the service we provide on the fingerprints and the management contractors pay their own way with respect to the background investigations they do.

I know that the Committee is very interested in the consultation that NIGC conducts. We have adopted a consultation policy. We attempt to adhere to that, and we are watching with great interest that bill that is in the House that relates to consultation. Consultation is a good idea, but I think in terms of current controversy, if you will, it is not, in my view, that we haven't consulted. Rather, it is that we haven't agreed with everything that the tribe has asked or suggested of us with respect to the Class II standards. I would be happy to respond to questions that might arise in that connection.

So we do have many other areas addressed in our written testimony, and I would be happy to respond to any questions that you or the Committee might have with respect to anything we do.

Thank you, Senator.

[The prepared statement of Mr. Hogen follows:]

PREPARED STATEMENT OF PHILIP N. HOGEN, CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION

Good morning Chairman Dorgan and members of the Committee. The National Indian Gaming Commission (NIGC) is delighted that the Committee has once again chosen to look at the NIGC and the role it plays under the Indian Gaming Regulatory Act (IGRA). As I have testified before, Indian gaming is the greatest engine for economic development that Indian country has developed.

Indian gaming is not a federal program, and its genesis did not occur with the enactment of IGRA. Rather, tribes have been gaming since before the inception of the Act and in many respects, the structure established by IGRA has fostered the growth and development of that industry. IGRA created the NIGC and it is the nation's only federal gaming regulatory entity. To put the regulation of tribal gaming in proper context, we need to appreciate that the vast majority of the regulation of tribal gaming is done by the tribes themselves, with their tribal gaming commissions and regulatory authorities. In many instances, where tribes conduct Class III or casino gaming, state regulators also participate in the process. NIGC has a discrete role to play in this process and is only one partner in a team of regulators.

As I have often told this Committee, the growth of revenues generated by tribal gaming is large, and getting larger. For individual casinos, however, growth may slow and, in some cases, may even diminish. There has been and continues to be growth in the industry, which now generates nearly $26 billion of gross gaming revenues annually, and which represents the second largest component of gaming revenues generated by the gaming industry in the United States.

NIGC's role in the structure established by IGRA is to ensure ongoing integrity in the tribal gaming industry by assisting tribes to determine the suitability of those whom they approve or license to staff and operate their gaming operations and to ensure that the play at the casinos and bingo halls is fair, both to the customer players and to the facilities themselves. In addition, NIGC ensures that the revenues generated by the tribal gaming operations go to the tribal governments and are not wrongfully siphoned away or disproportionately paid to those who supply and assist tribes as they conduct those operations.

As the Committee knows, zero taxpayer's dollars are provided to NIGC to fund its role, but rather the tribes pay their way through fees the Commission assesses on the tribes' gross gaming revenues. The large and growing scope of Indian gaming of late has meant that NIGC, too, has grown and is growing to keep pace. The composition and staffing of NIGC is currently as follows:

**Overview of the Commission**

The NIGC is headed by three Commissioners. The Chairman is appointed by the President with the advice and consent of the Senate and the other two Commissioners are appointed by the Secretary of the Interior. One Commissioner position is currently vacant.

Our current structure is comprised of our Washington D.C. Headquarters Offices, six regional offices (one of which is housed in our D.C. offices) and five satellite offices. The typical regional office is composed of a regional director, several field investigators, one or two auditors and administrative staff.

Collectively our field personnel consist of six regional directors, field and background investigators, auditors, and administrative staff (with one vacancy). It should be noted that the auditors in the regional or satellite offices actually report to the Director of Audits in our D.C. offices.

Our D.C. Headquarters houses the Directors of Enforcement, Training, Auditing, and Contracts. The Directors and our managers for Information Technology (IT), Freedom of Information Act requests, Finance and other administrative roles all report to a Chief of Staff. In addition there is the Office of General Counsel. The attached chart further breaks down the composition of our staffing. Of our 104 employees, 22 are Native American, 16 of whom are enrolled tribal members.

A brief description of the function and achievement of the several divisions of the Commission follows:

**Enforcement Division**

NIGC's Enforcement Division, through its field investigators, reviews the conduct of gaming at 416 tribal gaming operations run by 230 tribes.

As a result of NIGC field investigators' work and with the help of NIGC's Office of General Counsel, in 2007 NIGC issued seven Notices of Violation and entered into an additional 4 Settlement Agreements in lieu of notices of violation. Although informal compliance is the primary method for assuring compliance, approximately 160 Notices of Violation have been issued over the years.

**Training**

Along with Congress's grant of flexibility in the amount of fees collected to fund our activities came a mandate to provide technical assistance to tribal gaming operations. NIGC has always seen training as an important part of its mission but has taken special care to offer training since enactment of Pub. L. No. 109–221 on May 12, 2006. For example, in calendar year 2007, NIGC's Division of Enforcement provided over 700 hours of formal training to tribal regulators. This figure excludes all the hours of informal training that took place during the 715 site visits that were conducted during 2007 or that took place at national and regional gaming conferences. Training topics include: tribal background investigations and licensing; environment, public health and safety programs; tribal gaming commission duties; and slot machine technology.

NIGC recently hired a Director of Training, who will oversee the agency's training efforts, integrating the work of our field investigators and field auditors in providing the training, both formal and informal, that is needed by tribal gaming facilities and regulators.

**Audit Division**

Since the U.S. Court of Appeals for the D.C. Circuit affirmed the holding in the *Colorado River Indian Tribes (CRIT)* decision, the Audit Division has foregone the conduct of Minimum Internal Control Standards (MICS) audits at most gaming operations conducting Class III gaming; however, at the time of the decision follow-up was being performed from several previous audits. At the request of some tribes, that work continued and reports of findings were provided to the tribal gaming regulatory authorities for their disposition. Furthermore, in addition to performing four compliance audits at Class II gaming operations, the Division has received two requests from Class III properties to conduct audits; one has been completed and the other is in progress.

The Division has also conducted audits confirming that the uses of gaming revenue by three tribal governments were compliant with NIGC regulations. Complementing the audit work has been an increased demand for training assistance from gaming operations and tribal regulatory personnel. Since the beginning of the cur-

rent fiscal year, audit staff have participated in or conducted training on 17 occasions.

The Audit Division has also worked to install a computerized accounting system to improve various aspects of the agency's financial management. The new system has allowed the automation of billings and receipts for the tribes that process fingerprints of tribal gaming operation key employees through the NIGC. The new system also allows us to better monitor the timely payment of NIGC quarterly fees and to more accurately track payment of fines and penalties that are deposited with the U.S. Treasury. The system will also help improve NIGC's monthly financial management through preparation of monthly financial statements, comparing actual expenditures to budgeting revenues and expenses to facilitate financial planning for the future.

**Contracts Division**

The Contracts Division is responsible for reviewing all management contracts and amendments in order to make a recommendation to the Chairman, who must approve management contracts before they become effective.

**Tribal Background Investigations and Licensing**

The NIGC assisted in processing over 72,000 fingerprint cards for tribal gaming operations. All the fingerprint information is sent electronically to the Federal Bureau of Investigation, pursuant to a MOU with the Bureau with most of the results returned to the tribes within 24 hours. This is a marked improvement since the early days of NIGC when results were sent through the mail and not received for two to four months.

**Administration Division**

The NIGC Administration Division has responsibility for, among other things, responding to Freedom of Information Act (FOIA) requests. Our FOIA Office began FY 2007 with 10 pending requests, and received 101 new requests. By December 31, 2007, the Office had processed and closed out 108 of those requests; the remaining three were closed out within the 20-day time limit.

In addition to updating the Employee Manual with many new policies and procedures, the Division is also working to create an updated agency-wide data base.

**Office of General Counsel**

The Office of General Counsel (OGC), a staff of 17, provides legal advice and counsel to the Commission.

Currently, OGC attorneys, along with the Department of Justice, are handling 13 cases in Federal courts and monitoring 11 additional cases that impact the Commission. In 2006, 69 ordinances and amendments were submitted for review, and in 2007, an additional 49 were submitted. In every instance, those reviews were completed within the 90-day statutory deadline.

Twenty-eight contracts in 2006 and 22 contracts in 2007 were submitted to OGC for a review of management and sole proprietary interest. The OGC issues advisory opinions on these contracts as a service to tribes and contractors so that they may avoid possible violations of the IGRA.

The OGC also assumed responsibility for tracking whether tribal gaming facilities are located on Indian lands. It established an Indian lands data base to capture all of the information required to determine if the lands are eligible for gaming. That data base is undergoing a complete revamping to make it more user friendly. The OGC is also developing a system of maps to reflect where the gaming operations are located.

The OGC, along with NIGC's program personnel, staffs the Commission's work on regulations. It also provides legal advice on the distinction between class II and class III games. As a consequence, over a period of five years, the Office helped draft and revise the Commission's several drafts of the regulations for classification, facsimile definition, technical standards, and class II minimum internal control standards. To do so, they staffed the meetings of two advisory committees, the meetings of a separate working group formed by the advisory committees, consultation hearings, and hundreds of individual consultations, and reviewed hundreds of written comments submitted by tribes, states and others.

The OGC also drafted Facility License Standards which were published as final in the Federal Register in February of this year. The regulation requires tribes to notify the Commission 120 days before a tribe plans to license a new facility. The rule was finalized after nearly two years of consultation with tribal leaders and 217 written comments on prior drafts and proposed standards. Since the Facility License Standards were published, the NIGC has received seven tribal notifications of intent to open a new gaming facility in 120 days. We have requested information from an-

other five tribes regarding their intent to open a facility within the 120-day timeframe.

**The Commission's Evolving Mission**

Over time, of course, the methods by which the Commission fulfills its mission have evolved, and continue to evolve. Some of the areas of focus in this regard are as follows:

**Consultation**

In keeping with the obligation to consult, NIGC adopted its consultation policy in early 2004, a copy of which is attached and which we published in the Federal Register. This policy was itself a product of the Commission's consultation with tribes as it was formulated. In the course of formulating this policy, NIGC also gathered and examined the consultation policies of other federal agencies, and discussed the utility of those policies with those agencies.

In the course of consulting on regulations, we typically first draft the proposed regulations, based on the agency's experience of what is needed for healthy regulation, and then we present these proposed regulations to the tribes. The proposals are often published on our website and, for example, in the case of the classification regulations, are presented to tribal advisory committees, so that tribal gaming regulators with the most experience in the field can advise NIGC of how the regulations would affect them.

We continue to seek consultation in the most effective ways. While there are 562 recognized tribes in the United States, only about 230 are engaged in Indian gaming, and so it is that group to whom the NIGC has most often turned for consultation. In the two years 2006 to 2007, NIGC has conducted 154 government-to-government consultations.

In addition, I met with 41 tribes here in my office in D.C. at their request to discuss a myriad of issues. NIGC also attended 15 tribal advisory committee meetings, 15 national and regional conferences, and 8 tribal leadership meetings to which we were invited. In addition, on September 16, 2006, we held a public hearing on the class II regulations. That hearing, at which 27 speakers made public comments, was attended by 129 participants.

It is not possible, of course, for the Commission to visit every tribe on its reservation each time an issue or policy might affect tribes. Gaming tribes have formed regional gaming associations, such as the Great Plains Indian Gaming Association (GPIGA), the Oklahoma Indian Gaming Association (OIGA), the Washington Indian Gaming Association (WIGA), the California Nations Indian Gaming Association (CNIGA), the Midwest Alliance of Sovereign Tribes (MAST), and the New Mexico Indian Gaming Association (NMIGA), among others, as well as national and regional organizations such as National Indian Gaming Association (NIGA), National Congress of American Indians (NCAI) and United South and Eastern Tribes (USET). Those organizations meet annually or more often, and NIGC has taken those opportunities to invite tribal leadership to attend consultation meetings on a NIGC-to-individual-tribe basis. Consulting at gaming association meetings maximizes the use of the Commission's time and minimizes the travel expenses that tribes, who ordinarily attend those meetings anyway, must expend for consultation.

Many tribes accept these invitations, many do not. Some tribes send their tribal chair, president or governor, and members of their tribal council to these consultation sessions, while others only send representatives of their tribal gaming commissions, or in some instances staff members of the tribal gaming commission or of the tribal gaming operations. The consultation session is always most effective when tribal leadership, by way of tribal chair or council, is present. The letters of invitation identify issues that NIGC is currently focusing on, and about which the agency would like tribal input. The letters always include an invitation to discuss any other topics that might be of particular interest to an individual tribe. Some consultations, therefore, have been limited to a single issue, such as NIGC's proposals to better distinguish gaming equipment permissible for uncompacted Class II gaming from that permitted for compacted Class III gaming. Others might focus on issues specific to the individual concerns of the tribes.

We do not only make ourselves available for numerous consultations but we also listen seriously to what we hear at those consultations. The regulations NIGC adopts are published with thorough preambles, which attempt to summarize all of the issues raised in the government-to-government consultation sessions the Commission has held with tribes, as well as those raised by all other commenters providing written comment, during the comment period on the regulation. We write such detailed preambles so that commenters will know that we considered their comments and understand why those comments were or were not accepted.

We also take to heart what we hear at consultations while we formulate our regulations. For example, the proposed regulations on Minimum Internal Control Standards for Class II gaming were written completely in response to observations made by the Tribal Advisory Committee on the Class II regulations. Likewise, we have drastically revised our Class II classification regulations and technical standards based on tribal feedback. While it may not be patently clear to the Committee why reducing the number of daubs or ball releases in an electronic bingo game is important, I can assure you, it is a topic of hot debate among gaming tribes and the states. The fact that we have reduced the number of daubs from two (after the game starts) to one, makes a tremendous difference in the speed with which the game may be played.

This is not to say that our responses to tribal feedback are met with applause in Indian Country. We believe that consultation should not necessarily mean agreement and that the parties consulting should not measure the good faith or effectiveness of the consultation by whether agreement is reached. We must also balance the desire for collaboration with the regulated community (Indian gaming tribes) with our statutory mission to provide robust and healthy regulation.

Typically, there is little or no clamor for consultation if the action being considered is favorably received throughout the Indian gaming industry. NIGC's recent reduction in the fees it imposes on gross gaming revenues to fund NIGC operations provides such an example. On the other hand, if the issue the agency is considering is viewed as problematic, often there are concerns expressed that consultation has been inadequate.

A further challenge the NIGC has observed is that consultation is most often criticized by tribes when the eventual policy that the agency settles on is at odds with the position expressed by tribes during consultations. That is, the NIGC's failure, from the tribal point of view, was not in the consultation per se but rather that the Commission did not agree with tribal points of view. It is often the case that the only consultation deemed adequate is that in which the Commission always fully comports with tribal points of view. NIGC often finds itself sympathetic to tribal points of view, but it is also bound by statutory constraints. For example, the IGRA's characterization of certain games as Class III requires the sanction of tribal-state compacts.

**Government Performance and Results Act (GPRA)**

In mid-2006 IGRA was amended by Pub. L. No. 109–221 (Act of May 12, 2006) to require the NIGC to formally comply with the Government Performance and Results Act (GPRA).

The formal GPRA process was new to NIGC, and we lacked knowledge and experience in our agency in preparing strategic and performance plans in accordance with GPRA procedures and requirements. Our staff, after reading GPRA and reviewing one or two existing plans from other agencies, drafted a plan for FY 2008. In light of feedback, including from tribal representatives who read the discussion draft on our website, the plan was essentially discarded and we started anew.

The new draft was completed around the first of April 2008. We are now seeking review, guidance and assistance relative to our new plan.

We hope to have a draft strategic plan suitable for submission to Tribes and Congress for comments by the end of June 2008.

**CRIT Decision**

In performing its oversight role, in the 1990s NIGC addressed concerns about the lack of internal controls in a number of tribal gaming facilities by adopting a comprehensive set of Minimum Internal Control Standards (MICS), which the NIGC applied to Class II and Class III gaming. While many tribes at that time already had excellent internal control systems, a number did not, and as a result of the application of those standards, the entire Indian gaming industry moved to a more professional level, some tribes adopting the NIGC MICS, some tribal-state compacts adopting those MICS, and many tribes combining the NIGC standards with their own, more rigorous standards. The annual audits IGRA requires tribes conduct and furnish to NIGC for review, thereafter included independent auditors' analysis of tribal compliance with those standards. NIGC expanded its team of auditors and conducted tribal audits in connection with compliance with those standards. Those standards were applied to Class II and Class III gaming. At the time of their adoption, many tribes, while complying with the new regulations, voiced a concern that NIGC lacked the authority to so regulate Class III gaming—Class III gaming constituting more than 90% of the $26 billion of gross gaming revenues per year. Those concerns crystallized in a judicial challenge brought by the Colorado River Indian Tribes (CRIT) to the NIGC's MICS's application to Class III gaming. The United

States District Court and the United States Court of Appeals in the District of Columbia agreed with the tribes reasoning and in 2006 decreed that NIGC could no longer mandate tribal compliance in that area. Thus, the role and approach of NIGC in that area has since changed. A number of tribes have recently amended their tribal gaming ordinances to adopt and include the NIGC MICS, and to recognize NIGC's enforcement authority over Class III. In those instances NIGC has reverted to the role that it earlier played. Elsewhere, NIGC confines its review of MICS compliance to Class II gaming except when a number of tribes have invited the NIGC to their facilities to do Class III MICS audits on a voluntary basis.

**Classification Standards**

Perhaps the highest profile initiative of the NIGC in recent years has been its effort to adopt a regulatory scheme to draw a brighter line to distinguish gaming equipment tribes may use for uncompacted Class II gaming (bingo, etc), from that which tribes employ for compacted Class III gaming (casino gaming). The IGRA recognized that the long standing Johnson Act prohibited "gambling devices" in Indian country, but made a specific exemption for the use of such equipment when it is utilized pursuant to the tribalstate compact. The Act also recited that tribes could use computers and electronic and technologic aids when they conducted their bingo and games similar to bingo, but further provided that slot machines of any kind and electronic facsimiles of games of chance fell into the compacted Class III category. After taking enforcement actions, closing tribal gaming facilities and imposing significant fines, in instances where the NIGC observed slot machines or electronic facsimiles of games of chance being employed in the absence of compacts, the Commission attempted to better address the issue by providing a number of advisory opinions with respect to equipment it deemed playable without a compact. That process proved complex and difficult, and with the rapid advances in technology, we discovered that no sooner were such advisory opinions written, than they became obsolete. Thus, a long effort, assisted by tribal advisory committees, was commenced to write regulations to clarify what equipment could be used without a compact, and how such equipment could be identified and certified. This effort included a long discussion and negotiations with the Department of Justice, which has responsibility for enforcement of the Johnson Act, and drafting and proposing rules which, after strong criticism by tribes and others during many consultation sessions, were withdrawn.

As a result of a long arduous effort by the NIGC's tribal advisory committees, working with a working group of representatives who build, design and regulate such equipment at the tribal level, a new package of proposals was published in the Federal Register in October, 2007. Much consultation with respect to those proposals was held thereafter, and the comment period was extended several times, most recently concluding on March 9, 2008. In connection with this effort the Commission commissioned an economic impact study which will be considered together with the comments on the proposals under consideration. This long-standing effort deserves to be fairly and finally concluded, and the Commission is cautiously optimistic that with the information received from tribes, states and the public, it can publish final rules with respect to at least some aspects of this concern in the near future.

Unless or until clarity is brought to this area, challenges will remain for gaming tribes, as well as those of us who attempt to regulate them. Tribal gaming is by no means the only sector where concerns of this nature exist. In many states, there is a significant expansion of what is purported to be charitable gaming using automated bingo equipment. These states find themselves struggling with questions about whether such equipment complies with their charitable gaming laws or runs afoul of their gambling laws, and, generally, with the scope of permissible charitable gaming within their borders. In some instances, this has raised issues about violating the "exclusivity" that tribes understood they had bargained for in their Class III compacts in exchange for revenue sharing with the states. Tribes cannot expect to have an unfettered breadth of Class II gaming equipment in their sector, yet require states to view the issue very narrowly. Clarity in this area will serve many purposes.

**Change in the Face of Growth**

The NIGC, in the context of the federal family, is a relatively young and small agency. It was not long ago when NIGC's staff consisted of only a handful of people, operating from a single office. As the industry grew from at most a $200 million industry when IGRA was enacted to a $26 billion industry, the agency's budget grew from $1.2 million in 1991, to $13 million in 2006, to $20.5 million in 2008.

The days are not long past when there were only five "field investigators" operating out of their homes and the trunks of their cars, spread throughout Indian country.

As this growth has occurred, it has become necessary to adopt more and more formal policies and procedures. The agency has always attempted to look at federal statutes, such as most of Title 5 U.S.C. governing government organization and employees, and through more specific procedures of the Department of the Interior under our interagency arrangement with the Department to provide administrative support. With the agency's growth, it has become necessary to develop and adopt more agency-specific policies, and this is a work in progress. Recently the agency has adopted policies relating to reasonable accommodations under Equal Employment Opportunity Commission guidance, and undoubtedly as the agency continues to grow, further policies of this nature will be deemed appropriate. Common sense and good judgment has always been the approach the agency has attempted to take when dealing with its management. As the NIGC has now grown to have a staff of more than 100, formal policies and procedures become a greater necessity. While an informal approach kept the agency nimble in its early days, experience is showing that as it has grown, more bureaucracy, to ensure due processes and transparency, is appropriate and the agency continues to examine its practices to develop measures that are necessary. In this connection, the agency is using its own audit staff to conduct audits of a number of its programs, and greater consistency and clarity is resulting there from.

That is an overview of how we are evolving in carrying out our mission. I will be happy to answer any questions the Committee have. Thank you.

**Staffing at the NIGC Headquarters**

1—Chief of Staff
2—Commission assistants
1—Director of Audits
1—Director of Enforcement
1—Director of Training
1—Director, Region VI
1—Director, Congressional and Media Relations
1—Director of Contracts
1—Financial Analyst
1—NEPA Compliance Officer
2—Tribal Background Investigation Staff
1—Support Staff
1—Director of Administration (vacant)
11—Administration Personnel (1 vacant)
1—IT Manager
4—IT Staff (1 vacant)
1—Acting General Counsel
13—Attorneys (2 on detail)
5—Legal staff

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D.C. Total 50
Field Total 54

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Agency Total 104
April, 2008

Senator TESTER. Thank you, Chairman Hogen. I appreciate that.

Along the lines of testimony, Congressman Boren has requested a statement for the record and it will be also included.*

Senator TESTER. Delia, I look forward to your testimony. As with the previous one, if you can keep it to about five minutes and we will put your full testimony in the record. So go ahead. Thank you for being here.

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*The information referred to is printed in the Appendix.

**STATEMENT OF DELIA CARLYLE, CHAIRWOMAN, ARIZONA INDIAN GAMING ASSOCIATION; CHAIRWOMAN, AK–CHIN INDIAN COMMUNITY**

Ms. CARLYLE. Thank you. Good morning, Chairman Dorgan, Vice Chairman Murkowski, Senator Tester and other distinguished members of this Committee and staff. My name is Delia Carlyle. I am currently the Chairman of the Ak-Chin Indian Community, which is just south of Phoenix, not in Phoenix, but south of Phoenix. I am also the Chair of the Arizona Indian Gaming Association, which represents 19 tribes with gaming compacts in Arizona.

My comments today are on behalf of both my tribe and AIGA, and are based on my written comments which I respectfully request be entered into the record.

First, let me discuss what I think many of you may have heard about Indian gaming in Arizona. First and foremost, tribal gaming activity in Arizona is rigorously regulated by both the tribes and the State in Arizona. In Arizona, the tribes and the State have developed a collaborative partnership for effective regulation of Indian gaming.

Now, that is not to say we agree on everything. Like many good relationships, we often agree to disagree, but remain reasonable, respectful and attentive. To reiterate what the Arizona Department of Gaming Director Paul Bullis had previously stated to this Committee, and I quote, "Although the compact is the cornerstone of our partnership, what makes the partnership work is communication, discussion, engagement, and a process for resolving issues." In fact, in May of 2007, Casino Enterprise Management Magazine wrote that Arizona's regulatory program exemplifies the very best in regulation.

I want to touch upon a few issues with the NIGC's current practices and regulations. In general, the NIGC is overreaching with its recent regulations and appears to be engaging in empire-building as there is no significant reason for them to be involving themselves in areas already regulated by other Federal, tribal and State agencies.

The publishing of the NIGC's facility licensing standards is a prime example of how NIGC has disregarded meaningful tribal consultation and collaboration, and adopts its own rules. Based upon our experience in Arizona, tribal consultation and collaboration means actually listening to and considering tribal perspectives, not just sitting across from tribal representatives in a one-hour meeting and responding with a thank you for your comments.

Here is an example of what we think the NIGC considers consultation. At our January, 2008 annual Southwest Indian Gaming Trade Show, the Arizona tribal leaders extended an invitation to the NIGC to meet with them and talk about a number of issues, one of which was how tribes and the NIGC could better communicate. The first item brought up by tribal leaders was the NIGC's facility licensing regulations.

To our surprise, the answer from NIGC was that the regulations were already at the Federal Register waiting to be published and additional comments were not necessary. When asked if there were changes from the last draft, the answer was yes. When asked if

NIGC could let the tribal leaders know what those changes were, the answer from NIGC was no.

If you look further into this issue, you will see that the December 12th, 2007 NIGC consultation letter to Arizona tribal leaders included the status of proposed facility licensing regulations as a bullet point discussion item. Doesn't it seem odd that NIGC listed for discussion with tribal leaders the proposed facility licensing standards, when the NIGC already had its version of the standards at the Federal Register waiting to be published?

With the new regulations, the NIGC is trying to expand from a gaming activity regulator to a sanitation, emergency preparedness, electrical, plumbing, food and water, construction and maintenance, hazardous materials, and environmental regulator.

Mr. Chairman and other distinguished members of this Committee, tribes already have EPA, OSHA, IHS and other Federal, State and tribal regulators who review environmental health and safety conditions. There are more than enough Federal layers piled on our industry.

Moreover, we are highly dubious of gaming regulators turned all of the above regulators at the swoop of a Federal Register publication. We do not need yet another Federal agency expanding beyond its statutory mission as directed by Congress to become another unwieldy, ever-growing bureaucracy.

Finally, on October 1st, 2007, the NIGC submitted its draft Government Performance Results Act report, GPRA. Subsequently, as I have been informed, the NIGC has decided on its own to revise its own GPRA report. The NIGC should not be allowed to stall this long. We question the logic of implementing significant changes to the current regulations when tribes do not know how we fit within NIGC's strategic five-year plan.

In addition, tribes are also waiting for the plan on technical training, which is another part of the GPRA report.

Again, on behalf of the Ak-Chin Indian Community and the Arizona Indian Gaming Association, I would like to thank the Chairman, Vice Chair and other members of this Committee for holding this important meeting.

Thank you.

[The prepared statement of Ms. Carlyle follows:]

PREPARED STATEMENT OF DELIA CARLYLE, CHAIRWOMAN, ARIZONA INDIAN GAMING ASSOCIATION; CHAIRWOMAN, AK-CHIN INDIAN COMMUNITY

**Introduction**

Good Morning, Chairman Dorgan, Vice-Chair Murkowski, other distinguished members of this Committee and Staff.

My name is Delia Carlyle and I am the Chairman of the Ak-Chin Indian Community. I am also Chair of the Arizona Indian Gaming Association (AIGA) which represents 19 tribes in Arizona. My comments today are on behalf of both my Tribe and AIGA.

The Ak-Chin Indian Community Reservation was established in May 1912 and comprised over 47,000 acres. A few months later, more than half of the Reservation was taken by the federal government and reduced to its present day size of almost 22,000 acres. The Community is located approximately 35 miles south of Phoenix, Arizona, near the Gila River Indian Reservation. We are a small tribe with about 800 enrolled members.

Ak-Chin is an O'odham word which means "people of the wash." The term refers to a type of desert farming that depends on the area's washes where our ancestral people planted beans, corn and squash, which were irrigated from the wash runoff

from storms. While we are still farmers today, we also engage in another form of economic development known as Tribal Governmental Gaming which helps support the needs and dreams of our tribe and tribal members.

On behalf of the Ak-Chin Indian Community I would like to thank the Chairman, Vice-Chair, and the other members of this Committee for holding this hearing on oversight of the National Indian Gaming Commission (NIGC).

**Collaborative Regulation: Arizona Indian Tribes and the Arizona Department of Gaming**

First, let me discuss what I think many of you may have heard about Arizona Indian gaming. In Arizona, the tribes and State have developed a collaborative partnership for effective regulation of Indian gaming. After years, if not decades, of the State not accepting that tribes are in fact sovereign governments, Arizona, under the leadership of Governor Napolitano, now understands that tribes are indeed sovereign governments that predate Arizona. Moreover, under the leadership of Executive Director Paul Bullis at the Arizona Department of Gaming, the relationship between tribes and the State has become a successful partnership. That is not to say we agree on everything. Like many good relationships, we often agree to disagree but remain reasonable, respectful and attentive.

In Arizona, the Tribal-State Gaming Compacts delineate the roles and responsibilities of the tribes and State. To reiterate what Director Bullis has previously stated to this Committee, "[a]lthough the Compact is the cornerstone of our partnership, what makes the partnership work is communication, discussion, engagement, and a process for resolving issues." [1]

Pursuant to our Compacts, tribal gaming in Arizona funds the vast majority of the Arizona Department of Gaming's budget and regulatory activities. The Department's Fiscal Year 2008 budget is approximately $15.6 million, and for FY 2009 about $16.3 million. To highlight some examples, the tribally-funded Arizona Department of Gaming: [2]

- Has 111 employees (comprised of numerous peace officers, auditors, CPAs and CFEs);
- Performed approximately 12,000 slot machine inspection and certifications;
- Conducted over 300 vendor background reviews and certifications with 100 being new vendor certifications and 200 renewals; and
- Conducted approximately 10,000 employee background reviews and certifications with almost 2,500 new applications and over 7,500 renewals.

Please keep in mind that tribal regulatory agencies also inspect and certify slot machines; review and certify employee and vendor backgrounds; and have multi-million dollar budgets and staff to ensure fair and safe gaming on our tribal lands. In May 2007, "Casino Enterprise Management" magazine wrote that Arizona's regulatory program exemplifies "the very best in regulation," The magazine staff spent several days with the Arizona Department of Gaming and observed their gaming compliance technicians inspecting slot machines at our casinos. The article said: "The state regulators and the tribal regulators work together for the best interest of gaming and to assure compliant and effective enforcement. The Department's management and staff have worked hard to build a comprehensive and efficient system of checks and balances that not only work well for them, but . . . are also welcomed by the tribes." Consequently, tribal gaming activity in Arizona is rigorously regulated by both the tribes and the State.

**Problems with NIGC Regulation—Facility Licensing Standards**

I want to touch upon several issues we have with NIGC current regulatory regime. In general, the NIGC is overreaching with its recent regulations, and appears to be engaged in empire building as there is no significant reason for them to be involving themselves in areas already regulated by other tribal, federal, and state agencies.

The promulgation and publishing of the Facility Licensing Standards are prime examples of how the NIGC has disregarded *meaningful* tribal *consultation and collaboration,* and unilaterally adopts its own rules. The NIGC's own March 31, 2004 Tribal Consultation Policy requires that:

> To the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with Federally-recognized Indian tribes, when formulating and im-

[1] SCIA March 8, 2006 Testimony of Mr. Paul Bullis.
[2] Arizona Department of Gaming.

> plementing NIGC administrative regulations . . . which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA.

Accordingly, collaboration means more than the NIGC incorporating grammatical comments into their regulations. Based upon our experience with tribal and State regulation in Arizona, consultation and collaboration means actually listening to and considering tribal perspectives not just sitting across from tribal representatives in a one hour meeting and responding with only a curt "thanks for your comments." This regulation by fiat must be replaced by meaningful consultation and collaboration with tribes, instead of the all too familiar "we [NIGC] considered that comment but . . . ."

Here is an example of what NIGC considers consultation. As stated in Chairman Hogan's testimony on H.R. 5608, "Gaming tribes have formed regional gaming associations, such as . . . . Those organizations meet annually or more often, and NIGC has taken those opportunities to invite tribal leaders to attend consultation meetings on a NIGC-to-individual-tribe basis. Consulting at gaming association meetings maximizes the use of the Commission's time and minimizes the travel expenses that tribes, who ordinarily attend those meeting anyway, must expend for consultation." While this looks great on the surface, the experience we had at our Annual Southwest Trade Show was very different. Although Arizona tribes received letters to meet with NIGC (see attached example letter), tribal leaders also extended an invitation to the NIGC to meet with them at a breakfast since some of the tribal leaders could not meet with the NIGC at their scheduled time (where the NIGC met with tribal staff). The first comment to the Commissioners was that they would like to talk about the "Facility Licensing Draft Regulations." To our surprise, the answer from the NIGC was that the regulations were already at the Federal Register waiting to be published and additional comments were unnecessary. When asked if there were changes from the last draft—the answer was yes. When asked if they could let the leaders know what changes were made—the answer was no.

If you look further into this issue you will see that the NIGC consultation letters to tribal leaders inviting them to a consultation meeting were dated December 12, 2007. One of the bullet point discussion items was the "[s]tatus of proposed facility licensing regulations." Our tribal leaders' breakfast meeting was on January 15, 2008. The new regulations were published on February 1, 2008. It seems disingenuous that the NIGC listed for discussion with tribal leaders the proposed gaming facility licensing standards, when the NIGC already had its version of the standards at the Federal Register waiting to be published two weeks later.

A significant problem at the NIGC is that they have stopped listening to tribes. As I have previously stated, in Arizona, both the tribes and the Arizona Department of Gaming work together to fulfill the goals of the Compact by *listening* to each other to develop a mutual understanding, even if we don't always agree. The problem with the NIGC is that they are hearing tribes—but *not* listening! While this NIGC administration has done a good job of meeting with tribes as compared to their predecessors, they are putting *quantity* of meetings over *quality* of listening to tribes. For example, most tribes in Arizona met with the NIGC in March 2007 and January 2008 regarding the Facility Licensing Standards. Again, the quality of consultation is far more important than the quantity of tribal consultations.

In December of 2007, the AIGA submitted written comments to the NIGC which detailed AIGA's objections to their Facility Licensing Standards. In summary, the 19 Indian tribes of AIGA find it offensive that the NIGC's Standards conflict with the intent of IGRA, which recognizes tribal authority to regulate the construction, maintenance, and operation of a tribal gaming facility within tribal jurisdiction. In addition, the regulations provide a very broad grant of authority and discretion to only the Chairman, as opposed to the Commission, for approving gaming facility licenses. IGRA itself provides that a *tribe* must issue a facility license for Class II or III gaming. Finally, the tribe must provide in its tribal gaming ordinance that it will comply with appropriate construction, maintenance, and operation of these facilities.

Furthermore, our State-Tribal Compacts already require tribes to comply with minimum operational standards to protect environment, health and safety. Once again, the NIGC's rules conflict with our Compact and, thus, are a waste of resources when tribal operations in Arizona already comply with such standards.

The overbreadth of regulation is especially true for the new Gaming Facility Licensing Standards. The Indian Gaming Regulatory Act (IGRA) is supposed to provide a balanced framework for tribal, state, and federal regulators. Unfortunately, the NIGC has upset that delicate balance with its new Gaming Facility Licensing Standards. With the new regulations, the NIGC is trying to expand from a *gaming*

*activity* regulator to a sanitation, emergency preparedness, electrical, plumbing, food and water, construction and maintenance, hazardous materials, and environmental regulator. Mr. Chairman and other distinguished members of the Committee, we already have the EPA, OSHA, IHS, and other federal, state and tribal regulators who review environmental, and health and safety conditions. There are more than enough federal layers piled on our industry. Moreover, we are highly dubious of gaming regulators turned all-of-the-above regulators at the swoop of a federal register publication. We do not need yet another federal agency expanding beyond its statutory mission as directed by Congress to become another unwieldy, burgeoning bureaucracy.

Finally, another major concern of many tribal regulators is whether the NIGC is prepared to understand and apply new technology as it rolls out today and in the future. We are concerned that the NIGC's process for Class II gaming could once again delay available technology and future gaming activities for tribal gaming.

**Revised GPRA**

On October 1, 2007, the NIGC submitted its Draft Government Performance Results Act Report (GPRA). The GPRA Report was due pursuant to the Congressional mandate as part of S. 1295, the National Indian Gaming Commission Accountability Act of 2005. Subsequently, as I have been informed, the NIGC has decided on its own to revise its own draft, a draft that was approved by the Chairman of NIGC and submitted for comment to the Office of Budget and Management. The NIGC's decision to revise its GPRA Report stalls its mandated requirement to submit to Congress: (1) a strategic five-year plan, annual performance plans, and performance reports, and (2) as part of its compliance with GPRA, a plan that addresses technical assistance to tribal gaming operations. If in fact the NIGC is not going to comply with the mandate, then it should be held responsible. The NIGC should not be allowed to stall this long, and Congress should not enable the delay. Without the GPRA Report, tribes have no idea how the current regulations fit into the NIGC's five-year plan and when, or if, the technical assistance that many tribes need are adequate or even being developed. Furthermore, we question the logic of embarking on such large regulatory changes without first knowing how they fit into a strategic plan and without that plan going out for consultation with the very people who have to implement it.

**Conclusion**

Again, on behalf of the Ak-Chin Indian Community I would like to thank the Chairman, Vice-Chair, and the other members of this Committee for holding this very important hearing. Thank you.

**Attachment**

December 12, 2007

Charles McCarty, Executive Director
Ak-Chin Gaming Commission
15406 N. Maricopa Rd.
Maricopa, AZ 85239

**GOVERNMENT-TO-GOVERNMENT CONSULTATION NOTICE AND REQUEST**

Dear Executive Director McCarty:

Pursuant to our commitment to government-to-government tribal consultation and in keeping with our stated policy, the National Indian Gaming Commission (NIGC) will be in Scottsdale, Arizona for the 11th Annual Southwestern Indian Gaming Conference and Expo on Tuesday, January 15th and Wednesday, January 16th, 2008, for the purpose of meeting and consulting separately with individual Tribes in Arizona and New Mexico.

Based on our separate government-to-government relationship with each Tribe and in recognition of the individual uniqueness of each Tribe, the Commission asks to meet and consult separately and privately with each individual Tribe and its governmental and regulatory gaming leaders. The Commission has reserved the Conference Room 103 in the Radisson Fort McDowell for this purpose. Meetings times may be scheduled on Tuesday, January 15th between 1:00 p.m. and 5:00 p.m. and Wednesday, January 16th between 9:00 a.m. and 5:00 p.m. Each meeting will be scheduled for 45 minutes. At these meetings, the Commission would like to hear and discuss your comments, questions, concerns and recommendations regarding:

- Training and technical assistance needs and the NIGC training catalog;
- Status of proposed facility licensing regulations and the proposed class II gaming regulations that include class II game classification standards, facsimile definition, class II technical standards and class II minimum internal control standards;
- Scope of NIGC's regulation of Class III gaming activities in light of Court holdings in *Colorado River Indian Tribes v. NIGC* litigation;

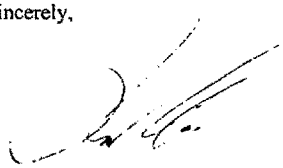
- Planning for NIGC's compliance with the Government Performance Results Act (GPRA), including budget review, training and technical assistance;
- Developing regulations that define sole propriety interest;
- Proposals for regulations to reduce the requirement to submit fees to twice a year from four times a year; to allow tribes to request a reduced scope audit in certain circumstances; to update and clarify the management contract regulations; and to revise the definition of net revenue; and
- Other gaming regulatory issues of concern of your Tribe.

Please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 to schedule your Tribe's private government-to-government consultation meeting with the Commission, as soon as possible. Each meeting will be scheduled on a first come first served basis with preference given to Tribes traveling the greater distance.

If you have any questions regarding the scheduling or consultation process, please call me or Ms. Homa at 202-418-9807.

Commissioner DesRosiers and I look forward to meeting and consulting with Tribes and their leaders during our visit to the Southwestern Indian Gaming Conference and hope you are able to schedule a meeting with us.

Sincerely,



Philip N. Hogen
Chairman

Senator TESTER. Thank you, Ms. Carlyle.
Mr. Mathews?

**STATEMENT OF J.R. MATTHEWS, NIGA EXECUTIVE COMMITTEE MEMBER AND VICE CHAIRMAN, QUAPAW TRIBE OF OKLAHOMA; ACCOMPANIED BY MARK VAN NORMAN, EXECUTIVE DIRECTOR, NATIONAL INDIAN GAMING ASSOCIATION**

Mr. MATHEWS. Thank you, Mr. Chairman.

Senator Tester and other members of the Committee, my name is J.R. Mathews. I am the Vice Chairman of the Quapaw Tribe of Oklahoma. As a Board Member, I am speaking on behalf of the National Indian Gaming Association. Thank you for this opportunity.

The Indian Gaming Regulatory Act is a remarkable success. Nationwide, there are over 230 tribes in 28 States which are engaged in gaming, and these tribes are using revenues to build or rebuild their communities.

Last year, Indian gaming, as you know, generated more than $26 billion in gross revenues for those tribal governments. That means

that we created more than 700,000 jobs nationwide and generated almost $12 billion in Federal, State and local revenues.

Tribal governments are dedicated to building and maintaining strong regulatory systems because of our sovereign authority, governmental operations and resources are at stake. Under IGRA, tribal governments are the primary day-to-day regulators of Indian gaming. We have dedicated tremendous resources to the regulation of Indian gaming. Tribes spent over $345 million last year on tribal, State and local regulations. We have more than 3,300 expert regulators and staff.

Among our concerns today is the government-to-government consultation and a need for a statutory directive to the NIGC to consult with Indian tribes. Executive Order 13175 establishes the framework for Federal agencies to work with Indian tribes and elected tribal leaders.

When Federal action will substantially and directly affect tribal governments, the essential principles and the guiding agency actions should be an all-out respect for tribal sovereignty and self-government, the maximum administrative discretion for tribal governments, and preserving the prerogatives of tribal lawmaking whenever possible.

This is a firm belief among tribal leaders that while the NIGC is willing to meet with tribal leaders, the NIGC does not accommodate tribal government concerns. Instead, the NIGC has a pre-determined decision that has already been made, and they tell us they are open to change, but they don't listen to us.

Tribal leaders believe that Federal agencies should try to reasonably accommodate a tribal government concern, not just to sit across the table from us and then go on about business as usual. The tribal Federal government-to-government relationship needs to be better than this, especially when the agency has "Indian" in its name. The NIGC should do the utmost to accommodate our views through consultation. We should not get a flippant response to the quote that was stated, consultation does not mean agreement.

The United States should operate on a basis of mutual consent with Indian tribes, just as it does with U.S. territories. A statutory directive to the NIGC on government-to-government consultation is both appropriate and necessary. We encourage this Committee to introduce legislation along the lines of House Resolution 5608 which seeks to codify the Executive Order 13175. Also Executive Order 12866 requires that agencies examine whether or not these alternatives to direct regulations consider the cost and benefits of the regulations, consult with State, local and tribal governments, and minimize the burdens on them.

In addition, regulations should be drafted in a manner that is simple and easy to understand. The NIGC has failed to comply with these standards.

NIGC's own economic impact analysis found that the Class II proposals would cost Indian tribes between $1.2 billion and $2.8 billion annually. The NIGC does not conduct cost/benefit analysis of its regulatory proposals. That violated Executive Order 12866. Clearly, the NIGC is failing to comply with the general rules for Federal regulatory proposals.

The NIGC should adopt and comply with the Regulatory Flexibility Act. Because the NIGC failed to conduct its economic impact analysis until the close of the comment period, and it did not consider lower-cost alternatives as required by the Regulatory Flexibility Act, once again the NIGC should open its regulation and consider the cost and benefits of alternatives.

The NIGC should comply with the Federal Advisory Committee Act. The NIGC has been regularly constituting and disbanding tribal advisory committees. This gives the impression that when an existing TAC objected to the arbitrary NIGC policies, the NIGC abolished them and sought a new TAC that would be amenable to the NIGC views.

The NIGC should comply with Congress's directive to provide training. Despite a clear directive to the NIGC in the NIGC Accountability Act, they have not provided meaningful training and technical assistance. Congress should act to ensure that the National Indian Gaming Commission is working with tribal governments to build up tribal government institutions, rather than a Washington-centered approach and relying primarily on rulemaking to resolve perceived problems.

Thank you for this opportunity to speak.

[The prepared statement of Mr. Mathews follows:]

PREPARED STATEMENT OF J.R. MATHEWS, NIGA EXECUTIVE COMMITTEE MEMBER; VICE-CHAIRMAN, QUAPAW TRIBE OF OKLAHOMA

Good Morning, Mr. Chairman and Members of the Committee. Thank you for inviting me to testify today.

My name is J.R. Mathews. I am the Vice Chairman of the Quapaw Tribe of Oklahoma and I serve on the Executive Committee of the National Indian Gaming Association.

I am speaking today on behalf of the National Indian Gaming Association and its 184 Member Tribes. NIGA is a tribal government association dedicated to supporting Indian gaming and defending Indian sovereignty. I am accompanied by Mark Van Norman, NIGA's Executive Director. Mark is a member of the Cheyenne River Sioux Tribe of South Dakota.

**Indian Gaming: The Native American Success Story**

The Indian Gaming Regulatory Act is a remarkable success. Nationwide there are 231 tribes in 28 states which are engaged in gaming. Tribes are using revenues to build or rebuild their communities, while putting tribal members to work and providing basic and essential tribal government services. Tribes are also generating significant taxes to Federal, state and local governments through Indian gaming and making significant charitable contributions to their communities and other Indian tribes. Last year, Indian gaming generated $26.5 billion in gross revenues (before capital costs, salaries, expenses and depreciation, etc.) for tribal governments. That means tribal governments created more than 700,000 jobs through Indian gaming nationwide and generated almost $12 billion in Federal, state and local revenue.

Here are some examples of the tribal community infrastructure and the essential government services that Indian gaming revenues provide:

- The Mescalero Apache Tribe of New Mexico built a new high school;
- The Choctaw Nation of Oklahoma built a new hospital;
- Gila River established a new police and emergency medical unit;
- The Pechanga Band established a new fire department;
- The Mohegan Tribe is building a water system for the Tribe and seven of its surrounding communities;
- The Rosebud Sioux Tribe established child care and provides new school clothes for impoverished students;
- The Fort Berthold Tribes established a new Headstart center;

- The Tohono O'odham Nation is funding the Tohono O'odham Community College and used $30 million to fund a student scholarship program; and
- Several tribal governments provided major funding for the new Smithsonian Museum of the American Indian.

These positive developments are happening across Indian country.

The development of Indian lands is a benefit to surrounding communities. For example, Gila River EMTs serve as first responders to accidents in their stretch of I–10. The Pechanga Band's Fire Department responded to the California wildfires, working hard to save homes and lives in neighboring communities.

Indian gaming benefits neighboring Indian tribes as well. The Shakopee Mdewakanton Sioux Tribe, for example, has generously assisted many Indian tribes in Minnesota, the Dakotas, and Nebraska, including refinancing the Oglala Sioux Tribe's debt, providing a grant to help build a new nursing home for the Cheyenne River Sioux Tribe and an economic development grant for the Santee Sioux Tribe.

The public recognizes that Indian gaming is a success. A national poll of 1,000 voters conducted on March 14, 2008 for NIGA by the independent polling firm Fairbank, Maslin, Maullin & Associates found that American voters generally agree that Indian gaming has been a success:

- 81 percent agree that Indian tribes benefit from having casinos;
- 82 percent agree that Indian gaming provides revenues that tribes can use to provide essential services to their members;
- 79 percent agree that Indian gaming provides jobs for Indians;
- 65 percent agree that Indian gaming benefits state and local communities; and
- 68 percent agree that Indian gaming allows Indian tribes to break the cycle of poverty and welfare and become self-reliant.

Approximately, twenty-four million visitors annually travel to Indian country to visit Indian gaming facilities and on average, make 7 visits per year. Thus, many voters have now experienced Indian gaming personally and their first hand experience is reflected in the polling data.[1]

**The Existing Regulatory Framework for Indian Gaming**

Tribal governments are dedicated to building and maintaining strong regulatory systems because tribal sovereign authority, government operations and resources are at stake. Under IGRA, tribal governments are the primary day-to-day regulators of Indian gaming and regulate Indian gaming through tribal gaming commissions. Tribal gaming regulators work with the NIGC to regulate Class II gaming, and through the Tribal-State Compact process, tribal gaming regulators work with state regulators to safeguard Class III gaming.

Tribal governments have dedicated tremendous resources to the regulation of Indian gaming: Tribes spent over $345 million last year nationwide on tribal, state, and Federal regulation:

- $260 million to fund tribal government gaming regulatory agencies;
- $71 million to reimburse states for state regulatory work under the Tribal-State Compact process; and
- $14.5 million for the NIGC's budget.

At the tribal, state, and Federal level, more than 3,350 expert regulators and staff protect Indian gaming:

- Tribal governments employ former FBI agents, BIA, tribal and state police, New Jersey, Nevada, and other state regulators, military officers, accountants, auditors, attorneys and bank surveillance officers;
- Tribal governments employ more than 2,800 gaming regulators and staff;
- State regulatory agencies assist tribal governments with regulation, including California and North Dakota Attorney Generals, the Arizona Department of Gaming and the New York Racing and Wagering Commission;
- State governments employ more than 500 state gaming regulators, staff and law enforcement officers to help tribes regulate Indian gaming;
- The National Indian Gaming Commission is led by Philip Hogen, former U.S. Attorney and past Associate Solicitor for Indian Affairs; and Commissioner

[1] At the outset of the poll, 59 percent of American voters support Indian gaming. After learning about the uses of Indian gaming revenue for essential tribal government purposes and economic development, 69 percent of voters support Indian gaming.

Norm DesRosier is a former tribal gaming regulator and state law enforcement officer.

- At the Federal level, the NIGC employs more than 100 regulators and staff.

Tribal governments also employ state-of-the-art surveillance and security equipment. For example, the Mashantucket Pequot Tribal Nation uses the most technologically advanced facial recognition, high resolution digital cameras and picture enhancing technology. The Pequot's digital storage for the system has more capacity than the IRS or the Library of Congress computer storage system. In fact, the Nation helped Rhode Island state police after the tragic nightclub fire by enhancing a videotape of the occurrence, so state police could study the events in great detail.

At the state level, more than 200 tribal governments have entered into 250 Tribal-State Compacts with 23 States. Typically, Tribal-State Compacts include rules on internal controls and regulation. For example, California 1999 Compacts require tribal governments to maintain accounting, machine and technical standards that meet or exceed industry standards. In California, tribal governments have incorporated MICS into their tribal gaming regulatory ordinances.[2] The Fairbanks Maslin poll found that 76 percent of American voters support the Tribal-State Compact system.

Indian gaming is also protected by the oversight of the FBI and the U.S. Attorneys. The FBI and the U.S. Justice Department have authority to prosecute anyone who would cheat, embezzle, or defraud an Indian gaming facility–this applies to management, employees, and patrons. 18 U.S.C. 1163. Tribal governments work with the Department of Treasury Financial Crimes Enforcement Network to prevent money laundering, the IRS to ensure Federal tax compliance, and the Secret Service to prevent counterfeiting. Tribal governments have stringent regulatory systems in place that compare favorably with Federal and state regulatory systems. Seventy-four percent of American voters agree that IGRA provides enough or more than enough regulation, according to the Fairbank, Maslin poll. Only 15 percent of American voters believe that there should be more regulation.

**Government-to-Government Consultation: Need for a Statutory Directive**

Since 1960, when then Senator John F. Kennedy pledged to "[e]mphasize genuinely cooperative relations between Federal officials and Indians," each succeeding Administration has pledged to promote tribal self-government. President Kennedy followed through on his pledge by ending the Termination Policy and establishing Federal programs to revitalize Indian country. President Johnson helped tribal governments build capacity to provide essential services to tribal citizens.

Building on the work of the Kennedy-Johnson Administrations, President Nixon promoted the Indian Self-Determination Act to empower tribal governments to provide the government services that the Bureau of Indian Affairs and the Indian Health Service previously provided. Nixon heralded the new Indian Self-Determination Policy in a special message to Congress, which explained:

> It is long past time that the Indian polices of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.
>
> President Nixon, Special Message on Indian Affairs, July 8, 1970.

Presidents Ford, Carter, Reagan and Bush used the Indian Self-Determination Policy as the baseline for American Indian policy. In their Administrations, Congress built upon Self-Determination Policy through the Indian Health Care Improvement Act, the American Indian Religious Freedom Act, the Tribal College Act, the Indian Self-Governance Act, and the Indian Gaming Regulatory Act, among others.

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[2] Alturas Rancheria, for example, provides in its tribal gaming ordinance: "Tribal Gaming Commission regulations necessary to carry out the orderly performance of its duties and powers shall include . . . the following: The Minimum Internal Control Standards (MICS) as issued by the NIGC." This type of incorporation by reference is unaffected by the Federal Court decision in Colorado River Indian Tribes. In California, tribal governments spent approximately $104 million to fund regulation of Indian gaming in 2006. Of the $100 million, Tribal governments spent $80 million to fund tribal regulation of Indian gaming, $20 million for state regulation, and $4 million for Federal regulation. The State of California dedicates more than 100 regulators and staff to Indian gaming regulation while tribal governments maintain 800 tribal regulators and staff.

On January 24, 1983, President Reagan issued a Statement on American Indian Policy, explaining:

> When European colonial powers began to explore and colonize this land, they entered into treaties with the sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national priorities, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this administration pledges to uphold . . . .
>
> The administration intends to . . . remove[e] the obstacles to self-government and . . . creat[e] a more favorable environment for the development of healthy reservation economies . . . . Development will be charted by the tribes, not the Federal Government . . . . Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination . . . .

President Clinton's Executive Memorandum and Executive Orders on Consultation and Coordination with Tribal Governments took President Reagan's announcement the next steps forward.

Executive Order 13175 on Consultation and Coordination with Tribal Governments, EO 13175, establishes the framework for Federal agencies to work with Indian tribes and elected tribal leaders. President Clinton issued it in 2000 and President Bush affirmed it in 2004. When Federal action will substantially and directly affect tribal self-government or tribal rights, the essential principles that guide agency action are:

- Respect for tribal sovereignty and self-government, treaty rights, lands and natural resources, and the Federal trust responsibility;
- Maximum administrative discretion for tribal governments; and
- Preserve the prerogatives of tribal law-making whenever possible.

The Executive Order recommends that consensual decision-making, such as negotiated rulemaking be used when possible.

Five years ago, the National Indian Gaming Association and our Member Tribes asked the Senate Committee on Indian Affairs to enact a statutory directive to the NIGC to consult with tribal governments on a government-to-government basis. The NIGC, for its part, said, "No, there is no need for a statutory directive because we will develop our own policy."

There is a firm belief among tribal leaders that, while the NIGC is willing to meet with tribal leaders, the NIGC does not accommodate tribal government concerns. Instead NIGC has a pre-determined decision made, they tell us that they are open to change, but they do not accommodate tribal leader concerns. Chairman Hogen says, "Consultation does not mean agreement." Well, we believe that is the wrong attitude. Tribal leaders believe that, to the maximum extent possible, Federal agencies should try to reasonably accommodate tribal government concerns—not just sit across the table for a little while and then go about with business as usual. One tribal representative explained to us that:

> As long as they feel they that tribal governments do not need to be consulted in the rulemaking process until after the final rules are crafted by NIGC and published, then they are perpetuating a failed process. Tribes not only have the same responsibilities and goals to protect the integrity of Indian gaming, they have the primary responsibility, and they have created the governmental institutions in the tribal gaming commissions and have hired and trained staff in the areas of compliance, surveillance, security, co-jurisdictional law enforcement, etc.

Some tribal government leaders are reluctant to meet with the NIGC because they believe that informational meetings are wrongly being reported as Federal-tribal government-to-government consultation. A Northwest tribal representative has informed us that:

> In my dealings with the NW tribes thru ATNI and WIGA, even as recently as yesterday, what I hear is that tribes are reluctant to sign up for the consultations offered at the trade show next week, or ANY consultation opportunity for that matter.

> Many of the NW tribes' consultation meetings with NIGC over the past 2–3 years were mischaracterized by the NIGC in their October 2007 letters to Congressman Rahall and Senator Dorgan regarding the proposed Class II package, stating that the listed tribes were consulted regarding the proposed regulations. Most, if not all, tribes discussed (when the NIGC wasn't monopolizing the conversation) their own individual tribe's issues at those meetings. One tribe . . . gave a tour of their surveillance department to the NIGC only to have their tribe show up on the list of tribes having been consulted with on the proposed regulations. What?!?
>
> . . . Also, the laundry list provided in the notice of consultation is huge. There are 7 bullets in the notice but if you read each one, it's really 13 topics plus your own tribe's issues. All done in 45 minutes should you have the full amount of time once NIGC is done with their spiel.
>
> In sum, the tribes up here feel that they are damned if they do and damned if they don't. If they sign up, chances of misrepresentation of their meeting to benefit the NIGC's position is likely to occur. If they don't, then their absence will be misrepresented as not haven taken the opportunity to consult when offered (as done with my tribe.) And finally, most believe that even if they could manage to have their meetings represented accurately, whatever they say about the proposed regulations will not be considered. That is, what difference will it make? They aren't listening anyway. Why bother? This is a good indicator that something is wrong with the NIGC's consultation process.

The Federal-tribal government-to-government relationship needs to work better than this, especially when the agency has "Indian" in its name!

The United States' government-to-government relationship with Indian tribes is as venerable as the American Republic. In 1796, President George Washington told the Cherokee Nation that:

> The wise men of the United States meet together once a year to consider what will be for the good of all of their people . . . . I have thought that a meeting of your wise men once or twice a year would be alike useful to you . . . . The beloved agent of the United States would meet with them . . . . If it should be agreeable to you that your wise men should hold such meetings, you will speak your mind to my beloved man . . . . to be communicated to the President of the United States . . . .
>
> President George Washington Letter to the Cherokee Nation, August 29, 1796.

President Thomas Jefferson said, "The sacredness of [Native American] rights is felt by all thinking persons in America as well as Europe."[3] Jefferson's view is embodied in the Louisiana Purchase Treaty, where the United States agreed to honor prior European treaties, until such time as it entered its own treaties with the Indian nations, based upon mutual consent:

> The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians until by mutual consent of the United States and the said tribes or nations other Suitable articles shall have been agreed upon.[4]

In total, the United States entered into more than 370 Indian treaties, and these treaties guaranteed tribal lands and tribal self-government. Those guarantees continue to protect tribal self-government and tribal lands today.

Given this background, the NIGC should do its utmost to accommodate tribal government views through consultation. We should not get a flippant response that consultation does not mean agreement. The United States should operate on a basis of mutual consent with Indian tribes, whenever possible—just as it does with United States territories. A statutory directive to NIGC on government-to-government consultation is both appropriate and necessary. We encourage the Committee to introduce legislation along the lines of H.R. 5608, which seeks to codify Executive Order 13175.

**NIGC Should Follow Basic Rules for Drafting Regulations: Executive Order 12866**

Executive Order 12866, as modified by the Bush Administration to exempt the Vice President, provides the framework for Federal agency rule-making. The Executive Order provides:

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[3] A. Josephy, *The Patriot Chiefs* (1961) at 178.

[4] Louisiana Purchase Treaty (Treaty between U.S.A. and the French Republic), Article VI (1803). (Spain is referenced because France acquired Louisiana territory from Spain).

> The American people deserve a regulatory system that works for them, not against them . . . . [R]egulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable . . . .

This Executive Order requires that agencies identify the problem the regulation is intended to address, examine whether there are alternatives to direct regulation, determine the costs and benefits of the regulation, consult with state, local and tribal governments and seek to minimize the burdens on those governments. In addition, regulations should be drafted in a manner that is simple and easy to understand.

NIGC has failed to comply with these standards. First of all, tribal governments have asked: What is the need for these regulations? NIGC has responded that it seeks clarity in terms of the definition of Class II technologic aids, yet its proposed definition is inherently ambiguous and does little or nothing to promote clarity. Indeed, Indian tribes have pointed out that its proposed definition of "electro-mechanical facsimile" may very well be contrary to IGRA's statutory language and contrary to five Federal Court of Appeals cases on this subject. *See U.S. v. 162 Megamania Gambling Devices,* 231 F. 3d 713 (10th Cir. 2000); *U.S. v. 103 Electronic Gambling Devices,* 223 F. 3d 1091, 1093 (9th Cir. 2000); *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission,* 327 F.3d 1019 (10th Cir. 2003); *United States v. Santee Sioux Tribe,* 324 F.3d 607, 615–617 (8th Cir. 2003); *Diamond Games v. Reno,* 230 F.3d 713 (D.C. Cir. 2000). Thus, the primary NIGC rationale for the regulation is baseless and leaves the regulation without foundation or merit.

The Oklahoma Indian Gaming Association makes the point a different way–where there is clear statutory guidance, why is the agency adding new legal requirements of its own making? OIGA states:

> Assuming for arguments sake, that classification regulations were needed, another question that has been asked and not answered is why hasn't the NIGC used the statute and the Federal court cases, both those won and lost, as guidelines for drafting regulations? Instead, the NIGC has chosen to draft extremely cumbersome language, which arbitrarily adds more than one legal element beyond the elements that IGRA uses to define the game of "bingo." Given the strict construction given to IGRA in other cases like the *Colorado River Indian Tribes* decision, and with three Federal Appeals Courts ruling that the statutory language of IGRA establishes the legal elements for bingo, the NIGC has no valid reason to go down a legally perilous path.

As Gerry Danforth, Chairman of the Oneida Tribe of Wisconsin testified before the House Natural Resources Committee last week, if NIGC took the time to really consult with tribal governments on a government-to-government basis, it would find workable, acceptable and durable solutions to regulatory issues that do not lead to litigation. So, the time invested in *consultation and coordination* with Indian tribes is well worth it.

NIGC's own economic impact analysis (conducted by an independent economist) found that its Class II regulatory proposal would cost Indian tribes between $1.2 billion and $2.8 billion annually. While the four proposed Class II regulations were published on October 24, 2007, the economic impact study was not published until February 1, 2008 and the comment period on the regulations closed on March 9, 2008. NIGC did not conduct a cost-benefit analysis of its regulatory proposals. That violated Executive Order 12866. A cost-benefit analysis should have considered the cost of alternative regulatory approaches, such as using existing statutory definitions or existing regulatory definitions. The existing regulatory Class II technologic aid definition would carry no additional cost because it has been in force since June, 2002, the industry has already accommodated the regulation, and the Federal Courts have approved the regulation.[5]

Clearly, the NIGC is failing to comply with the general rules for Federal regulatory proposals. Indeed, on the Class II regulations, the NIGC failed the very basic task of drafting the regulations in a simple manner: After months of work by the Class II gaming manufacturers group convened by NIGC, NIGC took a fairly reasonable rewrite of its Class II minimum internal control standards regulation and re-inserted its old Class II MICS rule by reference. That is not plain English—the

[5] *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission,* 327 F.3d 1019 (10th Cir. 2003) (10th Circuit relied on NIGC 2002 Class II regulations); *United States v. Santee Sioux Tribe,* 324 F.3d 607, 615-617 (8th Cir. 2003) (Relying on the NIGC 2002 Class II regulations, the Court found that "NIGC's conclusion that Lucky Tab II is a permissible class II gaming device seems to be a reasonable interpretation of the IGRA").

incorporation by reference makes it almost impossible to understand the new regulatory proposal, or to point out potential conflicts between the old and new rule. This proposal needs to go back to the "drawing board" for a "plain English" lesson.

**NIGC Should Comply with the Regulatory Flexibility Act**

The Regulatory Flexibility Act requires Federal agencies to consider the economic impact of Federal regulations on small governments, communities, and entities. The RFA requires agencies to consider lower cost alternatives to expensive regulations. Experts explain the RFA as follows:

> The Regulatory Flexibility Act created several new sections in the APA. The legislative history states that the intention of the Act is "to encourage individuals, small businesses, small organizations, and small government bodies that would otherwise be unnecessarily adversely affected by Federal regulations . . . . It is primarily aimed at forcing agencies to consider the problems of small businesses and local governments and to investigate least cost alternatives in regulation.
>
> C.A. Wright & C.H. Koch, "Judicial Review of Administrative Action," 32 Fed. Prac. & Proc. Judicial Review, Section 8187 (2008).

Yet, because the NIGC failed to conduct its economic impact analysis until the close of the comment period and it did not consider lower cost alternatives as required by the Regulatory Flexibility Act. Thus, with the comment period closed tribal governments are left to contemplate an economic impact of $1.2 billion to $2.8 billion in lost income, a loss of perhaps 35,000 jobs, and an additional compliance burden of $347 million. Once again, the NIGC should re-open its regulation and consider lower cost alternatives to its proposed regulations.

**NIGC Should Comply With Congress's Directive to Provide Training**

In 2006, Congress gave the NIGC new authority to work with tribal governments to provide technical assistance and training to tribal regulators. Public Law No. 109–221 (2006). Specifically, the NIGC Accountability Act is intended to do three things:

- Provide increased funding for NIGC by empowering NIGC to assess a fee up to the level of $0.80 per $1,000 of gross Indian gaming revenue;
- Require NIGC to follow the Government Performance and Results Act; and
- Require NIGC to include a training and technical assistance plan in its GPRA compliance plan.

NIGC is currently undertaking a paperwork shuffle of its GPRA compliance plan, but Indian tribes were not consulted in its development, there have been no national or regional meetings scheduled to consult with tribes on the GPRA plan, and no training or technical assistance programs have been undertaken pursuant to the plan. NIGC has increased its fees and is spending more money under the fee provisions.

**NIGC Should Comply with the Federal Advisory Committee Act**

Congress established a general rule to limit the use of Federal Advisory Committees by regulatory agencies because they are not democratic. Yet, it provided an exception for Federal agency consultation with state, local and tribal governments. That exception only applies to tribal governments when Federal agencies meet with authorized tribal government representatives. Under FACA, GSA provides oversight of Federal Advisory Committees.

The NIGC, however, has been regularly constituting and disbanding Tribal Advisory Committees for work regarding the development of the NIGC's regulatory proposals. It has several problems with this approach:

- No Tribal Advisory Committee (TAC) plan or proposal was presented to GSA to ensure that NIGC is actually complying with FACA;
- TAC Members were not initially requested to be authorized representatives of their tribal governments and some were not, putting them outside the FACA exception for consultation with tribal governments;
- While the NIGC established the TAC to assist in the development of its Class II regulations, this committee was limited to seven members expected to represent all of Indian country; and
- Although the TAC unanimously objected to unreasonable restrictions on Class II games, none of its significant objections were accepted by the NIGC.

Just last month, the NIGC disbanded its existing TAC and Minimum Internal Control Standards Tribal Advisory Committee (MICS TAC) and then asked for the formation of a new Tribal Advisory Committee, to be limited to tribal regulators with five or more years experience. This gives the impression that when the existing TACS objected to arbitrary NIGC policies, the NIGC abolished them and sought a new TAC that would be amenable to NIGC views. As a tribal representative explained to us:

> NIGC's latest initiative to dissolve existing tribal advisory committees and to appoint new committees whose member's qualifications have been predetermined by NIGC is done without tribal consultation. The NIGC should be consult with the tribes concerning the purposes and functions of the committees, and the qualifications of committee members.
>
> Tribes do have staff with the legal, technical and operational experience and skills to develop an effective regulatory environment, and they are willing and able to consult with NIGC to contribute their expertise to the process. It is clear from Chairman Hogen's letter of February 29, 2008, that NIGC intends to exclude many experienced and competent candidates, who have legal or operational experience, rather than "auditing" or "accounting" experience.

Indeed, the NIGC's new tribal regulatory experience requirement excludes elected tribal leaders while FACA expressly authorizes Federal consultation with elected tribal leaders as the primary exception to the general prohibition on "expert" advisory committees!

**Miscellaneous Concerns**

We have additional concerns with the NIGC. For example, NIGC does not have an audited financial statement available for review. The NIGC is just now implementing an accounting package that will give it the ability to produce financial statements. For the past 5 years, the NIGC has collected more fees than needed for its operating budget over the past 5 years. At the end of last year, the amount was greater than $10 million. While IGRA requires "excess" fees to be returned to the Tribes, these funds have been retained by NIGC from year to year.

**Conclusion**

Congress should act to ensure that the National Indian Gaming Commission is working with tribal governments to build up tribal government institutions rather than using a Washington-centered approach and relying primarily on rulemaking to solve perceived problems. We encourage the Senate Committee to consider legislation like H.R. 5608 to mandate an accountable government-to-government consultation process for the NIGC. In addition, the NIGC should begin to provide training and technical assistance to tribal governments and tribal gaming regulators as Congress mandated in 2006. NIGC has been collecting increased fees, but has yet to engage tribes under its new requirement to provide training and technical assistance. Perhaps if it did, NIGC would find a useful role, besides continually revising existing NIGC regulations.

Senator TESTER. Thank you, Mr. Mathews.
Mr. Patterson?

## STATEMENT OF BRIAN PATTERSON, PRESIDENT, UNITED SOUTH AND EASTERN TRIBES

Mr. PATTERSON. Good morning, Senator Tester and distinguished members of the Committee on Indian Affairs. My name is Brian Patterson. I am the President of the United South and Eastern Tribes. I am also a member of the Oneida Indian Nation where I serve as Bear Clan Representative to the nation's council. Thank you for the opportunity to testify before the Committee on our experiences with the National Indian Gaming Commission.

USET represents 25 federally recognized tribes from Maine to Texas to Florida. While for the most part the relationship of our member tribes with the NIGC works well and is positive, there is one very important area in which USET feels that NIGC has failed to meet its responsibility to Indian Country, and our tribes are af-

fected by this failure far more than other areas of the Country. The NIGC and USET share the same common goal of ensuring that Indian gaming operates in a manner which benefits and protects tribal interests. I will highlight several areas in which we have been able to establish positive relationships.

One, our member tribes have been able to work collaboratively with the NIGC to identify areas in which the tribes could improve the regulation before they become problematic. Two, despite a Federal decision limiting the NIGC's jurisdiction on Class III gaming operations, several of our member tribes have continued to work with the NIGC to ensure that their operations meet minimal internal control standards.

Three, a number of our member tribes are located in States which allow Class III gaming as a matter of State law, but the States refuse to negotiate with tribes for Class III gaming compacts. The NIGC has been helpful in providing these tribes with technical assistance in the operation of Class II gaming and offering support and assistance with developing the regulatory framework necessary for secretarial procedures to move forward.

Four, the NIGC has also provided on-site training to a number of our member tribes which provides them with invaluable technical assistance they need to develop and improve their regulatory systems.

As I have mentioned above, there is one very important situation in which we believe the NIGC has failed to meet and fulfill its responsibilities to those tribes who are only able to operate Class II gaming. For the member USET tribes who find themselves in this situation, the State's regulatory scheme would in fact allow them to operate Class III gaming. However, for these tribes, their respective State has refused to negotiate a Class III compact with the tribe.

These tribes are therefore left to operate Class II games, and apply to the Department of Interior for Class III gaming procedures, a process which has taken years to navigate. Thus, the regulation of Class II gaming is vital to USET member tribes, especially those located in Florida, Alabama, Louisiana, and Texas. Consequently, USET member tribes follow the NIGC's regulatory efforts in the area of Class II gaming with great interest.

Unfortunately, the NIGC's new set of proposed regulations addressing Class II definitions would have a devastating impact on many gaming operations. The NIGC's own economic impact study estimates that the draft Class II regulations will cost the tribal gaming industry over $1.2 billion a year.

Much to our dismay, these regulations are dramatically different than previous drafts that have been worked on between NIGC and tribes. The USET tribes generally believe that NIGC has not listened to our comments, nor have they acknowledged the current state of the law. USET tribes are most concerned that the NIGC has set on a specific outcome with regard to adoption of these proposed regulations pertaining to Class II gaming, and that this has skewed the rulemaking process. I have attached copies of our member tribes' comments regarding the proposed gaming classification regulations.

One additional area on which we would like to comment is that of governmental planning and performance. The application of the Government Performance Results Act to the NIGC is a positive step. We look forward to an ongoing consultation and dialogue with the Commission as the draft GPRA report is finalized.

In conclusion, our member tribes feel the overall relationship between the tribes and NIGC is positive. We acknowledge Chairman Hogen's support of Indian tribes over the many years and in his many different roles. But we also believe that NIGC has failed in one very significant respect with its unyielding move toward reworking Class II gaming regulation.

A lot of hard work has already been done to develop consensus positions on many of the Class II issues. This provides a good place for us to re-engage with the Federal Government in establishing a meaningful dialogue to reach out to an acceptable outcome for Indian nations.

Thank you, Senator Tester, for the opportunity to testify before you today.

[The prepared statement of Mr. Patterson follows:]

PREPARED STATEMENT OF BRIAN PATTERSON, PRESIDENT, UNITED SOUTH AND EASTERN TRIBES, INC.

Good morning Mr. Chairman and distinguished members of the Committee on Indian Affairs, my name is Brian Patterson, and I am the President of the United South and Eastern tribes, Inc. (USET). I am also an enrolled member of the Oneida Indian Nation, where I serve on the Nation's Council as a Bear Clan Representative. Thank you for the opportunity to testify before the Committee on our experiences with the National Indian Gaming Commission ("Commission" or "NIGC").

United South and Eastern Tribes, Inc. is a non-profit, inter-tribal organization that collectively represents its member tribes at the regional and national levels. USET represents twenty-five federally recognized tribes. [1]

Included among the members of USET are some of the largest gaming tribes in the United States. We also represent tribes with more modest gaming facilities, as well as tribes that currently do not engage in gaming.

Congress enacted IGRA "to promote tribal economic development, tribal self-sufficiency, and strong tribal government." [2] The Act, for the most part, has accomplished those goals. Indian gaming has been described as "the only federal Indian economic initiative that ever worked." That is absolutely correct. Indian gaming has served as a critical economic tool to enable Indian nations to once again provide essential governmental services to their members, re-assert their sovereignty, and promote the goals of self-determination and self-sufficiency.

Prior to the advent of Indian gaming, many Indian nations, while legally recognized as sovereign governments, were not able to provide basic, governmental services to their people. They had all of the legal attributes of sovereign nations, but many did not have the practical ability to be an effective government for their members. Consequently, despite a strong and proud tradition, Indian nations languished in a two hundred year cycle of poverty.

Today, the resources of Indian gaming operations are used to provide essential governmental services to tribal members. Indian nations across the country are using gaming revenues to invest in dozens of tribal member programs, including home ownership initiatives, tuition assistance for everything from elementary

[1] Members of the United South and Eastern Tribes, Inc., include: Eastern Band of Cherokee, Mississippi Band of Choctaw, Miccosukee Tribe, Seminole Tribe of Florida, the Chitimacha Tribe of Louisiana, the Seneca Nation of Indians, the Coushatta Tribe of Louisiana, the St. Regis Band of Mohawk Indians, Penobscot Indian Nation, the Passamaquoddy Tribe Indian Township, the Passamaquoddy Pleasant Point, the Houlton Band of Maliseet Indians, the Tunica-Biloxi Indians of Louisiana, the Poarch Band of Creek Indians, the Narragansett Indian Tribe, the Mashantucket Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), the Alabama-Coushatta Tribe of Texas, the Oneida Indian Nation, the Aroostook Band of Micmac Indians, the Catawba Indian Nation, the Jena Band of Choctaw Indians, the Mohegan Tribe of Connecticut, the Cayuga Nation, and the Mashpee Wampanoag Tribe.

[2] 25 U.S.C. § 2701(4)

schools to post-doctorate work, health insurance for all tribal members, and access to top-notch health clinics.

We cannot calculate the intangible benefits of the impact such economic development has created, including the impact on the most important matter for an Indian nation—its human resources. Suffice it to say that in many situations, Indian governments have seen their members move from unemployment rolls to being gainfully employed.

Reclaiming a past heritage also has been a priority for all USET members, and gaming proceeds have enabled Indian nations to make tremendous gains in this area. In many respects, these individual efforts culminated collectively in the dedication of the National Museum of the American Indian in September 2004. I am proud to note that the three largest contributions to the building of this tremendous institution came from Indian nations that are Members of USET.[3] I want to thank the Committee for its leadership in making this museum a reality, and in particular, Senator Inouye for his vision and dedication to ensuring that the museum would meet the expectations of Indian people.

While for the most part, the relationship of our member tribes with the NIGC works well and is positive, there is one very important area in which USET member Tribes feel the NIGC has failed to meet its responsibilities to Indian Country, and our tribes are disproportionately affected by this failure far more than other areas of the Country. I am here today to discuss both the negative and positive aspects of our members' relationship with the NIGC.

**Working Toward a Common Goal**

The National Indian Gaming Commission and the United Southern and Eastern Tribes, Inc., share the common goal of ensuring that Indian gaming operated by the USET Tribes is operated fairly and in a manner which benefits and protects the Tribes' interests. We believe that the Tribes and the NIGC have been able to establish a relationship that assists both parties in meeting their goals.

There are several areas in which we have been able to establish positive relationships.

*1. Working together to identify problem areas.*

Our member tribes have been able to work collaboratively with the NIGC to identify areas in which the Tribes could improve their regulation before they become problematic. It can be helpful to engage the assistance of the NIGC, even though Tribes are quite effective at resolving the vast majority of these issues without such assistance.

*2. Voluntarily working with NIGC to conduct on-site reviews of their Class III gaming operations.*

Despite the holding in the *Colorado River Indian Tribe (CRIT) v. National Indian Gaming Commission,* several of our member tribes have continued to work with the NIGC to ensure that their operations meet minimum internal control standards. Many tribes, since the CRIT decision was issued, have voluntarily continued to follow the Minimum Internal Control Standards set in place by the NIGC prior to the decision.

The NIGC has assisted more than one of our member Tribes with on-site visits to assess voluntary compliance with those MICS standards.

*3. Working with tribes who have applied for Secretarial Procedures.*

A number of our member Tribes are located in states which allow Class III gaming as a matter of State law, but the States refuse to negotiate with the tribes for Class III gaming compacts. These tribes are left to operate Class II gaming and seek Secretarial Procedures.

The NIGC has been helpful in providing these tribes with technical assistance in the operation of Class II gaming, and offering support and assistance with developing the regulatory framework necessary for Secretarial Procedures to move forward. In at least one instance, the NIGC has offered to provide Class III regulatory services to the Tribe seeking procedures.

*4. Providing on-site training and review.*

The NIGC has also provided on-site training to a number of our member Tribes, which provides them with invaluable technical assistance they need to develop and improve their new or existing regulatory systems. They are also available and have provided on-site reviews to assess the adequacy of existing systems in place, and

[3] Jim Adams, *Leaders guide museum with humble yet historic partnership,* Indian Country Today (Lakota Times), Sept. 22, 2004, at 1.

provide advice on how to improve those systems, preventing problems before they can happen.

**When Relationships Break Down**

As I mentioned above, there is one very important situation in which we believe the NIGC has failed to meet its responsibilities to those Tribes who are only able to operate Class II gaming.

For the member Tribes of USET who find themselves in this situation, their state's regulatory scheme would in fact allow them to operate Class III gaming. However, for these Tribes, their respective state has refused to negotiate a Class III compact with the Tribe. These Tribes are therefore left to operate Class II games, and apply to the Department of Interior for Class III gaming procedures, a process which takes years to navigate. In the case of one of our member Tribes, this process of receiving Class III gaming took sixteen years (16) to resolve and is still not complete.

Thus, the regulation of Class II gaming is vital to many of our member Tribes, especially those located in Florida, Alabama, Louisiana and Texas. Consequently, USET member tribes follow the NIGC's regulatory efforts in the area of Class II gaming with great interest.[4]

In the past several years, the NIGC has attempted to modify the regulatory structure surrounding Class II gaming in a number of ways, beginning in 2003 with the formation of a Tribal Advisory Committee charged with creating a "bright line" between Class II and Class III gaming. These efforts led to the NIGC's publication of Game Classification Standards and amendments to its definition of electromechanical facsimile on May 26, 2006, as well as proposed Class II Technical Standards on August 11, 2006. Tribes overwhelmingly opposed these draft regulations, a position that was driven home during a hearing held on September 19, 2006. Most Tribes stated that the new standards would impose an unwieldy and unworkable system of rules on Class II operators, and would cause severe economic harm to Indian tribes who operate Class II games. And tribes were not alone in their opposition of these regulations: gaming manufacturers also opposed the NIGC's regulations.

In the wake of this hearing, the NIGC held a follow-up meeting in December of 2006 with what is now termed the "Tribal Gaming Working Group." This Working Group consists of Tribal Leaders, technical and legal experts, and members of the NIGC's Tribal Advisory Committee (TAC) on Class II gaming, which itself is made up of Tribal representatives and Class II technical experts. During this follow-up meeting, the draft regulations were discussed, and it was agreed that the Working Group would develop a more suitable set of Class II Technical Standards. Less than two months later, on January 25, 2007, this group provided a revised draft of the Class II Technical Standards to the NIGC for review and consideration. Now understanding that they were looking at Class II gaming incorrectly, and that they needed to look at Class II gaming more systematically, the NIGC withdrew all pending Class II regulations on February 15, 2007.

The NIGC, in conjunction with the Tribal Gaming Working Group, then embarked on an extensive effort to revise the NIGC's Minimum Internal Control Standards (MICS) so that they conformed to the Technical Standards, as revised. The Working Group also made additional conforming changes to the already revised Technical Standards to ensure that when taken as a whole, the overall package was consistent.

The work product from this extensive effort was submitted to the NIGC on September 12, 2007. On October 24, 2007, the NIGC published four new sets of proposed regulations addressing the Facsimile Definition, Game Classification Standards, the MICS and the Class II Technical Standards. Much to our dismay, however, our member tribes who participated in this process were completely shocked to find that significant and material changes had been made by the NIGC to the collaborative September 2007 drafts.

Overall, USET Tribes generally believe that the NIGC has not listened to their comments, nor have they acknowledged the current state of the law. Our member Tribes also are concerned with the appearance that the NIGC simply went through the motions of "consultation" by holding meetings with tribal leaders and representatives when in fact, they had no intention of attempting to reach a consensus or

[4] In addition, the regulation of Class II gaming is important even to those tribes who operate pursuant to Class III compacts because in many instances the terms of the compact expire. There is no guarantee that a state with a new governor and legislature will negotiate in good faith over a new compact.

even making meaningful concessions regarding the substance of the draft regulations.

Perhaps most disturbing, our members Tribes are concerned that the NIGC has not heeded Tribal concerns regarding the devastating impacts that these proposals will have on the Tribal gaming industry. The NIGC's own economic impact study estimates that the draft Class II regulations will cost the tribal gaming industry over $1.2 billion a year.

At the end of the day, USET Tribes are concerned that the NIGC has been set on a specific outcome with regard to the adoption of the proposed regulations pertaining to Class II gaming, and that this orientation to a specific outcome has skewed the rulemaking process. They also feel that, despite their best efforts to deal with the NIGC fairly on these issues, they have not received the same treatment in return.

I have attached copies of our member Tribes comments regarding the proposed gaming classification regulation for your information, because I feel the information contained in them is important and too detailed to be properly addressed by my brief testimony.

**Governmental Performance and Results Act**

One additional area in which we would like to comment is that of governmental planning and performance. Until very recently, the National Indian Gaming Commission was not required to take part in the standard strategic planning and performance assessment in which other agencies are required to participate.

This changed very recently, with the adoption of Public Law 109–221, which subjected the NIGC to the requirements of the *Government Performance and Results Act (GPRA) of 1993* (Public Law 103–62) and additionally required the NIGC to provide a plan for technical assistance to tribal gaming operations in accordance with GPRA.

We believe that the application of GPRA to the NIGC is a positive step toward making the Commission more transparent and accountable to the public and particularly to Indian Country. We are also encouraged by the development of the draft GPRA plan proposed by the NIGC is a move in the right direction, and we look forward to an ongoing consultation and dialogue with the NIGC on their future plans before the report is finalized.

**Conclusion**

As you can see, the relationship between the diverse tribes who make up the United South and Eastern Tribes and the Commission is complicated. Overall, our member tribes feel that the relationship between tribes and the NIGC is positive. We acknowledge Chairman Hogen's support of Indian tribes over many years and in many different roles. But we also believe that NIGC has failed in one very significant respect, with its unyielding move toward reworking Class II gaming regulation.

The failure of the NIGC to properly consult with tribes regarding its Class II rulemaking efforts has left our member Tribes frustrated. However, if afforded the opportunity, we are committed to continuing to work with Congress and the NIGC on the Class II gaming issues. A lot of hard work already has been done to develop consensus positions on many of the Class II issues. This provides a good place for us to re-engage with the Federal Government in establishing meaningful dialogue to reach to an acceptable outcome for Indian nations.

Thank you, Mr. Chairman, for the opportunity to testify today.

Senator TESTER. Thank you, Mr. Patterson.

Mr. Luger?

## STATEMENT OF J. KURT LUGER, EXECUTIVE DIRECTOR, NORTH DAKOTA AND GREAT PLAINS INDIAN GAMING ASSOCIATION

Mr. LUGER. Thank you, Senator. My name is Kurt Luger. I am a member of the Cheyenne River Sioux Tribe in South Dakota. My office is in Bismarck, North Dakota and I represent 28 nations from Kansas, Nebraska, Iowa, North Dakota, South Dakota, and the great State of Montana.

I am here today, and I will great right to the heart of our concerns with the NIGC. It is that they have adopted a top-down inside-the-beltway approach to the regulation of Indian gaming.

Rather than coming out to the field to assist tribal governments in ensuring that tribal regulatory systems are running appropriately. The NIGC constantly wants to write new Federal rules. We acknowledge that the NIGC is willing to sit down with tribal leaders and willing to attend tribal meetings. Unfortunately, tribal leaders often come away with the feeling that NIGC had a predetermined decision and that despite tribal concerns, the NIGC will not move off its own bureaucratic agenda to find its way to respect tribal sovereignty and self-government.

We are told that consultation does not mean agreement, but consultation is supposed to be meaningful and it should require consideration of tribal points of view and accommodation of those perspectives to the greatest extent possible. For example, when the NIGC was developing its Class II regulatory proposals, it was very reluctant to consider tribal governmental points of view. Yet when the gaming manufacturers made a point, the NIGC would listen to them readily.

The other thing that happens is when something appears to make travel concerns, the Chairman and Commissioners go back and talk to the NIGC lawyers and any sign of accommodation is later dropped. There is simply too much inside-the-beltway counseling and not enough field experience.

I brought with me five recommendations that we believe would help the NIGC in fulfilling its mission to assist Indian tribes with gaming regulation. One, our first recommendation is to make Federal and tribal consultation meaningful, that NIGC should be directed by statute to follow Executive Order 13175, and we call upon the Senate Committee to consider a bill similar to H.R. 5608.

Our next recommendations concern training and technical assistance. In 2006, the NIGC Accountability Act was signed into law. In that Act, Congress intended three things: to provide increased funding to the NIGC; require the NIGC to comply with the Government Performance and Results Act; and to require the NIGC to include training and technical assistance plans to the GPRA.

NIGC is currently undertaking a paperwork shuffle of its GPRA compliance plan, but Indian tribes were not consulted in its development. There have been no national or regional meetings scheduled to consider with the tribes on the GPRA plan, and no training or technical assistance programs have been undertaken. NIGC, however, has increased its fees and is spending the money under the fee provisions.

Two, we recommend that NIGC hire a training and technical assistance director with Indian gaming experience. We urge the Senate Committee to ensure that NIGC hires a training and technical assistance director to begin providing training and technical assistance programs to tribal governments and tribal gaming regulators.

Three, we also recommend that NIGC provide training and technical assistance that meets or exceeds industry standards. This is critical. We need practical training and useful technical assistance that can really help tribal regulators to establish and maintain top-notch systems that meet or exceed industry standards.

Mr. Chairman, our experience of you today called up what I myself and my association has put on more than 150 training sessions. I went back through my record. Their people have been at

less than 10 of them. They tell me one of two things: they are not available or they don't have the expertise in that particular field to do it. So, I get them from Indian Country, from within ourselves. If lawyers who do not know the industry standards are assigned to the task of training and technical assistance, it is a waste of time.

The NIGC should apply Indian preference in hiring. The District Court of the District of Columbia recently ruled that Indian preference in hiring applies to "positions in the Department of Interior whether within or without the Bureau of Indian Affairs that directly and primarily provides services to Indians." NIGC is directly and primarily providing regulatory services to Indians within the meaning of Indian preference, yet NIGC has a poor track record of hiring Indians. Only three out of 17 supervisory personnel at the NIGC Washington headquarters are Indian. This must change.

Lastly, we are also very concerned with NIGC's use of Federal advisory committees. The NIGC claims exemption from FACA and constitutes and disbands tribal advisory committees at will. It is a recommendation that NIGC submit its claimed FACA exception to GSA for its review, and upon a favorable review by GSA, that the tribal advisory committees be formed only after consultation about their use and purpose with tribal governments.

In conclusion, the NIGC must respect tribal governments as day-to-day regulators of Indian gaming and become more of a user-friendly agency. NIGC must stop its top-down inside-the-beltway approach. We have seen it before. It was called the BIA and the IHS, and we don't need anymore of that.

Thank you very, very much for your time and for being invited today.

[The prepared statement of Mr. Luger follows:]

PREPARED STATEMENT OF J. KURT LUGER, EXECUTIVE DIRECTOR, NORTH DAKOTA AND GREAT PLAINS INDIAN GAMING ASSOCIATION

Good Morning, Chairman Dorgan and Members of the Committee. Thank you for inviting me to testify this morning.

My name is Kurt Luger and I am a member of the Cheyenne River Sioux Tribe. I grew up on the Standing Rock Sioux reservation in North Dakota on my family ranch and my family operates a grocery store and small business in Fort Yates, North Dakota.

I serve as the Executive Director of the North Dakota Indian Gaming Association, which includes the Spirit Lake Sioux Tribe, Standing Rock Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, the Three Affiliated Tribes of Fort Berthold, and the Turtle Mountain Chippewa Tribe.

I also serve as the Executive Director of the Great Plains Indian Gaming Association, which covers North Dakota, South Dakota, Nebraska, Iowa, Kansas, Wyoming, and Montana. GPIGA was founded in 1997, and we have 28 Tribes as Members. This year we will hold our 16th Annual Gaming Conference & Trade Show together with the Minnesota Indian Gaming Association on May 18–21, 2008 at the Mystic Lake Casino & Hotel. Senator Dorgan, I respectfully extend to you an invitation to be our keynote speaker on Monday, May 19, 2008, so our tribal leaders can hear from you directly about the Committee's policies and priorities.

At GPIGA, our mission is to bring together the federally recognized Indian Nations in the Great Plains Region who are operating gaming enterprises in a spirit of cooperation to develop common strategies and positions concerning issues affecting all gaming tribes; to promote tribal economic development and its positive impacts within the Great Plains; to provide pertinent and contemporary information for the benefit of the GPIGA member nations; to draw upon the unique status of those Great Plains Indian Nations which have treaties between themselves and the

United States; and to provide our Member Tribes with information about national legislation and issues affecting tribal economic development.

Naturally, we are concerned about the manner in which the NIGC approaches its mission to assist tribes in regulating Indian gaming. Rather than a cooperative environment where the NIGC and Indian tribes work together to ensure the highest standards of regulation, Tribes are left with the impression that the NIGC has chosen to write regulations without tribal input or concern for the affect those regulations will have on tribal sovereignty and the Indian gaming industry. Similarly, we are concerned by the lack of training and technical assistance on those regulations to Indian tribes and tribal regulators despite a mandate to do so in the NIGC Accountability Act of 2006.

**Background: Federal-Tribal Government-to-Government Relations**

Before the United States, Indian tribes were independent sovereigns with sustainable economies, strong agricultural traditions, vast natural resources and extensive trade networks. Early United States' treaties sought to foster "a firm and lasting peace" with the North Dakota tribes, to build a trade network between the United States and North Dakota tribes, and to extend Federal protection to the tribes. *See* Treaty with the Mandan (1825); Treaty with the Arikara (1825); Treaty with the Hunkpapa Sioux (1825). Later, the United States sought cessions of land from North Dakota tribes through war, treaty, or statutory agreement, and these cessions left the tribes destitute.

Through these treaties the United States acknowledged the status of Indian tribes as sovereigns and established the principle of government-to-government relations between the United States and Indian tribes. In fact, these principles are part of the very fabric of the Constitution, as set forth in the Indian Commerce and Treaty Clauses. The United States never withdrew its treaty pledges of peace, friendship, and protection for North Dakota's Indian tribes, and accordingly, we seek to hold the United States to its Federal trust responsibility. Part of the Federal trust responsibility is a duty to protect tribal self-government, which means that to the greatest extent possible, the United States, its officers and agencies should work with Indian tribes on a basis of mutual respect and mutual consent.

**Indian Gaming in North Dakota**

The Indian Gaming Regulatory Act's purpose is to build strong tribal governments, promote tribal economic development and foster tribal self-sufficiency. Indian gaming has been an important economic development activity for Indian tribes in North Dakota and the Great Plains region. 25 U.S.C. section 2701(4).

After almost 20 years of experience under the Indian Gaming Regulatory Act, we can say definitively that Indian gaming is working in rural areas of America. Indian tribes that faced 50, 60, and even 70 percent unemployment are now generating jobs not only for their own tribal members, but for neighboring non-Indians as well. I live and work in North Dakota so I will use the North Dakota Tribes as a representative example.

In North Dakota, Indian gaming has a significant economic impact. Our tribal government gaming operations provide employment, essential tribal government revenue that funds essential services and community infrastructure, and generates much needed revenue for communities statewide through the economic multiplier effect. Our Tribes have created 2,400 direct, full-time jobs with pension and health care benefits. The payroll from the gaming operations exceeds $55 million, and approximately $39 million of that payroll goes to tribal members who live in rural North Dakota. More than 70 percent of our gaming employees are Native Americans and 40 percent of our employees were formerly unemployed and survived on welfare.

Our tribal government payroll contributes $156 million annually to the total economy of the state. Tribal government gaming operations purchased over $45 million in goods and services within North Dakota. Purchases were made in 93 communities throughout the State. Without these sales, the state would lose $100 million of economic activity in cities throughout the State. We have estimated our total economic impact in the State since 1997 to have exceeded $1.3 billion.

**Indian Tribes in North Dakota**

In North Dakota, 5 tribal governments operate Indian gaming facilities: the Three Affiliated Tribes of Fort Berthold—Mandan, Hidatsa, and Arikara; the Spirit Lake Sioux Tribe, the Turtle Mountain Chippewa Tribe, the Standing Rock Sioux Tribe and the Sisseton-Wahpeton Sioux Tribe. Both the Standing Rock Sioux Tribe's reservation and the Sisseton-Wahpeton Sioux Tribe's reservation straddle the border with South Dakota.

*Three Affiliated Tribes.* The Three Affiliated Tribes, Mandan, Hidatsa, and Arikara, operate as a unified tribal government. These Tribes have occupied the Missouri valley for hundreds and thousands of years, planted corn, squash, and beans on the fertile flood plains, and hunted buffalo and wild game. Living in stockaded villages, the Three Affiliated Tribes were devastated by smallpox epidemics in 1792, 1836, and 1837.

The traditional lands of the Mandan, Hidatsa, and Arikara encompassed an area of 12 million acres from eastern North Dakota to Montana and as far south as Nebraska and Wyoming. Early on, the Three Affiliated Tribes established friendly relationships with the United States. They welcomed the Lewis and Clark expedition into their villages and assisted them on their journey. The Fort Laramie Treaty of 1851, congressional acts and executive orders reduced the Tribes' lands to 1,000,000 acres in western North Dakota.

In the 1950s, the Three Affiliated Tribes were asked to undertake a tremendous sacrifice by allowing the United States to dam the Missouri River and flood their reservation. The original tribal headquarters were flooded and families were moved away from the fertile Missouri River flood plain up on to the high prairie. When Lake Sakakawea was formed by the dam, the new lake divided the reservation into three parts.

Due to the flooding, the Tribes suffered an enormous loss of natural resources, including the most fertile land on the reservation, their community was divided and the small village life that many had known along the Missouri River was gone. The tribal headquarters were relocated four miles away in New Town, North Dakota. Today, the tribal population is about 10,000 with about 5,000 living on the reservation.

*Spirit Lake Sioux Tribe.* The Spirit Lake Sioux Tribe is composed of the Sisseton-Wahpeton and Yankton bands of the Dakota or Sioux Nation. Originally residing in Minnesota and eastern North Dakota, the Spirit Lake Sioux Reservation was established by the Treaty of 1867 with the United States. The Treaty of 1867 provides that: "The . . . Sioux Indians, represented in council, will continue . . . friendly relations with the Government and people of the United States . . . ." The Treaty recognizes the Spirit Lake Sioux Reservation as the "permanent" reservation of the Tribe.

The Tribe has worked to develop jobs through manufacturing, providing Kevlar helmets and military vests to the Pentagon through Sioux Manufacturing Corporation, yet with a reservation population of over 6,000 people, the Tribe has struggled with 59 percent unemployment as the Defense Department budget was cut in the 1990s. The Spirit Lake Reservation encompasses 405 square miles north of the Sheyenne River in northeastern North Dakota.

*Turtle Mountain Chippewa Tribe.* The Chippewa or Ojibwe people originally inhabited the Great Lakes Region and began to hunt and trade in North Dakota in the late 18th and early 19th Centuries. Historically, the Chippewa and the Dakota fought wars with each other, but they settled their differences through the Treaty of Sweet Corn in 1858.

In 1882, Congress set aside a 32 mile tract in Northeastern North Dakota for the Turtle Mountain Band of Chippewa 11 miles from the Canadian border. With the passing of the great buffalo herds, the Chippewa turned to agriculture and ranching, and faced many difficulties due to encroachment by settlers.

Today, almost 20,000 tribal members live on the 6 × 12 mile Turtle Mountain reservation. Belcourt, North Dakota, the tribal headquarters, has become the 5th largest city in the state.

*Standing Rock Sioux Tribe.* The Standing Rock Sioux Tribe is composed of Sitting Bull's Band, the Hunkpapa, and the Yanktonai, with some Black Foot Sioux on the South Dakota side. In the Fort Laramie Treaty of 1868, the United States pledged that: "The Government of the United States desires peace and its honor is hereby pledged to keep it." The Treaty also provides that the Great Sioux Reservation was to serve as the "permanent home" of the Sioux Nation.

Yet, in 1876, General Custer and the 7th Cavalry came out to Sioux country to force the Sioux tribes on to diminished reservations. In 1889, the Federal Government once again called on the Sioux Nation to cede millions more acres of reservation lands, and the Standing Rock Sioux Reservation was established by the Act of March 2, 1889. Sitting Bull had opposed the land cession and in 1890, he was murdered by United States officers—that is, the BIA police acting in concert with the U.S. Cavalry and under the direction of the Indian Agent.

The Standing Rock Sioux Reservation is composed of 2.3 million acres of land lying across the North and South Dakota border in the central area of the State. Like the Three Affiliated Tribes, the Standing Rock Sioux Tribe was asked to make a substantial sacrifice for flood control and ceded almost 56,000 acres of the best

reservation land for Lake Sakakawea. Tribal members were removed from their traditional homes along the Missouri River flood plain and relocated well up above the river. Today, the population of resident tribal members is almost 10,000.

*Sisseton-Wahpeton Sioux Tribe.* Located in Southeastern North Dakota and Northeastern South Dakota, the Sisseton-Wahpeton Sioux Tribe has a total enrollment of over 10,000 tribal members and a resident population of about 5,000 tribal members. The Tribe was originally located in Minnesota, but pressure from white settlers pushed the Tribe westward. The Treaty of 1858 with the United States established the Sisseton-Wahpeton Sioux Reservation, which today has approximately 250,000 acres in North and South Dakota.

**The Tribal-State Compact Process in North Dakota**

Since the beginning of tribal gaming in North Dakota, its primary function has been to provide employment and economic development opportunities. Indian gaming has also provided vital funding for tribal government infrastructure, essential services including police and fire protection, education, and water and sewer services, and tribal programs, such as health care, elderly nutrition, and child care.

There are five Indian gaming facilities in the state—Four Bears Casino & Lodge (Three Affiliated Tribes), Sky Dancer Casino & Lodge (Turtle Mountain), Spirit Lake Casino (Spirit Lake Sioux), Dakota Magic Casino (Sisseton-Wahpeton), and Prairie Knights Casino & Lodge (Standing Rock).

In North Dakota, tribal governments have worked hard to maintain our sovereign authority and territorial integrity, so that we can provide a life for our people on our own homelands. The Indian Gaming Regulatory Act acknowledges the governmental status of Indian tribes and seeks to promote "tribal economic development, self-sufficiency, and strong tribal governments."

Historically, state law does not apply to Indian tribes or Indians on Indian lands in the absence of an express congressional delegation of authority. That means that under general principles of Indian sovereignty, Indian tribes are able to conduct gaming under tribal law, not state law. Yet, through the Indian Gaming Regulatory Act, Congress made a compromise between tribal interests and state interests and established the Tribal-State Compact process for the regulation of Class III gaming. The Senate Committee Report explains:

> It is a long and well-established principle of Federal Indian law as expressed in the United States Constitution . . . that unless authorized by act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands . . . . [U]nless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities. The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the . . . application of state laws . . . is a Tribal-State Compact.

The Administration expressly rejected a primary Federal regulatory role:

> Recognizing that the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests, some have suggested the creation of a Federal regulatory agency to regulate class II and class III gaming activities on Indian lands. Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies, and thus there was no need to duplicate those mechanisms on a Federal level.
>
> Senate Report No. 100–497 at 5–7 (1988).

Accordingly, when tribal governments conduct Class III gaming, IGRA first requires three things: (1) a tribal gaming regulatory ordinance that meets minimum statutory standards, approved by the NIGC; (2) the Tribe is located in a state where Class III gaming is allowed for any purpose by any person, entity or organization; and (3) a Tribal-State Compact. The Tribal-State Compact provides the rules for Class III gaming:

> (i) the application of the criminal and civil laws of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in such amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) other subjects that are directly related to the operation of gaming activities.

25 U.S.C. sec. 2710(d)(3).

Tribal gaming regulatory ordinances support the Tribal-State Compact provisions. Tribal gaming ordinances must include: (1) the tribe has sole ownership of the gaming facility; (2) net revenues are used first and foremost for essential government purposes and tribal infrastructure; (3) annual audits are provided to NIGC (including independent review of contracts in excess of $25,000); (4) standards for construction and maintenance of the facility; and (5) a background check and licensing system for management and key employees. The tribal ordinance process is intended to provide a measure of respect for tribal law-making authority, so the NIGC can only disapprove of a tribal ordinance if it does not meet the statutory criteria.

**North Dakota Tribal-State Relations**

In North Dakota, both our Tribes and the States have taken the Tribal-State Compact very seriously. Our first Tribal-State Compacts were approved in 1992 and they were renewed in 1999. We follow a broad, inclusive process of negotiation where all 5 Tribes work together and we negotiate with the Executive Branch, including the Governor's office and the Attorney General. The State Senate Majority and Minority Leaders and the State House Majority and Minority Leaders are invited to sit in on our compact negotiation meetings. The Tribes participate in six public hearings throughout the State to gather public input. Then our Tribal-State Compacts are approved through the normal legislative process, including committee hearings and approval by a vote of the State Legislature.

All of the North Dakota tribes have worked to maintain positive government-to-government relationships with the State of North Dakota. We meet every two years with the same group of state officials that negotiate Tribal-State Compacts to review tribal progress and any regulatory or implementation issues that may arise.

Our Tribes expressly adopted Minimum Internal Control Standards through our Tribal-State Compacts—which incorporate the NIGC MICS by reference:

*Minimum Internal Control Standards*

"Tribes shall abide with such Minimum Internal Control Standards as are adopted, published, and finalized by the National Indian Gaming Commission and as may be in current effect."

The State Attorney General is vested with authority to regulate gaming under state law, so Attorney General has expertise in this area:

The State Attorney General regulates the State Lottery, horse-racing and charitable gaming, alcoholic beverages, and tobacco retailers, enforces consumer protection laws, and operates the Bureau of Criminal Investigations. The Attorney General's Gaming Division regulates, enforces and administers charitable gaming in North Dakota. The division provides training, performs audits and investigations of gaming organizations; reviews gaming tax returns; issues administrative complaints; conducts criminal history record checks of gaming employees and Indian casino employees; and ensures compliance with tribal-state casino gaming compacts.

The Attorney General's office works with our tribal gaming commissions to address any significant issues that arise in Class III gaming conducted pursuant to our compacts. Our compacts provide: (1) GAAP and IGRA standards for accounting; (2) regulation, testing and reporting for electronic machines to the state; (3) regulation for table games; (4) background checks conducted by the State Attorney General's office and licensing standards for our tribal gaming commissions; and (5) random inspections by the State Attorney General's office and tribal gaming commissions. The Tribes in North Dakota have worked very hard to preserve a strong relationship with the State, and the State for, its part, has worked in good faith with the Tribes.

In North Dakota, tribal governments employ more than 325 tribal regulators and staff. In 2006, tribal governments spent $7.4 million on tribal and state regulation of Indian gaming in North Dakota. That's $1.48 million per tribal government and we run relatively modest operations. We just had our biennial meeting with state officials and no regulatory issues or deficiencies were identified by any party. The

Attorney General has said that his office is comfortable that we have achieved our original intention to create a safe, secure and effective tribal-state regulatory system.

Attorney General Stenjhem has complimented the tribal governments on our record of strong regulation and has cooperated with the tribal regulatory agencies to apprehend and prosecute those who attempt to cheat our casinos. The Attorney General has recognized that Indian gaming has created important jobs and generated vital revenue for tribal self-government. He made it clear that he is proud that the State has not asked for revenue sharing. State officials in North Dakota know that tribal governments have many unmet needs and it helps the whole state, when tribal governments have a way to create jobs and generate essential governmental revenue.

**The Role of the NIGC—Background Oversight/Training and Technical Assistance**

The National Indian Gaming Commission was established to assist Indian tribes with the regulation of Indian gaming. Under IGRA, tribal gaming regulators are the primary day-to-day regulators of Indian gaming and they regulate Indian gaming under tribal gaming ordinances, which are approved by the NIGC provided that they conform to minimum federal statutory standards.

For Class II gaming, tribal regulators are supported by continuous monitoring of the NIGC. For Class III gaming, tribal regulators are supported by State regulators in accordance with Tribal-State compacts and the NIGC has a specialized role. Specifically, the NIGC:

- NIGC reviews and approves tribal gaming regulatory laws;
- NIGC reviews tribal background checks and gaming licenses;
- NIGC receives independent annual audits of tribal gaming facilities;
- As part of the annual audits, NIGC receives audits of gaming contractors over $25,000; and
- NIGC approves management contracts.

In addition to the Tribal-State Compact system, IGRA specifically provides that NIGC authority to work with tribal governments to ensure the enforcement of NIGC approved tribal ordinances under 25 U.S.C. sec. 2713:

> Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

Thus, the NIGC has authority to assist the tribes in ensuring proper enforcement of those tribal minimum internal control standards. This role continues and was not interrupted by the Federal Court decision in *Colorado River Indian Tribes v. NIGC.* [1]

**Top Down/Inside the Beltway Approach to Regulation**

Our concern with the NIGC is that they have adopted a top-down, inside the beltway approach to the regulation of Indian gaming. Rather, than coming out to the field to assist tribal governments in ensuring that tribal regulatory systems are running appropriately, the NIGC constantly wants to write new Federal rules.

To strengthen the United States' government-to-government relationships with Indian tribes, President Clinton issued Executive Order No. 13175 (2000), which directs Federal agencies to consult and coordinate with Indian tribes on Federal rulemaking and agency actions that have substantial direct impacts on tribal self-government, tribal lands and treaty rights. In considering Federal rulemaking that so impact tribal interests, the Executive Order provides that agencies shall adhere to the following criteria:

- Respect for tribal self-government and sovereignty, treaty and other rights that arise from the Federal trust relationship;
- Provide tribes with the maximum administrative discretion possible; and

[1] In essence, the Federal Court ruling simply held that the NIGC may not draw up new Federal standards for the operation of Class III Indian gaming over and above Tribal-State Compacts. The Federal Court left in place the original understanding of IGRA.

- Encourage tribes to develop their own policies to achieve objectives, defer to tribal standards where possible, and otherwise preserve the prerogatives and authority of Indian tribes.

The Executive Order also directs Federal agencies to consider the need for the regulation in light of tribal interests, take tribal concerns into account, and use consensual mechanisms for decision-making, including negotiated rulemaking, where appropriate. On September 23, 2004, President Bush issued an Executive Memorandum directing Federal agencies to adhere to Executive Order 13175.

We acknowledge that the NIGC is willing to sit down with tribal leaders and is willing to attend tribal meetings. Unfortunately, tribal leaders often come away with the feeling that NIGC had a pre-determined decision and that despite tribal concerns, NIGC will not move off its own bureaucratic agenda to find a way to respect tribal sovereignty and self-government. We are sometimes told that consultation does not mean agreement but consultation is supposed to be meaningful and it should require consideration of tribal points of view and accommodation of those perspectives to the greatest extent possible.

For example, when the NIGC was developing its Class II regulatory proposals it was very reluctant to consider tribal government points of view, yet when the gaming manufacturers made a point, the NIGC would listen to them. The other thing that happens is when we sometimes appear to make some headway in promoting tribal government concerns, the Chairman and Commissioners go back and talk to NIGC lawyers and any sign of accommodation is later dropped. There is simply too much inside the beltway counseling and not enough field experience.

*Recommendation: Make the Federal-Tribal Government-to-Government Relationship Meaningful!* The NIGC should be directed by statute to follow Executive Order No. 13175 and we call upon the Senate Committee to consider a bill similar to H.R. 5608. If possible, we would ask the Committee to pass that bill with an expanded scope to cover other Federal agencies.

**Training and Technical Assistance**

In 2006, Congress gave the NIGC new authority to work with tribal governments to provide technical assistance and training to tribal regulators. Public Law No. 109–221 (2006). Specifically, the NIGC Accountability Act is intended to do three things:

- Provide increased funding for NIGC by empowering NIGC to assess a fee up to the level of $0.80 per $1,000 of gross Indian gaming revenue;
- Require NIGC to follow the Government Performance and Results Act; and
- Require NIGC to include a training and technical assistance plan in its GPRA compliance plan.

NIGC is currently undertaking a paperwork shuffle of its GPRA compliance plan, but Indian tribes were not consulted in its development, there have been no national or regional meetings scheduled to consult with tribes on the GPRA plan, and no training or technical assistance programs have been undertaken pursuant to the plan. NIGC has increased its fees and is spending more money under the fee provisions.

*Recommendation: NIGC Must Hire a Training/Technical Assistance Director with Indian Gaming Experience!* We urge the Senate Committee to ensure that the NIGC hires a training and technical assistance director to begin providing training and technical assistance programs to tribal governments and tribal gaming regulators. We strongly believe that the NIGC training and technical assistance director should be someone who has actual Indian gaming field experience (meaning that they have worked for an Indian tribe).

*Recommendation: NIGC Must Provide Training/Technical Assistance that Meets or Exceeds Industry Standards!* If Washington lawyers who have never worked in the field sit around a conference table at the agency headquarters and dream up training subjects, the NIGC is headed for failure in this area. We need practical training and useful technical assistance that can really help tribal regulators to establish and maintain top-notch systems that meet or exceed industry standards. If lawyers who do not know the industry standards are assigned to the task of training and technical assistance, it is a waste of time.

**The NIGC Should Apply Indian Preference in Hiring**

*Recommendation: NIGC Must Use Indian Preference in Hiring!* Under existing law, NIGC should provide for Indian preference in hiring. On March 31, 2008, the U.S. District Court for the District of Columbia ruled that Indian preference in hiring applies to all "positions in the Department of the Interior, whether within or

without the Bureau of Indian Affairs, that directly and primarily relate to providing services to Indians . . . ." *Indian Educators Federation v. Dirk Kempthorne,*___F.3d___(Civ. No. 04–01215) (March 31, 2008). IGRA expressly places the NIGC within the Department of the Interior and it is without question that NIGC is engaged in providing regulatory services for Indian gaming, which is a tribal government activity. Hence, NIGC is directly and primarily providing regulatory services to Indians within the meaning of Indian preference. Yet, NIGC has a poor track record of hiring Indians: only 3 out of 17 supervisory personnel at the NIGC Washington headquarters are Indian. This must change.

**Federal Advisory Committees**

In general, the Federal Advisory Committee Act (FACA) frowns on the use of Federal Advisory Committees because they are composed of unelected experts who may have an unknown impact on Federal policy while the public is excluded. There is an exception for consultation with state, local and tribal government representatives because such consultation is appropriate to promote federalism, comity, and respect for tribal self-government. Normally, when a Federal Advisory Committee is formed a plan must be filed with GSA.

NIGC simply claims exemption from FACA and constitutes and disbands Tribal Advisory Committees at will. *Recommendation: Tribal Advisory Committees Should be Formed Only After Consultation with Tribal Governments* about their uses and purposes. They should be staffed with tribal government representatives freely nominated by sovereign tribal governments. Instead, NIGC calls for experts and puts qualifications on its Tribal Advisory Committees that fly in the face of FACA. For example, NIGC just disbanded a MICS Tribal Advisory Committee and Technical Standards Tribal Advisory Committee and shortly thereafter, announced the formation of a new Tribal Advisory Committee that would limit its membership to tribal regulators with 5 or more years of experience. That means that no elected tribal government leaders will be on the committee and no gaming operators will be on the committee. That seems to subvert the FACA exception that NIGC is relying upon by cherry-picking committee members who are amenable to the NIGC viewpoint.

*Recommendation: NIGC Should Submit Its Claimed FACA Exception to GSA for Review.* NIGC should submit its Tribal Advisory Committee plans to GSA for approval as an exception to FACA to ensure that it is not end-running the statute.

**Conclusion: NIGC Must Respect Tribal Governments as Day-to-Day Regulators**

NIGC should embrace Congress' direction to provide training and technical assistance to tribal governments and tribal gaming regulators. Moreover, NIGC should meaningfully consult with tribal governments concerning the need for new regulations. For example, where NIGC just issued regulations in 2002 on Class II Technologic Aids, NIGC should truly consider the importance of simply maintaining those regulations as an alternative to new regulations. Especially, where those 2002 regulations were approved by the Federal Court of Appeals!

In short, NIGC needs to become a more user friendly agency, and stop the top/down inside the beltway regulatory directive approach to its mission. Tribal governments invest hundreds of millions of dollars for regulation and NIGC is not happy unless it is duplicating tribal government regulation.

Senator TESTER. Thank you, Mr. Luger.

Ms. Rand?

## STATEMENT OF KATHRYN R.L. RAND, J.D., PROFESSOR, UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW; CO–DIRECTOR, INSTITUTE FOR THE STUDY OF TRIBAL GAMING LAW AND POLICY; ACCOMPANIED BY STEVEN ANDREW LIGHT, PH.D., PROFESSOR, UNIVERSITY OF NORTH DAKOTA COLLEGE OF BUSINESS AND PUBLIC ADMINISTRATION; CO–DIRECTOR, INSTITUTE FOR THE STUDY OF TRIBAL GAMING LAW AND POLICY

Ms. RAND. Thank you, Senator Dorgan and the Committee for inviting us to testify this morning. My name is Kathryn Rand. I am a professor at the University of North Dakota School of Law, and

with me is Dr. Steven Light, a professor at the University of North Dakota College of Business and Public Administration.

We are the Co-Directors of the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota.

We are not here to criticize the NIGC. Our testimony will focus on three issues raised in our written statement: consultation with tribes; accountability; and agency capture. These issues, including our recommendations for each, are addressed in detail in our written statement.

As the Committee knows, the NIGC has a government-to-government tribal consultation policy, and as you have heard, tribal leaders have criticized the NIGC's consultation as pro forma and without substantive impact on decisions. These criticisms are illustrated by the protracted process of promulgating Class II bright-line regulations.

The NIGC's accountability is complicated by its varied stakeholders and the fact that it addresses highly controversial and technically complex issues. Several questions related to the Commission's accountability are raised in the context of the Class II-proposed regulations.

For example, are the proposed regulations necessary, given the Commission's 2002 amendments and the Federal court's application of the same? And is the content of the proposed regulations consistent with congressional intent, especially given the potential economic impact on tribes?

With agency capture, the question is how to balance appropriate government-to-government consultation and stakeholder accountability with the risk of capture. For example, both tribes and game manufacturers have a vested interest in a strong Class II market and have sought to influence the NIGC's regulation of the same.

We have a few preliminary recommendations in each of these areas. With regard to consultation, we recommend comparing other agency practices. For example, the IHS has a relatively detailed and specific consultation policy which requires the definition of consultation and specific triggers for the process of consultation.

We also recommend clarifying the nature of government-to-government consultation, which should be uniquely geared toward tribes' governmental status and their relationship with the Federal Government.

And also with regard to consultation, we recommend considering consent-based policy-making in the form of negotiated rulemaking. True government-to-government consultation may afford tribes a role in decision-making. There is a need for clear criteria and mechanisms to trigger negotiated rulemaking. For example, the IHS policy ties negotiated rulemaking to specific issues.

With regard to accountability, we recommend preserving the NIGC's role in tribal institution-building. The NIGC has a dual role of facilitating and overseeing tribal regulation of gaming. Any accountability measures should take into account the NIGC's facilitation of effective tribal regulation.

Also with regard to accountability, we recommend accounting for the NIGC's effective gambling regulation. The NIGC is also responsible for some direct regulation of gaming, and this regulation should be tailored to IGRA's goals and to the specific needs of the

tribal gaming industry, including fostering tribal economic development.

Finally, with regard to accountability, we recommend increasing transparency as much as possible.

On the issue of capture, we recommend ensuring sufficient funding and personnel for the NIGC and, perhaps more importantly, weighing the capture risk against IGRA's goals and the NIGC's role in facilitating tribal institution-building. There is a need for the NIGC to be informed by tribal and industry expertise. We recommend guidelines for the formation of work groups and advisory committees, as well as their input.

Thank you. Both Dr. Light and I stand ready to answer the Committee's questions.

[The prepared statement of Ms. Rand follows:]

PREPARED STATEMENT OF KATHRYN R.L. RAND, J.D., PROFESSOR, UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW; CO-DIRECTOR, INSTITUTE FOR THE STUDY OF TRIBAL GAMING LAW AND POLICY; ACCOMPANIED BY STEVEN ANDREW LIGHT, PH.D., PROFESSOR, UNIVERSITY OF NORTH DAKOTA COLLEGE OF BUSINESS AND PUBLIC ADMINISTRATION; CO-DIRECTOR, INSTITUTE FOR THE STUDY OF TRIBAL GAMING LAW AND POLICY

Good morning. We thank Senator Dorgan and the Committee for this opportunity to appear before you today to discuss the role of the National Indian Gaming Commission (NIGC) in effective and appropriate regulation of Indian gaming.

We co-direct the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota, which provides legal and policy assistance related to tribal gaming enterprises to all interested governments and organizations, assists tribes with gaming enterprises in pursuing reservation economic development and building strong tribal governments, and contributes to the scholarly and practical research and literature in the area of tribal gaming. Our testimony today is informed by our research and scholarship in the area of Indian gaming over the past twelve years.

In the last two decades, the tribal gaming industry has seen rapid expansion under the regulatory framework of the Indian Gaming Regulatory Act of 1988 (IGRA). Some 400 tribal gaming establishments in as many as 30 states are operated by 230 tribes that have decided to pursue gaming to create jobs, facilitate economic development, and provide public services to their members. The Indian gaming industry generated $25 billion in 2006. As a peculiar intersection of federal Indian law and gambling law, Indian gaming is a particularly complicated and highly specialized topic, giving rise to numerous legal questions fraught with political and policy implications. A regulatory official must respond to a phenomenal array of such questions, from concepts related to abstract theoretical principles or preconstitutional history to those with highly technical answers grounded in the interpretation of current federal law and regulations. Given the growth of the industry and the myriad and recurring legal and political issues concerning Indian gaming, it perhaps should come as no surprise that many, including members of Congress, see Indian gaming as meriting vigorous federal oversight.

The congressional goals reflected in IGRA and its legislative history contemplated both federal Indian law and policy and Congress's expectations for the tribal gaming industry. Although federal Indian policy may not have significantly changed since 1988, the Indian gaming industry certainly has. The predominant view, at least of non-tribal policymakers and the general public, is that the rapid growth of the industry has created significant problems that should be solved through more stringent regulation. Congress's goal in providing sufficient regulation of tribal gaming to ensure legality and protect the financial interests of gaming tribes remains critically important. At the same time, we believe the success of the industry has created opportunities to achieve two additional goals of at least equal importance in the long term. Together, the three goals of sound regulation, tribal institution building, and improving tribal-state relations, each of which is based on Congress's original intent in enacting IGRA, should serve as lodestars for Congress's policymaking for Indian gaming. See Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform,* 13 VA. J. SOC. POL'Y & L. 396 (2006).

Today we have been asked to provide our opinions related to Congress's legislative oversight of the NIGC, the independent federal regulatory agency charged with regulating Indian gaming. Indian gaming presents complexities unlike most other industries subject to federal regulation. We believe that the NIGC has been largely successful in its efforts to work with tribes in regulating a complex and changing industry. The members of this Committee undoubtedly are familiar with the NIGC's authority and many of the issues swirling around its implementation and enforcement of IGRA and federal Indian law and policy. As the NIGC itself has acknowledged, there is a strong perception among tribes that the NIGC does not adequately consult with tribal leaders regarding proposed regulations, a criticism raised repeatedly during the NIGC's protracted process of issuing proposed regulations related to Class II gaming. Recently, the NIGC requested assistance from the National Indian Gaming Association (NIGA) in developing and implementing procedures and practices for government-to-government consultation with tribes.

We welcome this opportunity to contribute our views on how best to ensure appropriate congressional oversight and efficient and accountable governance through the NIGC's meaningful consultation and cooperation with tribal governments. In this statement, we focus on three issues related to the NIGC's role that we believe may be helpful to the Committee: communication and consultation policies and practices, accountability, and agency capture.

**I. Scope of NIGC Powers**

In IGRA, Congress specified several goals related to the overarching tenets of federal Indian policy. Congress intended IGRA to codify tribes' right to conduct gaming on Indian lands as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments, while providing sufficient regulation to ensure legality and to protect the financial interest of gaming tribes. Congress also enacted IGRA to establish an independent federal regulatory authority in the form of the NIGC.

IGRA situates the NIGC within the U.S. Department of the Interior. At least two of the NIGC's three members must be enrolled members of a tribe. IGRA also requires the Commission to submit a report, with minority views, to Congress every two years. The NIGC's mission is "to regulate gaming activities on Indian lands for the purpose of shielding Indian tribes from organized crime and other corrupting influences; to ensure that Indian tribes are the primary beneficiaries of gaming revenue; and to assure that gaming is conducted fairly and honestly by both operators and players." IGRA assigns some powers to the NIGC Chair, and others to the full Commission. The powers of the Chair include authority to issue temporary closure orders, to levy and collect civil fines, to approve tribal ordinances and resolutions, and to approve management contracts. The Chair's decisions in these areas may be appealed to the full Commission. The Commission also may delegate additional authority to the Chair. The Commission's powers include authority to order permanent closure, to monitor and inspect Class II gaming, to conduct background investigations, to issue self-regulation certificates, and to issue subpoenas, order testimony, take depositions, and hold hearings. The NIGC also exercises broad authority to "promulgate such regulations and guidelines as it deems appropriate to implement [IGRA's] provisions." 25 U.S.C. § 2706(b)(10). In addition to promulgating formal regulations, the NIGC also issues opinion letters and other informal interpretations of IGRA.

In 2000, President Clinton issued Executive Order 13175, titled "Consultation and Coordination with Indian Tribal Governments." The Executive Order sets forth three "fundamental principles" to guide regulations, legislative proposals or recommendations, and other policy statements or actions that have "substantial direct effects on one or more Indian tribes":

- The unique nature of the tribal-federal relationship
- Federal law's recognition of tribal sovereignty
- Federal Indian policy recognizing tribal self-government and supporting tribal sovereignty and self-determination

The Executive Order further specifies "policymaking criteria," directing federal agencies to:

- Respect tribal self-government and sovereignty
- Grant tribal governments the maximum administrative discretion possible
- Encourage tribes to develop their own policies to achieve federal program objectives, defer to tribes to establish standards, and consult with tribes as to the need for federal standards

In a 2004 memorandum, President Bush directed federal agencies to adhere to the principles reflected in the Executive Order and to "work with tribal governments in a manner that cultivates mutual respect and fosters greater understanding." Accordingly, the NIGC adopted a Government-to-Government Tribal Consultation Policy. In addition to incorporating the fundamental principles set out in the Executive Order, the NIGC policy references IGRA's recognition of tribal sovereignty, its policy goals, and its regulatory framework, including the primary authority and responsibility of tribes over Indian gaming. The policy provides that:

> to the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with Federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines, or preparing legislative proposals or comments for Congress, which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA.

The NIGC policy also sets forth "policymaking principles and guidelines," including:

- Reasonable consideration of variations among tribes, gaming operations, and tribal-state compacts
- Qualified deference to tribal regulations and standards for Indian gaming
- Provision of technical assistance to tribes in complying with federal law and in implementing their own policies and standards
- Restraint from enacting policies that will impose substantial direct compliance or enforcement costs on tribes, if the policies are not required by IGRA or necessary to further IGRA's goals
- Granting tribes the maximum administrative and regulatory discretion possible in operating and regulating Indian gaming, and elimination of unnecessary and redundant federal regulation "in order to conserve limited tribal resources, preserve the prerogatives and sovereign authority of tribes over their own internal affairs, and promote strong tribal government and self-determination"

The policy's procedures and guidelines have as the primary focus consultation and collaboration with individual tribes. The consultation procedures promise "early notification" to tribes of proposed policies, "adequate opportunity" for discussion, and "meaningful input regarding the legality, need, nature, form, content, scope and application of such proposed regulations, including opportunity to recommend other alternative solutions or approaches." As part of the consultation process and before issuing a final decision, the NIGC will "answer tribal questions and carefully consider all tribal positions and recommendations." The NIGC also will "consult with affected tribes to select and establish fairly representative intertribal work groups, task forces, or advisory committees" in developing administrative regulations or legislative proposals. Finally, the policy provides that "[t]he NIGC will, to the extent it deems practicable, appropriate, and permitted by law, explore and consider the use of consensual policy making mechanisms, including negotiated rulemaking."

One of the more pressing issues with which the NIGC has grappled is game classification. If a particular game falls within Class II, then it may be operated by a tribe without a tribal-state compact; if the game falls within Class III, however, legal operation requires a compact. IGRA's definitions do not offer much in the way of technical guidance. Class II gaming is defined as "bingo (whether or not electronic, computer or other technologic aids are used in connection therewith)," as well as some card games. Class II gaming specifically excludes house-banked card games and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." Games excluded from Class II fall within Class III, a residual category that includes all other forms of gaming (excepting, of course, Class I's traditional games). In addition to the statutory definitions, the NIGC promulgated regulations meant to clarify the distinctions between Class II and Class III gaming. The current regulations in large part mimic the statutory language, but also provide "plain English" definitions and additional guidance. The NIGC also issues advisory opinions on whether a specific game is Class II or Class III.

Whether a game falls within the catch-all of Class III or qualifies as a Class II game has significant impact. The legality of Class II games depends only on whether "such gaming" is permitted in the state and the tribe retains exclusive regulatory jurisdiction (with limited federal oversight) over the games. Class III games, on the other hand, are allowed only under the terms of a valid tribal-state compact.

As reflected in IGRA's legislative history, Congress included the Class II "technologic aid" provision to ensure that tribes "have maximum flexibility to utilize

games such as bingo and lotto for tribal economic development." Tribes' Class II games should not be limited to "existing game sizes, levels of participation, or current technology," but should "take advantage of modern methods" of conducting games. See S. Rep. 100–446, 100th Cong. 2d Sess., 1988 U.S.C.C.A.N. 3071. Although Congress's intent in authorizing Class II technologic aids may have been clear, the line between a Class II technologic aid and a Class III electronic facsimile was not. IGRA did not define either term, and until it amended its regulations in 2002, the NIGC offered little additional guidance. The 2002 amendments provided more detailed definitions, as well as illustrative examples of Class II technologic aids. The 2002 amendments were applied by the federal courts in *United States v. Santee Sioux Tribe,* 324 F.3d 607 (8th Cir. 2003), and *Seneca-Cayuga Tribe of Oklahoma v. NIGC,* 327 F.3d 1019 (10th Cir. 2003), to conclude that the machines at issue in each case fell within Class II.

In both *Santee Sioux Tribe* and *Seneca-Cayuga Tribe,* the U.S. Department of Justice took a position contrary to that of the NIGC, contending that both games at issue were Class III electronic facsimiles or, alternatively, even if Class II technologic aids, the games violated the Johnson Act's criminal prohibition against gambling devices in Indian country. Because the Johnson Act is a federal criminal statute separate from IGRA and enforced by the Justice Department, the NIGC's interpretation of the Johnson Act is not entitled to the same deference as its interpretation of IGRA. Though agency officials were not uniform in their reading of the statutes, generally speaking the NIGC and the Justice Department disagreed over the Johnson Act's applicability to Class II aids. In 2005, the Justice Department sought legislation that would include Class II gambling devices within the scope of the Johnson Act. The Justice Department's proposal was met with tribal opposition, and failed to find a sponsor in Congress.

In the meantime, though, the NIGC was in the protracted process of issuing new, highly technical regulations governing Class II electronic aids, sometimes called the "bright line" rules. In 2004, the NIGC formed a Class II Game Classifications Standards Advisory Committee, charged with assisting the NIGC in developing definitive classification and technical standards for distinguishing Class II aids from Class III facsimiles. In May 2006, the NIGC published its first set of proposed regulations. During the public comment period, it collected comments from over 80 tribes, as well as state and local governments, game manufacturers, citizen groups, and others, and conducted multiple hearings. See *http://www.nigc.gov/LawsRegulations/ProposedAmendmentsandRegulations/ClassIIGameClassificationStandardsWithdrawn/tabid/705/Default.aspx.*

The 2006 proposed "bright line" regulations were criticized by tribes on two grounds. First, in requiring slower play, the rules would undermine the Class II market. An economic impact study concerning the 2006 proposed regulations commissioned by the NIGC found the rules would have "a significant negative impact" on Class II gaming revenue, and therefore on the tribes that operate such games. The study concluded that the proposed changes would reduce gaming revenue by $142.7 million, with an accompanying loss of $9.6 million in non-gaming revenue and a $17.4 million reduction in tribal government revenue. Second, the regulations would trigger IGRA's tribal-state compacting requirement. In drawing a bright line between Class II and Class III games, the proposed regulations would shift some Class II games into the Class III category. Tribes in states that allow Class III gaming would need to convince the state to negotiate a new compact, opening up the process to the whims and vagaries of state politics and the possibility of state-mandated revenue sharing.

Interagency contestation with the Department of Justice and continued criticism from tribes and game manufacturers considerably slowed the NIGC's promulgation of the new Class II regulations. Following the initial announcement of the 2006 proposed standards, a group of prominent manufacturers formed the Technical Standards Work Group (TSWG) to draft an alternative regulatory scheme to submit to the NIGC. Together with the Technical Standards Tribal Advisory Committee, a group of tribal operators and experts that had been advising the NIGC, the TSWG submitted alternative Technical Standards to the Commission in early 2007. In February 2007, the NIGC formally withdrew the 2006 proposed regulations. The NIGC published its new set of proposed regulations in October 2007, eventually extending the public comment period until March 9, 2008. On February 1, 2008, the NIGC released a second economic impact study, which estimated that under the 2007 proposed regulations tribes could lose up to $2.8 billion in revenues and face expenses of almost $350 million in redeveloping Class II machines. Both tribal and industry leaders have complimented Chairman Hogen's efforts and acknowledged some improvements over the 2006 proposed regulations, but also have expressed frustration

and disappointment in both the process and the substance of the 2007 proposed regulations.

**II. Concerns Expressed About the NIGC: The Goldilocks Gamut**

Indian gaming is a product of the confluence of law and public policy that sanction and regulate the industry at the tribal, state, and federal levels. With so much at stake for so many stakeholders, it is no surprise that the resultant regulatory politics of tribal gaming is complex and controversial. The NIGC is charged with the complex task of monitoring and enforcing IGRA in relation to a host of ever-changing issues. The Commission interfaces with 230 sovereign tribal governments, as many as 30 sovereign state governments, and a powerful industry lobby that increasingly resembles that of the commercial gaming industry—in part because it includes identical players with a global reach, from game manufacturers to the commercial conglomerates that operate the majority of the casinos in Reno, Atlantic City, and on the Las Vegas Strip, and in part because of the growing clout of tribal advocacy associations like NIGA and its state and regional partners, such as the California Nations Indian Gaming Association (CNIGA).

Despite its broad authority under IGRA and its generally successful efforts to regulate a complex industry, the NIGC variously has been accused of being underfunded, understaffed, and underempowered to regulate tribal gaming, overly solicitous of tribal, state, or industry interests, and overzealous and overreaching in exercising its statutory grant of authority.

In the last 20 years, the NIGC has faced a number of "hot-button" issues across the U.S. with which the agency is involved through direct regulation or advisory opinions or in conjunction with decision making by other federal agencies. These highly controversial, sometimes rapidly developing, and often technically complex issues include:

- Promulgation of rules defining Class II technologic aids and Class III electronic facsimiles, as detailed above
- Gaming on newly acquired lands, including land-into-trust and "Indian land" determinations
- Enforcement actions and closure of gaming operations
- Tribal-state compacting and a "Seminole Tribe" fix to address perceived political imbalances between tribal and state governments
- Management contracts and consulting agreements with non-tribal parties
- Tribal use of gaming revenue, including transparency and accountability
- Employment issues, including unionization of tribal casino employees
- Tribal acknowledgment determinations
- Differences of opinion across and within federal agencies
- Calls to amend IGRA and other federal statutes to address the above issues and more

A critical feature unifying the issues the NIGC faces is that they vary by tribe, by state, and even by gaming establishment, creating a tension between the need for uniform industry regulatory standards to effectuate IGRA's overarching policy goals, and the highly localized and particularized nature of issues that might compel highly tailored and even tribe-specific regulation. Elsewhere we have written in detail about the very different issues faced by tribes across the U.S., and the governmental challenges they create. See, e.g., STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005); Rand & Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act.*

Depending on the issue and the interests involved, concerns expressed about the NIGC's authority, resources (including funding and personnel), and decisions have run a Goldilocks gamut, ranging from "far too much" to "nowhere near enough." Rarely is the agency seen as having or exercising "just the right amount" of regulatory authority—although admittedly few agencies are.

We turn to three prominent critiques of NIGC authority that the above issues illustrate, and which may be of the greatest concern to this Committee as we sit before you in today's oversight hearing: the NIGC's communication and consultation policies and practices, its accountability to various stakeholders, including Congress and tribal governments, and the possibility of agency capture.

*A. Communication and consultation policies and practices*

Under the NIGC's own government-to-government consultation policy, the NIGC routinely communicates with tribes through "Dear Tribal Leader" letters, attends

tribal gaming association and other trade conferences and meetings, and conducts consultation sessions with individual tribal leaders. It also has convened working groups and advisory committees to assist in policy formulation.

Nevertheless, some tribal leaders and others have criticized the NIGC's consultation process as being pro forma; that is, the letters are sent and the meetings and sessions for the most part occur, but the consultation efforts are too little, too late (for instance, key information is released just before relevant deadlines, or consultation comes only after regulations are fully drafted and formally proposed), or tribal input does not have a significant or substantive impact on the NIGC's decision making. For example, the NIGC's protracted efforts to promulgate Class II "bright line" regulations have been subject to extensive criticism regarding both the process and substance of the NIGC's consultation with affected tribes. Recently, NIGA and a number of tribal leaders have criticized the fact that the NIGC closed the formal notice-and-comment period on the proposed regulations just over a month after releasing an economic impact study it commissioned that estimated the proposed regulations would cost tribes as much as $2.8 billion in lost revenues.

Succinctly put, the question is whether the NIGC in fact conducts timely and meaningful communication and consultation with the parties it regulates, which include sovereign tribal governments. The answer, though, depends upon the nature of government-to-government consultation—an area where tribes and the federal government may not agree.

*B. Accountability*

Like all administrative agencies, the NIGC is subject to concerns about accountability, whether to its enabling legislation (and therefore to congressional intent), its own internal policies, or appropriate stakeholders. Previous congressional hearings, including a Senate Indian Affairs Committee oversight hearing at which we testified in April 2005, have aired concerns about the NIGC's resources and capacity to adequately carry out its regulatory authority under IGRA. Despite its formal tribal consultation policy, the NIGC is one of three federal agencies singled out in a recent House bill (H.R. 5608, 110th Congress, 2d Session) meant to ensure an "accountable consultation process" between the agencies and tribal governments, including "meaningful and timely input by tribal officials in the formulating, amending, implementing, or rescinding [of] policies that have tribal implications." The broad and varied range of stakeholders to which the NIGC must at some level answer, including Congress, tribes, states, industry, and the public, further complicates the issue of agency accountability.

The attempt to promulgate Class II regulations illustrates several additional issues related to accountability. Some have suggested that, given the NIGC's 2002 amendments and subsequent application of the same in the federal courts, the proposed regulations were the result of pressure from the Justice Department and some members of Congress rather than any real need for new standards. From that perspective, the NIGC's accountability to Congress and other federal agencies trumped accountability to tribes. The distinction between a Class II technologic aid and a Class III electronic facsimile is, in many ways, a technical one. Game manufacturers and tribal regulators complained that the proposed standards lacked cognizance of game technology and were too rigid to accommodate innovation, therefore hamstringing the manufacture of games that would allow tribes to maintain and further develop the Class II market through the use of "modern methods" of conducting games. Some tribes have been critical of what they saw as continual NIGC lip service to tribal sovereignty and self-government, while perhaps embodying the stereotype of a federal agency that purports to be "here to help" but in reality simply assumes control. Others pointed out that with an estimated impact of $1 billion to $2.8 billion in lost revenues, the proposed regulations would undermine IGRA's goals of tribal economic development, tribal self-sufficiency, and strong tribal governments.

The NIGC frequently must deal with and resolve highly controversial and technically complicated issues in which the varied nature of stakeholders and their interests make it difficult to assess the outcomes. The question here is how best to assess whether the NIGC is "doing its job" while appropriately balancing relevant imperatives.

*C. Agency capture*

A frequently expressed concern in regulatory administration is the evolution of a capture effect. Agency capture occurs as regulator and industry develop an iterated relationship in which industry views come to govern how regulation occurs. Without sufficient and appropriate legislative oversight, the agency becomes a tool of those it seeks to regulate. The conditions under which this model prevails are found in

the relationship between the public and private sectors. The profit motive is best served by a favorable regulatory environment, and agency independence is sacrificed at the altar of private gain. Ultimately, the agency fails to promote the public interest. One need only look at recent headlines concerning American Airlines and the FAA to find evidence of agency capture—and calls for more and better legislative oversight in the future.

In the context of the regulation of Indian gaming by the NIGC, the capture criticism stems from two oft-made assertions: the NIGC is a "toothless tiger," and tribal government gaming commissions are akin to "the fox guarding the henhouse." See, e.g., Donald L. Barlett & James B. Steele, *Wheel of Misfortune,* TIME (Dec. 16, 2002), 48, 59. The charge is that the NIGC is unwilling or lacks the resources to guard against capture by the numerous gaming tribes it regulates or that tribal and industry interests may align in such a way as to exacerbate the risk. For instance, in the context of the development of the proposed Class II "bright line" regulations, both tribes and game manufacturers have vested interests in a competitive and lucrative Class II market. Both groups possess valuable and relevant knowledge and technical expertise that the NIGC has taken into account through what has ended up being a protracted and iterated process of consultation with working groups comprised of tribal officials and game manufacturers.

As we explained to this Committee in our 2005 testimony, our views on agency capture are based on our sense of at least three key differences between the Indian gaming and commercial gambling industries: regulatory structures, policy impetus, and who benefits. At the structural level, capture theory focuses on the capture of an entire agency by the industry. However, in contrast to commercial gaming, we note that tribal gaming operations are subject to extensive tribal, state, and federal regulations. Simply put, there are too many regulatory authorities involved to allow one (or the capture of one) to dominate. The policy impetus behind Indian gaming revolves around the goals stated in IGRA: tribal economic development, self-sufficiency, and self-governance. Tribal gaming commissions have a clear stake in promoting these goals, which are quite different than the profit motivation in the private sector. The vast majority of gaming tribes see Indian gaming as the first viable means of economic development in generations, and tribal regulatory authorities are less likely to lose sight of effective regulation and compliance with policy goals than if they were regulating private industry. These policy motivations relate to the third key difference between the private and public sectors: who benefits. Agency capture subverts a public interest. But Indian gaming directly supports tribal governments and underwrites their ability to provide essential government services—a clear public interest.

Here, then, the question is how to balance appropriate government-to-government tribal consultation and accountability to stakeholders with the risk of agency capture.

**III. Recommendations**

In exercising oversight of the NIGC and its role in regulating the Indian gaming industry, Congress should be guided by the best available data and analysis. The same definitely is true for the NIGC in exercising its authority as an independent regulatory agency. In our prior work, we have identified three lodestar policy goals for Indian gaming law and policy. The three goals—sound regulation, tribal institution building, and improving tribal-state relations, each of which is based on Congress's original intent in enacting IGRA—should serve to guide this Committee in its consideration of the issues raised in today's hearing. See Rand & Light, *How Congress Can and Should "Fix" the Indian Regulatory Act.*

We wish to offer a few preliminary concrete recommendations that may be useful to the Committee in exercising its oversight function.

*A. Communication and consultation policies and practices*

1. *Compare other agency consultation and communication practices.* We recommend gathering information about how other federal agencies interact with sovereign tribal governments, including assessment of the success of these practices, as measured in large part through the degree to which they align with and serve the articulated goals of federal Indian policy with regard to tribal self-government and self-determination.

2. *Clarify the nature of government-to-government communication and consultation.* As both Executive Order 13175 and the NIGC's tribal consultation policy acknowledge, tribal sovereignty and the federal government's trust obligation shape tribes' unique status in the American political system. Accordingly, the NIGC's consultation policy should be uniquely geared to tribes' governmental status and relationship with the federal government, both in theory and in practice. The challenge,

of course, is ensuring that the promises of both the Executive Order and the NIGC policy are kept in their implementation. Along with willpower and oversight, truly meaningful consultation requires resources, concretely realized in NIGC funding and personnel.

3. *Consider requiring consent-based policymaking in the form of negotiated or hybrid rulemaking.* Further, *government-to-government* consultation with tribes may require more than notice-and-comment periods and consultation sessions in which tribes may be listened to, but which do not provide tribes a direct role in setting priorities or shaping policy outcomes. Government-to-government consultation perhaps should include a defined role for affected tribes in the decision-making process. This may be appropriate, given not only tribes' unique status, but also the fact that unlike state governments, tribes have not delegated authority to the federal government. On a practical level, our point here is that the NIGC's consultation policy promises to "explore and consider the use of consensual policy making mechanisms, including negotiated rulemaking," but the criteria for the NIGC's decision on whether and when to use that process appear to be at the sole discretion of the agency. Clear criteria, along with a mechanism to trigger negotiated or hybrid rulemaking, should be established.

4. *Define and implement meaningful consultation and communication policies and practices.* Perhaps taking a cue from the impetus behind H.B. 5608, Congress's intent and expectations regarding government-to-government consultation in the NIGC's exercise of its statutory authority should be made clear. In addition to the points made above, this should include timeliness of notice and appropriate opportunity for input, guidelines for expanding or adjusting the usual formal notice-and-comment requirements, and guidelines and outcome measures for adherence to the goals of both IGRA and federal Indian policy.

*B. Accountability*

1. *Further IGRA's goal of tribal economic development.* The NIGC's regulatory role is distinct from that of other federal agencies, such as the BIA or the IHS, that implement or provide programmatic services to tribes and American Indian people. Indian gaming is neither a public entitlement program nor a federal obligation, but an aspect of tribal governmental authority, as Congress recognized in IGRA. One of IGRA's goals is to foster tribal economic development, a point to keep in mind in balancing the NIGC's relevant imperatives created by its varied stakeholders. Elsewhere we have discussed the social and economic impacts of tribal gaming, and we note that these considerations are relevant to both Congress's and the NIGC's decisions. As the economic impact studies connected to the Class II "bright line" rules clearly illustrate, the NIGC's decisions have a very real impact on tribes and tribal members, and the future of tribal communities.

2. *Preserve the NIGC's role in tribal institution building.* The NIGC is in the difficult position of both facilitating and overseeing tribal regulation of an industry that, in the private sector, traditionally has merited stringent governmental control. The NIGC has a dual role with regard to tribal regulation, as it provides technical assistance to tribes and encourages tribal institution building necessary for effective tribal regulation of gaming enterprises. As the NIGC's consultation policy promises, tribes should be given the maximum administrative and regulatory discretion possible. The NIGC should resort to federal policy or regulation only where required by IGRA or necessary to meet IGRA's policy goals. Thus, accountability measures must take into account the NIGC's effective facilitation of tribal regulation, and not merely its direct regulatory role.

3. *Account for effective gaming regulation.* Another challenge faced by the NIGC is the effective regulation of gambling itself. In enacting IGRA, Congress was well aware of the challenges of gaming regulation, particularly for casino-style gaming. IGRA's regulatory framework, which involves tribal, state, and federal regulation, balances federal standards with the need for regulation tailored to local concerns and needs. In assigning Class II regulation primarily to tribes, and Class III regulation primarily to tribal-state compacts, Congress recognized the need to tailor regulation to specific jurisdictional circumstances. Accountability, then, must not be measured solely by uniformity imposed by the NIGC through federal standards and regulations. Here, too, we emphasize the need for information gathering to build federal expertise in gaming regulation and to tailor general gaming policy to the specific goals and challenges of the Indian gaming industry.

4. *Increase transparency.* The NIGC should be applauded for its efforts to maintain an accessible and informative Web site. As with nearly any government agency, however, more could be done to make information readily available to stakeholders, including Congress, tribes, states, industry, and the public. We note that increased

transparency also serves the constituents of the governments charged with tribal gaming regulation at the tribal, state, and federal levels.

*C. Agency capture*

1. *Ensure sufficient funding and personnel.* Both the NIGC and tribes need sufficient resources to fulfill their obligations under IGRA. The NIGC's current levels of funding and personnel may constrain its ability to engage in meaningful government-to-government consultation with tribes, and also subject the NIGC to criticisms concerning its investigative and enforcement responsibilities as well as to charges of secrecy and behind-the-scenes decision making.

2. *Balance accountable consultation and agency capture.* Perceptions of the risk of agency capture must take into account the goals of IGRA and federal Indian policy, as well as the NIGC's role in facilitating effective tribal regulation. A perceived threat of agency capture must not be allowed to undermine the primacy of tribal regulation under IGRA or the NIGC's responsibility to consult with tribes on a government-to-government basis. Additionally, as the Class II "bright line" regulations illustrate, there is a need for industry and technical expertise to inform the NIGC's decisions. The work groups and advisory committees convened as part of the NIGC's process in promulgating the proposed Class II regulations should serve as a model for instituting a more formal and less ad hoc process. Guidelines and mechanisms concerning the formation of and input by such groups should be developed.

At the Committee's request, we would be glad to elaborate further on the points made in this written statement or other issues related to the NIGC that the Committee deems pertinent.

**Attachment**

INSTITUTE FOR THE STUDY OF TRIBAL GAMING LAW AND POLICY AT THE UNIVERSITY OF NORTH DAKOTA

**About the Institute**

Co-Directors Kathryn R.L. Rand (Law) and Steven Andrew Light (Political Science) founded the Institute for the Study of Tribal Gaming Law and Policy at the University of North Dakota in 2002 as the first university-affiliated institute in the U.S. dedicated to the study of Indian gaming. The Institute provides legal and policy assistance and analysis to all interested individuals, governments, and organizations, and conducting scholarly and practical research in the area of tribal gaming.

The Institute adopts a unique "team-based" interdisciplinary approach to legal and policy analysis of the complicated and technical issues related to Indian gaming, including regulation and agency authority, policy and socioeconomic impact analysis, tribal-state compacting, Class II vs. Class III gaming, tribal law and sovereignty, federal Indian law, labor relations, state referenda and voter initiatives, the federal acknowledgment process, land-into-trust applications, and "off-reservation" gaming.

**About the Co-Directors**

Kathryn R.L. Rand (J.D., University of Michigan School of Law; B.A., University of North Dakota) is Floyd B. Sperry Professor of Law and Associate Dean for Academic Affairs and Research at the University of North Dakota School of Law. Steven Andrew Light (Ph.D., Northwestern University; B.A., Yale University) is Associate Professor of Political Science and Public Administration at the University of North Dakota College of Business and Public Administration.

Rand and Light are internationally recognized experts on Indian gaming, with over 30 publications and three books: *Indian Gaming Law: Cases and Materials* (Carolina Academic Press, 2008), *Indian Gaming Law and Policy* (Carolina Academic Press, 2006), and *Indian Gaming and Tribal Sovereignty: The Casino Compromise* (University Press of Kansas, 2005). They have *testified on Indian gaming regulation* before the U.S. Senate Committee on Indian Affairs in Washington, D.C., and were featured on C–SPAN's *Book TV*. They frequently present their research and perspectives on Indian gaming before diverse audiences, including professional and trade groups, tribal and non-tribal civic associations, academic conferences, and university endowed lectures. Rand and Light have been quoted extensively by media throughout the world, including the *New York Times, Boston Globe, Miami Herald, Sydney (Australia) Morning Herald, International Herald Tribune, San Diego Union-Tribune,* and *Bloomberg Media.* Both are members of the International Masters of Gaming Law, and Rand is on the Editorial Board of the Gaming Law Review. Rand and Light write a column, "Indian Gaming Today," that appears regularly in *Casino Lawyer* magazine, and have written for *Casino Enterprise Management* and *Indian Gaming magazines.* They blog on Indian gaming and the legal, political, and

public policy issues raised by the tribal gaming industry at their website, *Indian Gaming Today*, at *indiangamingtoday.com.*

**Selected Publications Related to Indian Gaming**

**Books**

Kathryn R.L. Rand & Steven Andrew Light. 2008. INDIAN GAMING LAW: CASES AND MATERIALS (Durham, NC: Carolina Academic Press)

Kathryn R.L. Rand & Steven Andrew Light. 2006. INDIAN GAMING LAW AND POLICY (Durham, NC: Carolina Academic Press)

Steven Andrew Light & Kathryn R.L. Rand. 2005. INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (Lawrence, KS: University Press of Kansas)

**Book Chapters**

Kathryn R.L. Rand & Steven Andrew Light. Forthcoming 2009. *Morality Policymaking and Indian Gaming: Negotiating a Different Terrain.* In Alan Wolfe & Erik Owens, eds., GAMBLING AND THE AMERICAN MORAL LANDSCAPE

Kathryn R.L. Rand & Steven Andrew Light. Forthcoming 2009. *Within Boundaries: Indian Gaming in North Dakota and Beyond.* In Pauliina Raento & David Schwartz, eds., GAMBLING, SPACE, AND TIME (Reno: University of Nevada Press)

Steven Andrew Light. Forthcoming 2008. *Indian Gaming and State-Level Constraints on Tribal Interest-Group Behavior.* In Tracy A. Skopek & Kenneth N. Hansen, eds., ENFRANCHISING INDIAN COUNTRY: THE POLITICS AND ORGANIZATION OF NATIVE AMERICAN GAMING INTERESTS (Reno: University of Nevada Press)

Kathryn R.L. Rand. Forthcoming 2008. *State Law, State Politics, and State Courts: Indian Gaming and Intergovernmental Relations.* In Tracy A. Skopek & Kenneth N. Hansen, eds., ENFRANCHISING INDIAN COUNTRY: THE POLITICS AND ORGANIZATION OF NATIVE AMERICAN GAMING INTERESTS (Reno: University of Nevada Press)

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**Journal and Law Review Articles**

Kathryn R.L. Rand, Steven Andrew Light, & Alan P. Meister. Forthcoming 2008. *Questionable Federal "Guidance" on Off-Reservation Indian Gaming: Legal and Economic Issues.* GAMING LAW REVIEW 12

Steven Andrew Light. Forthcoming 2008. *Indian Gaming and Intergovernmental Relations: State-Level Constraints On Tribal Political Influence Over Policy Outcomes.* AMERICAN REVIEW OF PUBLIC ADMINISTRATION 38

Kathryn R.L. Rand. 2007. *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence Over Indian Gaming.* MARQUETTE LAW REVIEW 90(4): 971–1008

Kathryn R.L. Rand & Steven Andrew Light. 2006. *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform.* VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW 13(3): 396–473

Steven Andrew Light & Kathryn R.L. Rand. 2006. *The "Tribal Loophole": Federal Campaign Finance Law and Tribal Political Participation After Jack Abramoff.* GAMING LAW REVIEW 10: 230–39

Steven Andrew Light, Kathryn R.L. Rand, & Alan P. Meister. 2004. *Spreading the Wealth: Indian Gaming and Tribal-State Revenue-Sharing Agreements.* NORTH DAKOTA LAW REVIEW 80(4): 657–79

Steven Andrew Light & Kathryn R.L. Rand. 2004. *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy.* NEVADA LAW JOURNAL 4(2): 262–84

Steven Andrew Light. 2004. *The Third Sovereign: Indian Gaming as a Teaching Case in Intergovernmental Relations and Public Administration.* JOURNAL OF PUBLIC AFFAIRS EDUCATION 10(4): 311–27

Steven A. Light & Kathryn R.L. Rand. 2001. *Are All Bets Off? Off-Reservation Indian Gaming in Wisconsin.* GAMING LAW REVIEW 5: 351–63

Kathryn R.L. Rand & Steven A. Light. 2001. *Raising the Stakes: Tribal Sovereignty and Indian Gaming in North Dakota.* GAMING LAW REVIEW 5: 329–40

Kathryn R.L. Rand & Steven A. Light. 1998. *Do "Fish and Chips" Mix? The Politics of Indian Gaming in Wisconsin.* GAMING LAW REVIEW 2: 129–42

Kathryn R.L. Rand and Steven A. Light. 1997. *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity.* VIRGINIA JOURNAL OF SOCIAL POLICY & THE LAW 4: 381–437

**Prior Congressional Testimony**

Kathryn R.L. Rand and Steven Andrew Light. *Prepared Statement and Oral Testimony,* Oversight Hearing on the Regulation of Indian Gaming, United States Senate, Committee on Indian Affairs (John McCain, Chair), 109th Congress, 1st Session (April 27, 2005).

Senator TESTER. Thank you, Ms. Rand.

Chairman Dorgan, do you have comments?

## STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

The CHAIRMAN. [Presiding.] Senator Tester, first of all thank you for filling in this morning as Chair. I was called over to Senator Reid's office for a leadership meeting and it just lasted longer than we had expected. So my apologies to the witnesses. I have had a chance to review the testimony, however, and I thank you again, Senator Tester, for being such a significant part of our Committee.

Why don't you proceed with your questions, Senator Tester?

Senator TESTER. Thank you. I will just say that any time that you need to be away from the Committee for leadership reasons, it is time well spent. So thanks.

I do have a bunch of questions. I guess I will just start out with a pretty basic one to Mr. Hogen. You have heard the testimony here today, as have I. Do you think that there is a problem in communication between the NIGC and the tribes?

Mr. HOGEN. Yes, there is a problem. We continually work on it, as how can we better come up with a system that permits us to get the views of 230 tribal governments across the Nation when we confront an issue that we might act on that is going to impact upon them.

We are currently engaged in consultation. We are going out to the National Indian Gaming Association's meeting next week. We have scheduled consultations with tribes that will be attending there. We had more people ask for a slot than we had time for, given the other demands of the National Indian Gaming Association. So we have set up the overflow to go both to the Great Plains Association's meeting in Minneapolis and out to Reno for the National Congress of American Indians. So having the time to do it all is one of the challenges.

Ms. Carlyle referenced a consultation we held out in the Southwest and talked about our adoption of this facility license regulation and how we put on our letter inviting to talk about things that we wanted to talk about the status of that. When we got there, we said it has already been adopted, and that is true. That was the status of it. It was in the transition period of going to the Federal Register.

Why did we do it when we did it? Well, we had a long consultation period. We significantly modified the proposal based on the consultation that we had received. But as you just observed, Senator Tester, we are short a commissioner. Commissioner Choney,

the non-Republican, we wanted to get his view. He was there with us through the formulation of that. He was leaving on the 31st of December. You know, sometimes there comes a time when you just have to get it done.

So we adopted that policy and we don't micro-manage the environment for health and public safety. We merely ask tribes, please tell us what your roles are and certify as you license your gaming facility that you are in compliance.

Senator TESTER. A couple of questions, and maybe I should ask you if this is correct. Delia, Mr. Hogen cited the facility regulations and your testimony said there was no time for comment, there was no consultation. And I just wanted to make sure that was correct. That's what you did say, right?

Ms. CARLYLE. Yes.

Senator TESTER. Mr. Hogen, I kind of feel like I am up here as judge and jury, but the fact is that if there is one thing that can get me fired up about Government quicker than anything is lack of public opportunity for input. Sometimes the public takes advantage of it; sometimes the public doesn't take advantage of it. But if you presented those regs, I am sure that you heard that there was unhappiness in the hinterlands because the truth is as I heard it from everyone of these folks that were testifying here today.

At what time do you step back and say, maybe we need to rethink this and actively pursue more participation, knowing full well that the input you might get may not be input you agree with or the input you want to deal with, but that is the nature of this beast. It is the nature of where I sit and it is the nature of where you sit. It is probably the nature of where every one of these guys sit, too, from their constituents.

So at what point in time do you step back and say, hold it, be honest with ourselves, we didn't give enough time for public input. Let's go back to the drawing board and let's do it again.

I appreciate the fact that there is a point in time where you have to get it done, but I never heard, with the exception of one of them, that said the relationship overall is positive, Mr. Patterson, that the relationship overall is positive with the NIGC. I never heard a lot of glowing comments out of the testimony here today.

Mr. HOGEN. With respect to this example, and I think it probably serves to exemplify how we often do this, we started the process by writing a letter to tribal leaders saying the Indian Gaming Regulatory Act says that you have to license your gaming facilities, and it says if you are going to build and operate a tribal gaming facility, you have to take steps to protect the environment, health and public safety, but it doesn't have a lot more detail than that, and we are thinking about writing a regulation to kind of tie those together, licensing and complying with those concerns.

And then we send our a draft of what we were thinking about. We got a lot of criticism, particularly with respect to the information we want to gather about the Indian lands where the gaming facilities were located. I have forgotten exactly the sequence, but then we published the regulation and we received comments, and every time we went on one of these consultation stops, that was on the agenda. At a point, we said we have it wrong here.

Senator TESTER. How many days from the time you announced it until the time you adopted it?

Mr. HOGEN. I would guess more than six months, but I don't know for sure.

Senator TESTER. Could you get that for me?

Mr. HOGEN. I absolutely can, Senator.

Senator TESTER. That is the first thing.

The second thing is, do you have enough people to do the job adequately?

Mr. HOGEN. I think yes, I think we do.

Senator TESTER. Okay. How many people do you have working for you?

Mr. HOGEN. One hundred and four.

Senator TESTER. You have 400 gaming enterprises, 230 reservations in 30 States, 104 people. I just want to make sure that is fine.

When you receive the tribal comments, how do you utilize them in your decision-making process? It shouldn't just be tribal comments, any comments. How do you utilize those in your decision-making process?

Mr. HOGEN. We read them. We discuss them. And if we think a step forward is going to be the adoption of the regulation, we know that in the preamble that we publish in the Federal Register with the final regulation, we have to say what they are and why we agreed or disagreed with them.

Senator TESTER. So do you get back to the people who put forth their recommendations or the comments and say, you know, we don't agree on this and here is why? Or is that not something that you do?

Mr. HOGEN. I don't know that we send a letter to each and every author of the comments. During this ongoing consultation process, we attempt to share our thinking, yes.

Senator TESTER. Okay. Have you looked at other agencies? I know that one of the individuals brought up IHS. I am not sure that that is a good example. But have you looked at other agencies to see how they do it? Is your consultation process on rulemaking similar to what other agencies do?

Mr. HOGEN. I believe it is. When we drafted the consultation policy, we looked at every other Federal agency's policy that we could get our hands on, including the Indian Health Service. And we tried to put the best of all of those in our policy.

Now, having it in the policy and doing it are two different things.

Senator TESTER. That is kind of your job, though.

Mr. HOGEN. Absolutely, absolutely. So I think it is important to bear in mind as you look at what IHS does, providing health care to a greater or lesser extent for Indian people, and what we do are qualitatively different. We are a regulatory agency. We are the traffic cop. That is not a fun job to have. We don't provide services in the same way the Indian Health Service does. So what we agree on may have some limits.

Senator TESTER. Okay. I preface the letter that Senator Baucus and I sent to you a while back. I am just curious. I mean, why were tribes given one month to comment on the economic impact and really no time to comment on the cost/benefit analysis? I think just

why, that is all. I think that that kind of action really doesn't do much for me as a policy-maker, period.

Mr. HOGEN. One reason is we agreed absolutely with their view of the cost/benefit study. First of all, it wasn't the initial cost/benefit study. It was a modification of the cost/benefit study based on our modification of the proposal which we made because they made the comments. But if we adopt the regulations, they will have a draconian effect on the dollars generated by Class II gaming, but that doesn't necessarily make them wrong. It is just that is a fact of life.

Senator TESTER. I am not saying that. I am not saying whether their comments are right or wrong. I am saying 30 days, I don't know how many Class II operations are out there, but you have a pretty big area you are taking on. And you obviously felt 30 days was adequate, whether you agree with them or not, just the comment period, the time, 30 days from your perspective you felt was adequate?

Mr. HOGEN. It was part of the package. We had four discrete regulatory proposals. Part of the process was we decided we better to the cost/benefit or the economic impact study.

Senator TESTER. Consultation and listening to folks is a big deal. The question is, as it is coming out of this meeting, do you think it is going to take an act of Congress to make it happen? Or do you think the way things are, and I am sorry I haven't focused any questions to the rest of you guys, and I am sorry that I have focused them all on you, Mr. Hogen, too, but is it going to take an act of Congress to get this done? Or will an act of Congress do any good?

Mr. HOGEN. I think the proposed act of Congress that is the House bill would do a disservice to us, the regulators who have a job to do. Then we would need more people. We would need a lot more lawyers because everything we would try to do would be resulting in a lawsuit brought by one of the 230 tribes that the regulations might affect.

But cut to the chase, Senator. The hue and cry for the consultation concern has to do with what we have proposed in our Class II regulations. You have heard from the tribes, they are not listening. They haven't modified their proposal based on what we have said. Nobody has asked us what is our point of view, what changes have we made. But more importantly, why do we take the position that we do? We take the position that we do because that is exactly how we read the Indian Gaming Regulatory Act.

I would be delighted if Congress would amend that and say tribes can do whatever they want with bingo machines. But they haven't. They said if they use electronic and electric facsimiles of games of chance, then they are Class III. They have to have a compact. I would be happy to explain that further.

Senator TESTER. I have taken too much time. I am going to turn this over to Senator Dorgan. But I do want to make one last comment in relation to that comment. It is your job to communicate. It is my job to communicate. I have to tell people what I am doing and you have to tell people what their doing. And the truth is to say that do away with the rules so that we don't have to regulate anymore I don't think was the intent of NIGC.

So I think that what I heard at this Committee, and I came in here with, well, with a little bit because of our letter we sent off and we were denied on that extension, and I thought that was kind of interesting and actually raised some red flags there. But when I come into these meetings and I hear people that are working on the ground saying nobody is listening to us, I understand. I make decisions all the time that people don't agree with, but I try to make sure that those statements don't happen because it is your job and it is my job and it is policy-makers and part of the bureaucracy that if we don't listen to the people we are working for, we aren't going to be there very long.

Senator Dorgan?

The CHAIRMAN. Senator Tester, thank you very much.

This is not only an interesting, but also a very important issue. The gross revenues for Indian gaming have now reached I believe $25 billion. They have grown very rapidly. I think all of us understand the urgency and the need for effective regulatory capability. I know there are very different views about what form that should take from time to time. Mr. Luger and I have had long discussions over time.

Maybe, Kurt, you would take the position we don't need a National Indian Gaming Commission because the States have a regulatory authority and the tribes have a regulatory authority. So in most cases, you have two regulatory authorities. Others would take the position that you must have a national regulatory commission because some States say they regulate, but in fact do not effectively regulate, and all you have is the tribe, at which one level is not sufficient.

So this is very important. The one thing all of us would share, I believe, is we want to make certain that Indian gaming is able to continue free of scandal, free of difficulty, free of any criminal element. We understand. We have watched areas of gaming long before Indians had gaming in this Country. In every area where there is billions of dollars of gaming, it is a magnet for criminal elements, a magnet for fraud, a magnet for stealing and so on.

So that is why we have a long history in this Country, and just using Nevada as an example, of very aggressive, very, very certain kinds of regulatory authority with respect to gaming. It is different than many other enterprises.

Having said all that, I want to ask a couple of questions with respect to the commission itself.

Mr. Hogen, I am trying to understand. We are told by some, and I don't know this as a fact, that you have as much as $12 million in reserves. We have tried to get information from the commission about that, excess fees. Do you have a reserve? If so, how big is it?

Mr. HOGEN. About $10 million, Senator.

The CHAIRMAN. And what do you do with the reserve?

Mr. HOGEN. Well, we are, as I mentioned earlier, not funded by taxpayers' dollars. Rather, we are funded by the fees we collect. If we were a Department of the Interior, on the first of October every fiscal year, we would get the dollars and we would have them to spend. But we collect those dollars on a quarterly basis. They come in over the year. So if we didn't have some money in the bank, so

to speak, we wouldn't be able to pay the rent. So we need a little money there to tide us over.

The CHAIRMAN. I understand that. But do you have a detailed accounting of fees versus and operating budget?

Let me say to Senator Tester, I appreciate your chairing this morning and appreciate your work on the Committee. I know you have to run. I am going to continue to ask questions of the panel, so thank you, Senator Tester.

Do you have an operating budget and an accounting of fees that you can provide to the Committee? We have not seen that and that would be helpful to us.

Mr. HOGEN. We certainly do. I have it with me if you would like it now, Senator.

The CHAIRMAN. And you say you have a reserve because I think you make the point you need a reserve, given the financial mechanism with which we finance the commission. What size a reserve do you think is necessary?

Mr. HOGEN. We are trying to draw down on the carryover amount. It is probably excessive the way it is.

The CHAIRMAN. What size is the reserve you think you need?

Mr. HOGEN. Probably $5 million would be closer to ensure that there is no risk in terms of a smooth operation.

The CHAIRMAN. But the other way of looking at this, and the reason I ask the question is these come from fees sent in by tribes. So we need to work with you on an accounting here so we understand what is your operating budget, what kind of a reserve do you need. Because if you have $5 million in excess fees, it probably ought to go back to the tribes if you don't need them for operating purposes.

You have an Acting General Counsel, I understand, since 2002. Why has that position been only acting for now nearly six years?

Mr. HOGEN. The Chairman hires the General Counsel, and I have been the Chairman since December of 2002. It is not my first stint on the commission. I served as an Associate Commissioner and for a little while as Vice Chairman for a four-year period from 1995 to 1999. During that time, Penny Coleman, who is our Acting General Counsel, was in the Office of General Counsel. She came to NIGC from the Solicitor's Office over at the Department of Interior when IGRA was enacted. So she is kind of the institutional memory with respect to a lot of these things.

Penny is a career employee, not a political appointee, which she would be if she were the General Counsel of the NIGC. I found that her style, her knowledge, her experience served the commission very well. Rather than have her risk her career status and have her come on board and be political and then maybe have no place to go, it worked fine, in my experience, to have her serve as our Acting General Counsel. I am glad that we have done it that way.

The CHAIRMAN. Well, that is a curious thing, though, isn't it? Think of how many places in our government we would have if people said, well, I don't want to assume the risk of actually assuming the office. So we would have a whole government full of acting people. Would they have the responsibility and the authority? You do what you need to do on that, but I don't think that is necessarily

a good way to handle that responsibility. You have a specific post for a General Counsel, and to have an Acting General Counsel for six years makes little sense to me.

I am going to ask you a couple of other questions, and then I am going to have some questions of the rest of the panel.

I think that you need to publish some kinds of financial statements so that the Congress and also the tribes who are funding the commission understand what is happening. You don't now do that. Is there a reason you don't do that? And will you be doing that?

Mr. HOGEN. Well, we do it, Senator, in part in the appropriations process. We get, like every other Federal agency, what is referred to as the green book, where we break down the dollars. One of the reasons that is not particularly informative with respect to us is we are so small that the million-dollar increments that they use there makes it harder to get a good picture.

When I go to tribal gaming association meetings, I will display on a PowerPoint this is what we spend for compensation; this is what we are spending for rent and travel; these are our plans for the coming year, and so forth. But your advice is well taken. We will not only provide you, but the Indian tribal constituency that we serve with more of that information.

The CHAIRMAN. Let me suggest you do a yearly report so that it is not just when you go out and make a presentation. I am not suggesting you are hiding anything, far from it. But I think those that are financing you through fees should understand what your financial report is and shows. We would like to see that as well, so that would be something I would recommend.

Let me now talk just a bit about the issue of consultation. I understand this is kind of a unique situation. First of all, consultation, as I have said as Chairman of this Committee, is critically important. That is the hallmark, in my judgment. Our government needs to consult with tribes. I think the Indian Gaming Commission needs to consult with tribes. Consultation is critically important.

Obviously, you know from the testimony at this hearing and you know from other circumstances that there are discordant voices out there who feel you have not engaged in the consultation they would like. You say, well maybe that is because they don't like the result of some of our rulings. Maybe so, but whatever your rulings, it seems to me the issue of consultation is a continuum that I think is required of you and should be expected of you by us and by the tribes.

Let me ask Ms. Rand. You are at the law school, correct?

Ms. RAND. That is correct.

The CHAIRMAN. Tell me about how you see the consultation as you know it exists here or doesn't exist here, either one, with respect to consultation in other circumstances with other Federal entities and jurisdictions.

Ms. RAND. Senator, I think that we would suggest that government-to-government consultation with tribes should be distinct from the ordinary public notice and comment period required by Federal law; that it should be uniquely tailored to tribes' status as governments and their relationship with the Federal Government.

We brought up the IHS policy for two purposes. First, that there may be a more concrete way to address some of the issues either in the NIGC's own policy or through a directive to the NIGC. But also as Senator Tester implied, that what is promised on paper may not be implemented in practice. We think that that might be a very important issue for the commission or the Committee to grapple with.

The CHAIRMAN. I am not sure the IHS is necessarily a good model, as we have noticed before. If you want to take a look at an institution that pays very little attention to consultation, look at the Indian Health Service. I have a couple of investigations I have requested of them precisely because instead of consulting with anybody, they do whatever they damn well please. They are shifting incompetents around to various places in the Country instead of getting rid of the incompetents.

But the issue of consultation with respect to a regulatory authority and those that would be regulated I understand is different and interesting to discuss, but nonetheless still required. What are the conditions under which it is required and how should it be conducted? That is what I think we are trying to understand.

Mr. Luger, you discussed this in your testimony. I probably spoke for you when I said you would probably prefer that we not have a National Indian Gaming Commission. Was I accurate about that?

Mr. LUGER. Fairly accurate. I think it has its role. I just think that the role as it is currently taking place is bureaucratic. Phil is in a tough position. Phil and I are friends so it is not a personal thing, but they are just moving boxes around, Senator. We have regulatory problems out there.

Any time, for example—and I will be very brief—the Standing Rock Sioux Tribe calls up NIGC and thinks that they may have something wrong in their system. You are having a punitive conversation automatically. You can't have a confidential conversation saying I think maybe this might be it, but I am not sure, but you have the expertise and I want you to come in and look at it.

Standing Rock just subjected themselves to punitive action. I cannot stress this enough. Again, it is not a personal attack on NIGC. I would say this with any agency that any entity has to deal with. Bring in some experts. You have too many P.E. majors working for him and trying to help us in the gaming industry. I am generalizing.

The CHAIRMAN. We are not talking about Class III today. We are talking about Class II, because we are just talking about consultations here.

But with respect to Class II gaming, if the NIGC received a complaint and they said the Standing Rock Reservation is absolutely defying regulations, they are going to call you. They are going to send people in. They have a right, it seems to me, in that circumstance to say, here are the regulations and you at this point are not in compliance. So they are purely regulatory and everyone who is aggrieved by that would feel it is all punitive, but that is the role of a regulator, number one.

Number two, in the circumstance you just described, when you call the commission, you ought not when you call the commission get some notion there is some punitive voice on the other end of

the line. That is a culture issue with the NIGC. I don't know whether that is true or not, but you say it is true.

Mr. Hogen, what about that?

Mr. HOGEN. I think the record will reflect almost without exception whenever we learn, whether it is by the tribe telling us or some other, that there is a problem, the first thing we do is say let's fix this. Let us help you fix this. And only at the last resort do we end up with a notice of violation that might result in a fine, or in a worst-case scenario result in closure.

But Kurt is right that there are some tensions there in the relationship. If you hire your lawyer and you go in and say I want to ask you whether this is wrong or not, you hope he doesn't have to turn around and tell the FBI. We are supposed to provide this technical assistance, which I think we do a pretty good job of, but we also wear the traffic cop hat. We have to do that.

But the practice as borne out is very seldom do we—we have never issued a notice of violation for failure to adhere to the minimum internal control standards. We have always gotten it fixed, sometimes by way of an agreement, a kind of settlement agreement.

The CHAIRMAN. Let me ask Ms. Carlyle, you are from Arizona?

Ms. CARLYLE. Yes.

The CHAIRMAN. Arizona is reputed to have a fine statewide Indian gaming regulatory strata. Is that correct?

Ms. CARLYLE. I would be a little biased, but say yes.

The CHAIRMAN. You have a pretty substantial statewide effort with respect to Indian gaming regulatory practices.

Ms. CARLYLE. Yes, we do, Senator. I am very proud of that process.

The CHAIRMAN. If you pick up the phone and call the Nevada folks and say, look, we think we have a wrinkle here, is it different than calling the NIGC in terms of consultation from you to them?

Ms. CARLYLE. Nevada?

The CHAIRMAN. Yes.

Arizona, I am sorry.

Ms. CARLYLE. That is why I looked, Nevada.

[Laughter.]

The CHAIRMAN. Don't call Nevada. Call Arizona.

[Laughter.]

Let's assume that you pick up the phone and you call the regulatory authorities in the State, as opposed to calling the Indian Gaming Commission. Do you detect a cultural difference there?

Ms. CARLYLE. No.

The CHAIRMAN. Okay.

Ms. CARLYLE. I think based on the process that we have started that has been in Arizona, that relationship is understood, I want to say, so there is not a problem in picking up the phone and saying there could be a problem.

The CHAIRMAN. I see.

Mr. Patterson, you are from Tennessee?

Mr. PATTERSON. Oneida Indian Nation, Upstate and Central New York.

The CHAIRMAN. I see. The organization is in Nashville.

Mr. PATTERSON. Yes, Senator.

The CHAIRMAN. How many people does the State of New York employ to be involved in the State regulatory process of Indian gaming? Do you know?

Mr. PATTERSON. Mr. Chairman, I do not have that answer, but I would be glad to research that.

The CHAIRMAN. Would you submit that?

Mr. PATTERSON. Yes, sir.

The CHAIRMAN. And Mr. Mathews, you are here accompanied by Mark Van Norman. He is an acquaintance of this Committee. He has testified here a good number of times. You heard Mr. Luger talk about the issue of a tribe seeking information from the NIGC, or at least going to the NIGC, suggesting they have an issue. Do you have experience with that at all?

Mr. MATHEWS. Yes, we do.

The CHAIRMAN. Tell me your experience.

Mr. MATHEWS. I would just like to say this, that for our own tribe, the Quapaw Tribe of Oklahoma, we did have an issue several years ago, that the NIGC brought to us, with a management contract and a person that was working with us. I have to say that through the efforts of the NIGC, along with our tribe, we ended up getting rid of this guy. It was a very bad situation. We learned a lot. We have become a much stronger tribe with our regulatory issues. We have a very, very strong regulatory body, and it is due to the assistance that we got through the NIGC. We are very proud of that fact.

On the other hand, what they are doing now, we do have a problem with, in the publication of these four regulations, with the consultation that we don't feel is thorough, that we feel is a rush to judgment. It is a pre-determined consultation. As Phil has even said, consultation does not mean agreement, but when you have so many tribes in Indian Country that are against what they are doing and the way they are doing it, there has to be some red flag thrown up there.

We think they should consider cost/benefit alternatives to their current approach. They should reopen these regs for comments, along with the cost/benefit analysis. It is funny that the regulators expect us to comply with some of their rules when they don't even comply with their own. So we have issues there.

But it is very obvious that Indian Country wants regulation. We have 3,300 regulators across the Country. They spend an enormous amount of money on regulations. It is very important to keep out those bad elements, to make sure that we are providing a safe environment for our patrons and our employees. By doing that, we feel that we have to have strong regulations.

The CHAIRMAN. Mr. Hogen, the commission regulations on Class II, you have heard today concern and you have heard that concern before about lack of consultation. My understanding is that the National Indian Gaming Commission authorized a study to examine the potential impact of the proposed regulations. According to at least one of the comments we received, the commission determined that 57 percent of the Class II games in play would be considered unlawful if the proposed classification standards were adopted in the current form. Is that correct?

Mr. HOGEN. Yes. I consider them unlawful right now.

The CHAIRMAN. You did an economic impact. When did you launch that economic impact study? Was it through a consultant?

Mr. HOGEN. Yes. We hired a consultant who punches a lot of Indian gaming numbers. When we first published, I think that was in May of 2006, we published some regulations. We hired the expert to do the study. Then after we got those results and we heard comments, we withdrew that proposal. We then supplemented it with a pared-down version and had a renewal or an extension of that impact study done to reflect the changes.

The CHAIRMAN. Which of the practices will be shut down under the Class II regulations?

Mr. HOGEN. One-touch bingo machines primarily. However, as a result of the comments we received, the concern tribes expressed about the economic impact and so forth, we put in—and understand these are just drafts. We haven't done a thing yet. They are just a draft. But we put in a five-year grandfather clause. We said we know it is going to be a tough economic impact, so to soften that blow, the useful life of this equipment is probably about five years, use them until they are used up, and then comply.

The CHAIRMAN. This Committee is not in the business of trying to do your work or look over your shoulder and determine whether you are making judgments that are appropriate. Those are judgments you make. But the Committee is concerned, as Senator Tester has indicated, that in the conduct of the work of the National Indian Gaming Commission, that consultation exists as between the tribes and the commission so that there is some mutual understanding of what is happening and what are the consequences.

You have in your own commission adoption going back to 2004 government-to-government tribal consultation policies. So those exist. Do you feel like you have followed those policies sufficiently with respect to the Class II proposed rules, number one? And number two, given the concern by tribal authorities, do you feel that even if you did follow them, do you feel those policies are sufficient so that tribes feel like you have consulted adequately?

Mr. HOGEN. Obviously, they do not feel we have consulted adequately. I think we have made a really good-faith effort, Senator, to do that. We had four different versions of these proposals on our website to talk about with tribes before we actually put them in the Federal Register. When we were about ready to do that the first time, the Justice Department came along and said to us, these aren't tough enough; you can't do that.

Thereafter, we published another set. We met with I think about 70 tribes on the record government-to-government consultation. If you look on our website you will find the transcript of each one of those 67 or 70 meetings. We asked tribes to send us their best and their brightest in terms of a tribal advisory committee, tribal regulators and so forth, to help us with this.

Did we agree with everything they told us? No, we disagreed with some of it, but we sure learned a lot and we did make lots of changes. If you have the time, I could enumerate some of those changes. But we have extended the comment period numerous times, sometimes to accommodate comment on the economic impact study and so forth.

But Senator, I am going home some time soon. I am going back to the Black Hills, and when you hear that hurrah out in Indian Country, you will know that has happened. But the thing is, I have to get this done. I have been at it now for more than five years. It is time to draw this bright line so the industry, the manufacturers, the tribes, the States, can know what is going on.

Right now, there is confusion. That is not good for the industry, and if and when it appears that there is a loss of the integrity in the system, then the goose that laid the golden egg will be at risk. I don't want to be responsible for that. I want to leave it with some clarity.

The CHAIRMAN. I believe there should be a bright line, and I think that bright line is something that would be embraced by tribes. There needs to be definition. If you don't have definition, there is chaos. This is, as I said, a $25 billion growing industry. It is very important that the reputation of this industry be in tact, that there be effective levels of regulation that give all of us the assurance that this gaming and the stream of income from the gaming that can improve and invest in people's lives will be able to continue.

But that will only happen if we are free of scandal and free of the kind of criminal element that always tries to attach to any center of gaming anyplace in this world. We have plenty of experience with that.

Mr. Luger?

Mr. LUGER. Mr. Chairman, just indulge me for 30 seconds.

One, I just want to leave a note that I don't have quite the gloom-and-doom feeling that Phil does. I don't know if our dateline should be predicated upon his retirement back to the Black Hills. But on a separate note, and this is a pledge that I give to my folks at home, I cannot tell you now grateful and appreciative I am of you and our North Dakota and South Dakota delegation for what you did for Woodrow Wilson Keeble.

Everybody in this room knows about it. I love and honor you for that. That was something that needed to be done. It was a sore spot in Indian Country. I personally invite you at that third week in May we will have Woodrow Wilson Keeble Day, and we would be honored if you would be a part and master of ceremonies at that. Senator Daschle will be there. I have so much respect for the work that you did with that that I had to make that comment today.

From the Standing Rock Sioux Tribe, Sisseton-Wahpeton, Ayata, the Lakotas and the Dakotas, I want to thank you very, very much.

The CHAIRMAN. Mr. Luger, thank you very much. I was honored to be a small part of trying to rectify a mistake that was made many, many years ago of not giving the Medal of Honor to someone who had earned it, deserved it, and should have received it except for lost paperwork. It was an emotional moment to be in the East Room of the White House and have the President present to the relatives of Woodrow Wilson Keeble the Medal of Honor that he so richly deserved.

This was a very courageous, very brave American who risked his life many times and received a number of Purple Hearts, Silver Star, Bronze Star, the highest honors this Country could bestow on

a very brave soldier. Many years after his death, he finally received the Medal of Honor.

I regret that his wife, Blossom Keeble, was very hopeful that this would be done before she passed, but it did not happen. She passed away last summer. But I know that there is great pride in Indian Country for this Medal of Honor.

Let me thank all of you for being here.

Yes, Ms. Carlyle?

Ms. CARLYLE. Senator, if I could real fast, and I don't want to touch on Class II because we have a limited number of that in Arizona, but my biggest concern again, well really, I wouldn't want to be in NIGC's shoes. So I have to give them kudos for stepping up to the plate and taking on that responsibility.

But I truly feel that meaningful consultation, not just sitting across the table, can occur. If it can happen in Arizona and other areas, it can happen with the NIGC. My tribe's biggest concern was the rush on the facility regulations that was placed on tribes. When we talk about meaningful consultation, this is a bit of information that the Arizona Department of Gaming employs 111 people, and they have a $15.6 million budget. I will say that Arizona and the State, the collaboration is great.

I always like to end it with saying that we have our respective meetings. It may be a slow process, but we do come to a compromise which I was told that when both sides are equally unhappy, then we have met a true compromise. I think that is how in Arizona we try to work on that basis somewhat. I would like to see that with NIGC because the time-frames given to tribes is not enough. It is not adequate. My counsel only meets twice a month, but we have to call specials if we have deadlines. Then we have to include our regulators, too, to make sure that our comments are appropriate or at least heard and considered.

Thank you.

The CHAIRMAN. Well said.

Mr. Patterson?

Mr. PATTERSON. Mr. Chairman, I would just like to leave with the thought to say that my mother always said how naive I was, but I have a glass in front of me and I say that it is half full, not half empty.

[Laughter.]

Mr. PATTERSON. I believe that NIGC and USET share the same common goal to ensure that Indian gaming operates in a manner which benefits and protects tribal interests in that respect. I also believe that a lot of hard work has already been done to develop consensus positions. I think that is a great place to re-engage and build consensus.

As far as consultations, sir, my people have had a long history of consultation, beginning in the 1600s and the Two-Row Wampum Treaty that my people negotiated with the Europeans when they first arrived. We have been in consultation for 400 years, and I support meaningful dialogue.

Thank you, sir.

The CHAIRMAN. That is an interesting way of describing the fact that you know what consultation is when you see it.

Mr. Hogen, let me thank you for chairing the commission. We have sometimes tensions about various regulations and things, but our Committee has enjoyed working with you and will continue until you depart.

I do hope, and I say this to the Indian Health Service and BIA and every organization, I hope that everyone understands the need for effective communications. The issue of consultation—consultation is more than a word. It is an attitude and it is a culture. It is very important to remind every agency and every organization that works with tribes about the meaning of consultation.

So take that from this hearing, and understand that we want you to succeed. It is in our interest that the NIGC succeed. I think it is in the tribes' interest for you to succeed in a way that makes them a significant part of the future of regulation effective—and I underline the word effective—effective regulation of Indian gaming. All of us have a big stake in the effective regulation of Indian gaming.

This Committee will certainly be considering these issues going forward.

Ms. Rand, let me also say to you something that I think is important to be said. We have tried to build at the University of North Dakota a very effective Indian Studies Program in a wide range of areas, Indian doctors, Indian psychologists, Indian lawyers—a wide range of areas. And I think we have done that over a long period of time very successfully. I am enormously proud of those programs and proud that you are able to come from those programs and be a part of the hearing here in Washington, D.C. So I welcome you.

Ms. RAND. Thank you.

The CHAIRMAN. Mr. Luger?

Mr. LUGER. Senator Dorgan, I know there is a rumor out there that I have few friends, but Kathryn is one of them.

[Laughter.]

The CHAIRMAN. Let me thank all of you for being here today. This Committee will, as I said, consider all of the issues we have received today.

The hearing is now adjourned.

[Whereupon, at 11:55 a.m., the Committee was adjourned.]

# A P P E N D I X

DAN BOREN
2ND DISTRICT, OKLAHOMA

ASSISTANT DEMOCRATIC WHIP

VICE CHAIR, SPORTSMEN'S CACUS

WASHINGTON OFFICE:
218 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-2701
FAX: (202) 225-3038
WWW.BOREN.HOUSE.GOV

**Congress of the United States**
**House of Representatives**
**Washington, DC 20515-3602**

COMMITTEE ON ARMED FORCES
SUBCOMMITTEE ON AIR AND LAND FORCES
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**Statement for the Record**

**Senate Committee on Indian Affairs**
**Oversight Hearing on the**
**"National Indian Gaming Commission"**

**Hon. Dan Boren**
**Of Oklahoma**
**In the**
**U.S. House of Representatives**
**April 17, 2008**

Dan Boren, Member of Congress

Mr. Chairman:

I would like to thank you, Vice Chair Murkowski, and Members of the Committee on Indian Affairs for allowing me the opportunity to provide a statement on this matter of critical importance to thousands of my constituents, Indian and non-Indian.

I know the committee will be reviewing a number of NIGC activities today; my comments will focus on the NIGC's proposed Class II gaming regulations, over which there has been much controversy. I want to note that I do not question the good intentions of NIGC Chairman Phil Hogen. I firmly believe that he is committed to making Indian gaming a continued success. However, I do believe that where questions have arisen, they have been on the judgment exercised in trying to move these new Class II regulations into law on a very short time frame, without meaningful consultation with Tribes, and without regard for the tremendous negative economic impacts.

I would like to submit for the record a research study showing these proposed Class II regulations will have a negative nationwide economic impact of nearly $3.2 Billion. This is far higher than the $1.2 Billion impact shown in the economic impact study done by the NIGC, because this research looks at the overall impact to the Tribes as well as the surrounding local communities. For my home state of Oklahoma, the research shows that Class II Indian gaming accounts for nearly $1.2 Billion of the Oklahoma economy, including almost 19 thousand jobs. I have great confidence in these numbers, as they were researched by a noted economist at a premier institution of higher education—Dr. Robert Dauffenbach at the Price College of Business at the University of Oklahoma.

These potential economic impacts are significant and real. At a time when the nation's economy is struggling, I believe it is of great importance that Federal agencies carefully consider how their activities can have the least economic impact, while still providing effective regulation.

**Claremore**
309 W. 1ST STREET
CLAREMORE, OK 74017
(918) 341-9336
FAX: (918) 342-4805

**McAlester**
321 SOUTH THIRD, STE. 4
MCALESTER, OK 74501
(918) 423-5951
FAX: (918) 423-1940

**Muskogee**
431 W. BROADWAY
MUSKOGEE, OK 74401
(918) 687-2533
FAX: (918) 686-0128

On February 20th, I chaired a field hearing in Miami, Oklahoma, at which 7 Tribal leaders and the NIGC testified, as well as four local and state government officials. At the hearing both the NIGC and the Tribes offered good arguments on whether the NIGC was exceeding its statutory authority in these regulations, and whether or not the classification regulations may even be needed. What I found most troubling were the statements from Tribes and state and local officials clearly detailing the severe economic consequences they foresee with these regulations.

I remain concerned that these complicated and controversial regulations are being promulgated in a very truncated manner, with only minimal consultation with the Tribes and no consideration of the surrounding communities who would also be significantly affected. Recently, on April 9th, Chairman Rahall chaired a hearing on legislation that he recently introduced to improve the government to government relationship between Tribes and the NIGC, the Department of the Interior and the Indian Health Service. At that hearing, the views of the NIGC on its consultation effort was made clear. Chairman Hogen testified that the Commission had initiated efforts to address Class II regulations as far back as 3 years ago. Because of the length of that effort, he believes that a process that looked to consultations on other proposals from as far back as 3 years earlier justifies the shortened comment period and lack of consultation on these specific regulations.

After these hearings, three things are clear: the economic impact of the proposal is potentially catastrophic to small Tribes; there is a good faith disagreement on the basic statutory authority of the NIGC to promulgate these classification standards; and there has been insufficient time for meaningful consultation on these specific regulations. No argument has been brought forward claiming that there is an imminent disaster that must be headed off by these regulations. Given the lack of an emergency, there is nothing preventing NIGC from taking more time to insure this process is done properly, in a manner consistent with its own consultation policy, and with the cooperation of tribes.

More time would allow the parties to open a dialogue through meaningful consultation. A clear vetting of legal issues could avoid another judicial ruling like the one handed down in the case of Colorado River Indian Tribes vs. NIGC. Most importantly, allowing more discussion may present solutions to avoiding the huge negative economic impacts. Meaningful consultation respects the government to government relationships, and avoids putting thousands of people out of work and communities at risk.

The State of Oklahoma has the highest percentage of Class II gaming in the country, an economic impact of over a billion dollars to the state. The second Congressional district, which I represent, encompasses jurisdictional areas of 17 Federally recognized tribes, many of whom have successfully utilized gaming revenues to support critical Tribal programs – health, education, housing, and more. The subsequent investment these tribes make in their communities provide additional resources that benefit both tribal and non-tribal citizens, and help better the way of life in these rural areas of Oklahoma.

I believe that these regulations would significantly impact an industry of great importance to my constituency and they deserve Congress' careful attention. It is for this reason I asked to be able speak to you today. Thank you again for allowing me the opportunity to share my thoughts with you and for your careful consideration of this issue.

*The University of Oklahoma*

March 6, 2008

David Qualls, Chairman
P.O. Box 1909
Durant, Oklahoma 74702

At the Center for Economic and Management Research, Price College of Business, University of Oklahoma, we have compiled estimates of the statewide and national impact of lost revenues in consequence of proposed Class II machine restrictions. My review of Dr. Meister's document revealed that there was no attempt to examine total economic impacts (direct, indirect, and induced) that was included in his analysis. This is a chief deficiency of what is, otherwise, a compelling study. To remedy this missing feature of that analysis, we have engaged in a preliminary impact analysis of the proposed restrictions.

We used a nationally prominent impact analysis model to generate the economic impacts. This model is widely used throughout the nation. More can be learned about this model at the website Implan.com.

We used the $1.2 billion in lost sales point-estimate provided in the Meister document as the primary input. In truth, there is no "casino" industry available in the detailed listing of industries identified in the IMPLAN impact model. Thus, the main assumption that we employed is that Casino operations include a proportion of food and beverage sales (20%) with the remaining sales allocated to the Entertainment and Recreation industry. For the State of Oklahoma analysis, we used the statistic that about 59 percent of Class II machines are in Oklahoma as a guide. This results in about a $700 million direct sales (output) impact.

The attached tables provide estimates of the impacts for the nation and the State of Oklahoma in the categories of output, employment, and labor income. As will be seen through perusal of these results, there are sizable implications on employment and income of the proposed restrictions. The results are shown in six tables relating to output, employment, and income for the State of Oklahoma and the nation.

It is important to note that these results are "linearly scalable." That is, if one were to believe that the total impact is $1.0 billion instead of $1.2 billion, one would only need to multiply all tabled values by 0.8333 {that is, 1.0/1.2 = 0.8333) to convert the results to a one billion dollar base.

Cordially,

Robert C. Dauffenbach

Center for Economic and Management Research, 307 West Brooks Street, Room 4, Norman, Oklahoma 73019-4002 Phone: (405) 325-2931

**Table 1. State Output Impact**

Combined

| Industry | Direct | Indirect | Induced | Total |
|---|---|---|---|---|
| Ag, Forestry, Fish & Hunting | - | 7,388,421 | 3,301,040 | 10,689,461 |
| Mining | - | 2,926,742 | 2,739,083 | 5,665,825 |
| Utilities | - | 13,805,648 | 7,051,217 | 20,856,865 |
| Construction | - | 12,016,817 | 1,717,989 | 13,734,807 |
| Manufacturing | - | 34,663,955 | 22,758,500 | 57,422,454 |
| Wholesale Trade | - | 11,109,877 | 10,401,745 | 21,511,622 |
| Transportation & Warehousing | - | 11,863,341 | 6,023,386 | 17,886,727 |
| Retail trade | - | 3,485,096 | 28,014,481 | 31,499,577 |
| Information | - | 20,477,980 | 8,962,934 | 29,440,913 |
| Finance & insurance | - | 13,421,498 | 17,223,437 | 30,644,935 |
| Real estate & rental | - | 28,345,123 | 12,442,720 | 40,787,844 |
| Professional- scientific & tech svcs | - | 27,578,696 | 9,529,646 | 37,108,343 |
| Management of companies | - | 6,739,658 | 1,828,550 | 8,568,208 |
| Administrative & waste services | - | 15,756,207 | 4,568,725 | 20,324,932 |
| Educational svcs | - | 100,062 | 2,348,034 | 2,448,096 |
| Health & social services | - | 26,943 | 35,102,452 | 35,129,396 |
| Entertainment & recreation | 560,000,000 | 3,384,440 | 2,602,358 | 565,986,768 |
| Accomodation & food services | 140,000,000 | 3,879,198 | 14,541,295 | 158,420,488 |
| Other services | - | 11,401,948 | 12,256,963 | 23,658,911 |
| Government & non NAICs | - | 5,676,401 | 32,376,025 | 38,052,427 |
| Total | 700,000,000 | 234,048,051 | 235,790,580 | 1,169,838,599 |

**Table 2. State Employment Impact**

Combined

| Industry | Direct | Indirect | Induced | Total |
|---|---|---|---|---|
| Ag, Forestry, Fish & Hunting | - | 135 | 57 | 192 |
| Mining | - | 8 | 7 | 15 |
| Utilities | - | 28 | 14 | 41 |
| Construction | - | 147 | 20 | 168 |
| Manufacturing | - | 140 | 71 | 211 |
| Wholesale Trade | - | 103 | 96 | 199 |
| Transportation & Warehousing | - | 132 | 59 | 191 |
| Retail trade | - | 72 | 582 | 654 |
| Information | - | 98 | 33 | 130 |
| Finance & insurance | - | 113 | 130 | 243 |
| Real estate & rental | - | 275 | 123 | 398 |
| Professional- scientific & tech svcs | - | 301 | 109 | 410 |
| Management of companies | - | 50 | 14 | 63 |
| Administrative & waste services | - | 365 | 102 | 466 |
| Educational svcs | - | 2 | 55 | 57 |
| Health & social services | - | 0 | 541 | 542 |
| Entertainment & recreation | 10,171 | 162 | 73 | 10,406 |
| Accomodation & food services | 3,366 | 93 | 348 | 3,807 |
| Other services | - | 161 | 292 | 453 |
| Government & non NAICs | - | 31 | 23 | 54 |
| Total | 13,537 | 2,415 | 2,745 | 18,696 |

**Table 3. State Labor Income Impact**

Combined

| Industry | Direct | Indirect | Induced | Total |
|---|---|---|---|---|
| Ag, Forestry, Fish & Hunting | - | 1,653,604 | 844,093 | 2,497,697 |
| Mining | - | 527,453 | 490,713 | 1,018,166 |
| Utilities | - | 2,818,842 | 1,380,369 | 4,199,211 |
| Construction | - | 4,619,085 | 634,644 | 5,253,729 |
| Manufacturing | - | 7,406,152 | 4,305,705 | 11,711,857 |
| Wholesale Trade | - | 4,733,117 | 4,431,433 | 9,164,551 |
| Transportation & Warehousing | - | 5,557,667 | 2,432,763 | 7,990,430 |
| Retail trade | - | 1,633,132 | 13,121,441 | 14,754,574 |
| Information | - | 4,977,660 | 1,782,812 | 6,760,473 |
| Finance & insurance | - | 4,414,287 | 4,813,463 | 9,227,750 |
| Real estate & rental | - | 5,035,881 | 2,302,136 | 7,338,017 |
| Professional- scientific & tech svcs | - | 12,547,141 | 4,447,526 | 16,994,667 |
| Management of companies | - | 2,851,100 | 773,538 | 3,624,638 |
| Administrative & waste services | - | 7,682,304 | 2,110,625 | 9,792,929 |
| Educational svcs | - | 45,960 | 1,155,505 | 1,201,465 |
| Health & social services | - | 9,597 | 18,454,428 | 18,464,025 |
| Entertainment & recreation | 191,406,640 | 1,276,090 | 991,015 | 193,673,743 |
| Accomodation & food services | 43,317,924 | 1,234,253 | 4,545,536 | 49,097,716 |
| Other services | - | 3,340,833 | 4,900,152 | 8,240,985 |
| Government & non NAICs | - | 1,415,560 | 1,044,052 | 2,459,613 |
| Total | 234,724,564 | 73,779,718 | 74,961,949 | 383,466,236 |

**Table 4. National Output Impact**

Combined

| Industry | Direct | Indirect | Induced | Total |
|---|---|---|---|---|
| Ag, Forestry, Fish & Hunting | - | 23,574,150 | 18,547,928 | 42,122,076 |
| Mining | - | 9,066,898 | 10,766,461 | 19,833,358 |
| Utilities | - | 27,306,910 | 23,337,236 | 50,644,143 |
| Construction | - | 22,447,272 | 7,509,191 | 29,956,464 |
| Manufacturing | - | 183,301,928 | 207,848,400 | 391,150,328 |
| Wholesale Trade | - | 36,813,532 | 51,961,660 | 88,775,192 |
| Transportation & Warehousing | - | 39,763,893 | 36,272,953 | 76,036,846 |
| Retail trade | - | 7,924,751 | 90,434,748 | 98,359,494 |
| Information | - | 67,636,420 | 65,801,051 | 133,437,470 |
| Finance & insurance | - | 59,364,907 | 111,932,620 | 171,297,528 |
| Real estate & rental | - | 99,435,264 | 71,815,651 | 171,250,916 |
| Professional- scientific & tech svcs | - | 89,366,075 | 57,186,742 | 146,552,810 |
| Management of companies | - | 25,006,649 | 16,695,860 | 41,702,510 |
| Administrative & waste services | - | 49,112,951 | 29,450,731 | 78,563,686 |
| Educational svcs | - | 488,845 | 14,201,602 | 14,690,447 |
| Health & social services | - | 65,759 | 114,603,266 | 114,669,028 |
| Entertainment & recreation | 960,000,000 | 23,394,296 | 16,355,366 | 999,749,680 |
| Accomodation & food services | 240,000,000 | 10,741,123 | 51,558,820 | 302,299,952 |
| Other services | - | 26,181,095 | 49,087,702 | 75,268,797 |
| Government & non NAICs | - | 14,028,782 | 96,033,508 | 110,062,290 |
| Total | 1,200,000,000 | 815,021,500 | 1,141,401,496 | 3,156,423,015 |

**Table 5. National Employment Impact**

Combined

| Industry | Direct | Indirect | Induced | Total |
|---|---|---|---|---|
| Ag, Forestry, Fish & Hunting | - | 328 | 260 | 589 |
| Mining | - | 23 | 25 | 47 |
| Utilities | - | 45 | 38 | 82 |
| Construction | - | 228 | 74 | 301 |
| Manufacturing | - | 646 | 634 | 1,280 |
| Wholesale Trade | - | 258 | 365 | 623 |
| Transportation & Warehousing | - | 410 | 340 | 750 |
| Retail trade | - | 139 | 1,586 | 1,724 |
| Information | - | 295 | 226 | 520 |
| Finance & insurance | - | 328 | 623 | 951 |
| Real estate & rental | - | 557 | 417 | 974 |
| Professional- scientific & tech sv | - | 746 | 484 | 1,230 |
| Management of companies | - | 144 | 97 | 241 |
| Administrative & waste services | - | 942 | 543 | 1,485 |
| Educational svcs | - | 9 | 289 | 297 |
| Health & social services | - | 1 | 1,536 | 1,537 |
| Entertainment & recreation | 13,685 | 527 | 309 | 14,520 |
| Accomodation & food services | 5,206 | 212 | 1,058 | 6,476 |
| Other services | - | 301 | 970 | 1,271 |
| Government & non NAICs | - | 69 | 86 | 155 |
| Total | 18,891 | 6,206 | 9,958 | 35,054 |

**Table 6. National Labor Income Impact**

Combined

| Industry | Direct | Indirect | Induced | Total |
|---|---|---|---|---|
| Ag, Forestry, Fish & Hunting | - | 4,784,257 | 4,273,899 | 9,058,155 |
| Mining | - | 1,900,563 | 2,161,105 | 4,061,669 |
| Utilities | - | 5,653,012 | 4,720,507 | 10,373,519 |
| Construction | - | 10,139,638 | 3,289,761 | 13,429,399 |
| Manufacturing | - | 34,794,977 | 37,307,626 | 72,102,602 |
| Wholesale Trade | - | 15,687,524 | 22,142,667 | 37,830,191 |
| Transportation & Warehousing | - | 19,162,161 | 15,607,820 | 34,769,982 |
| Retail trade | - | 3,676,113 | 41,928,339 | 45,604,450 |
| Information | - | 20,715,189 | 16,685,947 | 37,401,137 |
| Finance & insurance | - | 22,991,544 | 41,372,838 | 64,364,382 |
| Real estate & rental | - | 16,626,088 | 12,294,399 | 28,920,487 |
| Professional- scientific & tech svcs | - | 43,790,546 | 28,085,756 | 71,876,300 |
| Management of companies | - | 11,846,551 | 7,909,431 | 19,755,982 |
| Administrative & waste services | - | 25,176,499 | 14,475,859 | 39,652,357 |
| Educational svcs | - | 267,408 | 8,096,114 | 8,363,522 |
| Health & social services | - | 24,899 | 62,770,229 | 62,795,128 |
| Entertainment & recreation | 336,574,624 | 10,765,057 | 7,058,609 | 354,398,278 |
| Accomodation & food services | 81,226,280 | 3,794,597 | 17,753,727 | 102,774,606 |
| Other services | - | 8,649,619 | 21,780,198 | 30,429,816 |
| Government & non NAICs | - | 4,002,458 | 4,808,483 | 8,810,941 |
| Total | 417,800,904 | 264,448,700 | 374,523,314 | 1,056,772,903 |

LAW OFFICES OF

GOOD, WILDMAN, HEGNESS & WALLEY

5000 CAMPUS DRIVE

NEWPORT BEACH, CALIFORNIA 92660

GARY ALDO DAPELO *
ROBERT W. DYESS, JR *
GREGORY D. FISHER
MARISHA GABLE
PAUL C. HEGNESS *
HEIDI STILB LEWIS
NIKKI A. PRESLEY
MICHAEL P. RIDLEY
JOHN A. STILLMAN
THOMAS E. WALLEY

* A PROFESSIONAL CORPORATION

ROY M. GOOD
(1923-2003)

PAUL WILDMAN
(1924-1983)

OF COUNSEL
DOUGLAS M. VICKERY
STEPHEN B. OTTO

AUTHOR'S DIRECT:
TELEPHONE (949) 720-1300
TELECOPIER (949) 720-9822

March 9, 2008

**Via Electronic Mail***
Philip N. Hogen, Chairman
Norman DesRosiers, Vice Chairman
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, D.C. 20005

Re: Comments of the Miccosukee Tribe of Indians of Florida Concerning Proposed Rules on Class II Definitions, Class II Classification Standards, Class II Technical Standards, and Class II Minimum Internal Control Standards

Dear Chairman Hogen and Vice Chairman DesRosiers:

On behalf of our client the Miccosukee Tribe of Indians of Florida ("Tribe"), we write to you as representatives of the federal government of the United States of America regarding the proposed regulations by the National Indian Gaming Commission ("Commission" or "NIGC") on (1) Definition for Electronic or Electromechanical Facsimile, published at 72 Fed Reg. 60482 (October 24, 2007) ("Definition Regulations"); (2) Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through and Electronic Medium using "Electronic, Computer, or other Technologic Aids," published at 72 Fed.Reg. 60483 (October 24, 2007) ("Classification Regulations," individually and collectively with the Definition Regulations, the "Proposed Rule"); (3) Technical Standards for Electronic, Computer, or Other Technologic Aids Used in the Play of Class II Games, published at 72 Fed. Reg. 60508 (October 24, 2007) ("Technical Standards"); and, (4) Minimum Internal Control Standards for Class II Gaming, published at 72 Fed.Reg. 60495 (October 24, 2007) ("Class II MICS," individually and collectively with the Technical Standards, the "Proposed Standards Regulations;" the Proposed Standards Regulations, in turn, individually and collectively with the Proposed Rule, the "Proposed Regulations").

By this letter, we respectfully provide comments for the Miccosukee Tribe in connection with the Proposed Regulations. We also provide comments in connection with the study dated February 1, 2008, entitled "The Potential Economic Impact of the October 2007 Proposed Changes to Class II Gaming Regulations," which study was apparently commissioned by the Commission and prepared by Alan Meister, Ph.D. ("Meister Economic Study"). We also provide comments on the process and methodologies apparently employed by the Commission in connection with the development of the Proposed Regulations including as to the Commission's Tribal Advisory Committees ("Advisory Committee").

The manner of presentation by the Commission of the Proposed Regulations makes it difficult for the Tribe to provide comments or to participate in the Commission's rulemaking process.[1] The

[1] The current Proposed Regulations are at least the second go around for the NIGC with respect to the subject matter presented in the Proposed Regulations. *See* Definition for Electronic or Electromechanical Facsimile, published at 71 Fed. Reg. 30232 (May 25, 2006) ("2006 Definition Regulations"); 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 Technologic Aids," published at 71 Fed. Reg. 30238 (May 25, 2006) ("2006 Classification Regulations," individually and collectively with the 2006 Definition Regulations, the "2006 Proposed Rule"); and, Technical Standards for "Electronic, Computer, or Other Technologic Aids" Used in the Play of Class II Games, published at 71 Fed. Reg. 46336 (August 11, 2006) (the "2006 Technical Standards," individually and collectively with the 2006 Proposed Rule, the "2006 Proposed Regulations"). The NIGC apparently abandoned its 2006 Proposed Rule and its 2006 Technical Standards in early 2007. *See* Notice of Withdrawal of Proposed Regulations, Class II Definitions and Game Classification Standards; Withdrawal, 72 Fed.Reg. 7359 (February 15, 2007); and, Notice of Withdrawal of Proposed Rule, Technical Standards for Electronic, Computer, or Other Technologic Aids Used in the Play of Class II Games; Withdrawal, 72 Fed.Reg. 7360 (February 15, 2007). During 2007, the NIGC apparently worked as part of its Advisory Committee process with a select group of individuals, mostly consisting of representatives of several gaming vendors and not tribal representatives, to develop the current Proposed Standards Regulations and the current Proposed Rule which were then published as the Proposed Regulations in October 2007. Many of the same definitions and individual requirements that appeared in the2006 Proposed Regulations now appear in the instant Proposed Regulations. Although some improvements were made to the individual provisions of the Proposed Regulations, in many respects the instant Proposed Regulations suffer from the same infirmities as the 2006 Proposed Regulations. The Tribe and many others to no avail previously pointed out to NIGC the defects in the 2006 Proposed Regulations and yet must do so again to the instant Proposed Regulations. *See* Letter dated August 15, 2006, Letter dated November 15, 2006, and Letter dated December 15, 2006, each to the NIGC, available at http://www.nigc.gov (website last visited March 8, 2009) (documents available under web page for laws and regulations – proposed amendments and regulations – class II game classification standards – withdrawn) (comments by or for the Miccosukee Tribe to the 2006 Proposed Regulations), which letters and other materials are incorporated by reference for all purposes into this present letter and made a part of the record of and comments to the instant Proposed Regulations. The Tribe reserves the right to treat the 2006 Proposed Regulations and the instant Proposed Regulations as a continuation of the same rulemaking process. *See* Classification Regulations, *supra*, 72 Fed.Reg. at 60487 ("To the extent that provisions are identical to the first proposed regulations, the Commission's thinking has not changed," requiring interested parties to refer back and forth to both the 2006 Proposed Regulations and the instant Proposed Regulations). The Tribe reserves the right to rely alternatively upon the comments and objections of other interested parties to the Proposed Regulations whether made in connection with the 2006 Proposed Regulations or with the instant Proposed Regulations. *See, e.g.*, Comments on www.regulations.gov, including without limitation documents NIGC-2007-011-042, NIGC-2007-0011-0050, NIGC-2007-0011-0077 (the Tribe's identification of comments by other interested parties is provided as a courtesy and is done in the interest of economy so as to avoid the restatement of some or all of those comments herein; the Tribe's identification of such other comments does not constitute a waiver of the Tribe's rights or the Tribe's comments provided herein, or signify agreement by the Tribe as to each comment made or the rationale or approach of any comments so identified).

The NIGC's presentation of the current Proposed Rule, as overlapping rulemaking efforts (which the NIGC treated as one rulemaking including through its Advisory Committee process as discussed herein), with long, detailed proposed regulatory provisions, and accompanied by a long, varied notice as to the NIGC's apparent stated rationale for the rule, involves countless issues relating to the regulation of tribal gaming. The Proposed Rule by itself goes to important issues relating to the jurisdiction of tribal governments with respect to tribal gaming, the jurisdiction of the Secretary and the various states as to class III gaming, and detailed substantive and technical aspects of games played as class II gaming. At the same time, the NIGC has proposed very detailed technical standards for equipment used with class II gaming through the Technical Standards along with the detailed Class II MICS (which the NIGC has also treated with the Proposed Rule as one rulemaking through its Advisory Committee process). Our objections and comments to the overall framework and apparent conceptual intent proffered by the NIGC with respect to the Proposed Regulations also extend and apply to the individual components and provisions of the Proposed Regulations.

The form of the presentation by the NIGC as to the Proposed Rule, with the intertwined Technical Standards and Class II MICS, makes it difficult to ascertain the NIGC's intentions as to new regulations, to present comments on the issues raised by the NIGC in the Proposed Regulations, or to participate effectively in the NIGC's rulemaking process. The NIGC's stated purposes in the Proposed Regulations and other public statements do not match the actual wording of the Proposed Regulations; in many areas, provisions in various components of the Proposed Regulations conflict with and are inconsistent with other provisions of the Proposed Regulations and existing regulations of the NIGC. The difficulty (prejudice) caused by the NIGC's rulemaking process as to the Tribe's ability to participate in the rulemaking process extends to any alternative that the NIGC may pursue in response to comments received by the NIGC on the Proposed Regulations. Because of the manner and method of the NIGC's presentation as to the Proposed Regulations, collectively and individually, we believe as to any final rule that adequate notice would not have been given by the NIGC with respect to any deviation from the overall framework of the Proposed Regulations, or as to individual substantive provisions of the Proposed Regulations. *See United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 243 (1973) (stating that notice of a proposed action must fairly advise the public of "exactly what" the agency proposes to do); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988) (finding inadequate notice because the "summary" did not make reference to the model the agency adopted). Otherwise, the NIGC would essentially be violating the logical outgrowth rule. At least one public hearing, and additional time to comment, should be granted to *tribal governments* to fully study, assess, and participate by written comments, or through true (see below) government-to-government consultation, with respect to the NIGC's overall regulatory initiatives as to class II gaming including the Proposed Rule and the Proposed Standards Regulations.

We understand that the NIGC has undertaken additional study and analysis regarding the economic and other impacts of the Proposed Regulations. We have not had an opportunity to review or to comment on such additional materials apparently held by the NIGC or not discussed in the NIGC's notice to the Proposed Regulations (the NIGC's Proposed Regulations stated that the economic impact study was already completed when the

Tribe reserves the right to supplement, or to revise, its positions stated in the enclosed comments whether through additional written comments to the Commission or on review of any final rule.

## I. Introduction.

Through the Proposed Regulations, the federal government yet again seeks to unilaterally change the nature of its relationship with tribal governments. The same has been true with respect to any number of prior federal legislative and regulatory initiatives.[2]

Prior to the Indian Gaming Regulatory Act ("IGRA),[3] "existing federal law" did "not provide clear standards or regulations for the conduct of gaming on Indian lands."[4] Congress provided in the IGRA that *all* tribal governments would have the opportunity to take advantage of *both* variety in game design, *i.e.*, the method of play, *and* advances in technologic aids used in the play, of class II bingo-related gaming (including the very games and technology threatened by the Proposed Rule and the Technical Standards).[5] As to certain specific bingo-like games in which the *method of play* is the same as live lottery games offered by State lotteries, and as to certain specific and limited technology,[6] Congress ostensibly limited tribal rights to play such games and such devices as class

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Proposed Regulations were published in October 2007 when in fact even the Meister Economic Study, which at best is an incomplete preliminary study, was not completed and made available until after February 1, 2008). We also understand that the NIGC has had ongoing discussions and correspondence with the Advisory Committee (vendor working group) concerning the Proposed Regulations. Our comments herein may likely have included additional or different material if we had an opportunity to review the NIGC's additional materials including as to the impacts of and alternatives to the Proposed Rule and materials exchanged between the NIGC and the Advisory Committee (vendor working group). We believe that fairness in the rulemaking process would have required (i) additional time to submit these comments in light of the economic and other studies apparently still being undertaken by the NIGC; and, (ii) the NIGC to post and to make available the drafts of and all correspondence relating to the Proposed Regulations exchanged by the NIGC and the Advisory Committee (vendor working group) in advance of the deadline for these comments.

We understand that the Department of Justice ("DOJ") previously had a legislative proposal that affected the matters raised in the Proposed Rule. *See* 2006 Classification Regulations, *supra*, 71 Fed.Reg. at 30241 (the NIGC noting "So much time has elapsed that it is not *likely* that the proposed legislation will pass the 109th Congress," emphasis added). The potential existence but uncertain status of the DOJ's legislative proposal makes it difficult to comment on the Proposed Regulations. The DOJ legislative proposal would have conflicted with the current Proposed Regulations and, therefore, the views of the DOJ may not be consistent with the apparent views of the NIGC stated in the Proposed Regulations.

[2] America's history is riddled with a track record of striking deals with tribal governments and then unilaterally changing the deal as the United States pleases. Often times, the relationship is changed simply because the United States no longer likes the deal it entered into with a tribal government.

[3] 25 U.S.C. §§2701-2721 and 18 U.S.C. §§1166-1168. We refer to the codification in both Title 25 and Title18 as the "IGRA," or the "Act," except as noted. Our discussion in these comments as to the language or structure of the IGRA goes to class II bingo-related gaming except as noted.

[4] 25 U.S.C. §2701(3); *see also, California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-219 (noting that for decades the federal government's involvement in tribal gaming was limited to approval of tribal ordinances, the review of tribal bingo management contracts with third-parties, and the promotion of tribal gaming enterprises through economic incentives).

[5] S. Rep. No. 446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Ad. News 3071 ("Senate Report"), 3079 ("Consistent with tribal rights that were recognized and affirmed in the Cabazon decision, the Committee intends in [25 U.S.C. §2703(7)(a)(i) that tribes have *maximum flexibility* to utilize games such as bingo and lotto for tribal economic development . . . *The Committee specifically rejects any inference that tribes should restrict class II games to existing game sizes, levels of participation, or current technology* . . . The Committee intends that tribes be given the opportunity of *modern methods* of conducting class II games and the language regarding technology is designed to provide maximum flexibility," emphasis added). The use in the Senate Report of the term "modern methods" meant just that – methods that are modern at the point of implementation not at the original point of enactment of the statute.

[6] *I.e.* slot machines and equivalent machines or devices which the IGRA denotes as electronic or electromechanical facsimiles in which one player plays a game with or against a machine or device. 25 U.S.C. §2703(7)(B)(ii). Contrary to the NIGC's representations in connection with the Classification Regulations, the focus of Congress during the enactment of the IGRA was on removing slot machines, not "casino gaming," from the technology used with class II gaming and it is for this reason that the exclusion from class II gaming in the statute is for slot machines however represented whether wholly mechanical, wholly electronic, or something in-between, *i.e.*, electromechanical. The NIGC's discussion in connection

III gaming without a tribal-state compact or Secretarial procedures.[7] An abrogation of tribal rights should and does require a clear expression by Congress.[8] The fact that rights were taken away by the IGRA means that at the least tribal governments should be given the full advantage of the remaining rights maintained by tribal governments under the IGRA.

For class II gaming, the Commission was created by Congress in the IGRA and given an important but limited role of oversight, principally as to class II gaming, of the exercise by tribal governments of the primary jurisdiction and regulation by tribal governments of tribal gaming. *"Oversight" does not mean "regulation"* as that term is applied by the Commission in the Proposed Rule or in the Technical Standards Regulations.[9] Tribal governments and the Commission are not co-equal regulators of tribal gaming as implied by the Commission in the Proposed Regulations.

As to all areas touched by the IGRA, namely the regulation and operation of gaming by tribal governments, tribal rights to self-government were recognized and protected by the Congress.[10] Involvement by outside, non-tribal governmental entities was minimized to the full extent

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with the Classification Regulations of references by individual members of Congress to casino gaming during the debate of the bill that ultimately became the IGRA appears an effort to find ambiguity in a statute where none exists.

[7] *Cf.* 25 U.S.C. §2710(d)(1)(C) and §2710(d)(7)(B)(vii). The IGRA must be read against the backdrop of the basic rules of federal Indian law. These basic rules include: (1) Indian tribes are sovereign, self-governing entities whose governing powers are inherent, predating the adoption of the United States Constitution; (2) Congress under the Constitution (Article I, Section 8) has plenary power over Indian Affairs although that power is limited by the trust responsibility; (3) the powers of self-government of an Indian tribe are not changed or abrogated, except if at all by express or clear language in an Act of Congress; (4) neither the federal government nor a state government has jurisdiction to regulate the conduct of Indian tribes or individual Indians in Indian country unless if at all an Act of Congress has conferred such jurisdiction; and, (5) the canons of construction of Federal statutes affecting Indian affairs require a broad construction when Indian rights are preserved or established, and a narrow construction when Indian rights are to be abrogated or limited. The Proposed Regulations are contrary to the established basic rules of Federal Indian law.

[8] A clear and specific expression of Congressional intent is required to intrude on tribal sovereignty. Absent such clear and specific intent, tribal sovereignty will not be curtailed. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976). Thus, for example, "[i]n *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court sharply limited the power of the states to apply their gambling laws to Indian gaming . . . An essential element of its decision was that *Congress had not acted specifically* to make state gambling laws applicable in Indian country." *Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 472 (6th Cir. 1998) (emphasis added), *cert. denied*, 525 U.S. 929 (1998); *see also Cohen's Handbook of Federal Indian Law*, §2.01[1] (2005 ed.) ("Congress's primacy over the other branches of the federal government with respect to Indian law and policy is rooted in the text and structure of the Constitution . . . Congress' constitutionally prescribed primacy in Indian affairs with respect to assertions of power by the *executive* branch is reflected in countless court decisions requiring federal agencies . . . to conform to congressionally determined Indian policy," *citing United States v. Lara*, 541 U.S. 193 (2004) and *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 188-89 (1999), emphasis in original). Federal power, however, to regulate Indian affairs is not absolute. *United States v. Creek Nation*, 295 U.S. 103, 109-110 (1935) ("[T]his power [is] not absolute . . . While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations . . . and to pertinent constitutional restrictions").

[9] *See, e.g.*, Classification Regulations, *supra*, at 60485. Statements to the contrary as to the NIGC's regulatory authority in prior court decisions discussing other aspects of the statutory scheme created by the IGRA are dicta.

[10] *Compare* 25 U.S.C. §2701(4) and (5) (describing findings of Congress as including "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government" and "*Indian tribes have the exclusive right to regulate gaming activity on Indian lands* . . .," emphasis added), *and* 25 U.S.C. §2702(1)-(3) (declaring purposes of the IGRA as including "to provide a statutory basis for the *operation of gaming by Indian tribes* as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," "to provide a statutory basis for the *regulation of gaming by an Indian tribe* adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players," and "to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue," emphasis added).

possible.[11] That was the deal that was expressed by Congress in the IGRA – a broad allowance for games *and* for technology for class II gaming, with minimal interference by non-tribal agencies including the Commission. The understanding was clearly expressed in the IGRA and to the extent the IGRA is unclear any ambiguity is resolved by reference to the legislative history for the IGRA.

In the almost eighteen years since the enactment of the IGRA, the Commission has already twice adopted definitional regulations, first in 1992, and again in 2002. The federal courts have on several occasions addressed and recognized the distinctions provided by Congress in the IGRA between class II bingo-related games and class III lottery games and also between class II technologic aids and class III facsimiles and slot machines. The federal courts have also recognized that the IGRA is clear and unambiguous as to its meaning on what constitutes class II bingo gaming and on what constitutes a class III facsimile – in other words, the very subject matter that the Commission now seeks to change in the Proposed Rule.

Since the enactment of the IGRA in 1988, tribal governments have attempted to follow the rules (*i.e.*, the deal) set by Congress. Tribes, in reliance of those rules, court decisions, and prior actions of the Commission, have invested substantial time, energy, and money, into the development of games and technology legal for play under the IGRA as class II gaming. Tribes have further invested substantial time, energy, and money into the negotiation of compacts with states for class III gaming but have increasingly found unwilling negotiating partners in various states within which those tribes are located (or to the extent "willing," a negotiating partner only in derogation of the IGRA and only at great expense to the sovereignty, jurisdiction, culture, customs, traditions, rights, and resources of tribal governments).

The Proposed Regulations threaten the longevity of tribal gaming and its productivity as a source of tribal governmental revenues. The Proposed Regulations violate the basic purposes of the IGRA. Basic notions of equity and fair play are threatened by the Proposed Regulations which seek (1) to change the rules late in the day as to what constitutes class II gaming; and, (2) to take away currently legitimate class II games (reducing the scope of class II gaming and thereby effectively enlarging the scope of class III gaming requiring a compact or procedures), and, yet, (3) leave tribal governments with no judicial remedy against states, and a difficult path to Secretarial procedures, by which to obtain class III gaming if the states in which the tribes are located fail to negotiate for a compact in good faith as required by the IGRA.[12]

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[11] See nn. 18 to 94 *infra* and accompanying discussion regarding the express wording, structure, and the legislative history of the IGRA.

[12] Congress also intended in the IGRA that tribal governments would have the opportunity to engage in class III gaming. *Cf.* 25 U.S.C. 2710(d) (creating obligation of good faith negotiations by states for class III gaming compacts and a right of action by tribal governments in federal court if a state fails to negotiate in good faith); Senate Report, *supra*, at 3083 ("It is the Committee's intent that the compact requirement for class III gaming not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes"). The Supreme Court subsequently invalidated the Congressionally created remedy in the IGRA of an action in federal court by a tribe when a state refuses to negotiate in good faith for a compact for class III gaming. *Seminole Tribe of Florida v. State of Florida*, 517 U.S. 44 (1996). The validity of the Secretary's regulations as to procedures for class III gaming has been questioned. *See State of Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), *petition for cert. filed* February 25, 2008 (No. 07-1109). So even as to the deal expressed by Congress in the IGRA, the relationship turned out not as it originally appeared to tribal governments.

Taken at a high-level view, the Proposed Regulations appear to attempt to accomplish the following tasks: (a) limit all class II gaming played with even remotely modern technology to essentially only one game design which the Commission has defined in an arbitrarily restrictive manner through the Proposed Rule, (b) thereby restrict the ability of tribal governments to offer all games and technology that Congress recognized for tribes as class II gaming under the IGRA, (c) limit technology used with class II gaming through the Proposed Rule (while at the same time further limiting the ability of tribal governments to use class II technology through the Commission's separately proposed Technical Standards and Class II MICS), and, (d) regulate through the Commission all aspects, down to the finest details, of tribal class II gaming played with technology.

The basic approach of the Commission in connection with the Proposed Regulations, which follow from the 2006 Proposed Regulations, appears an attempt to impose on tribal governments an overbroad, vague, and ambiguous definition of "facsimile," which definition is arguably broad enough to ensnare every class II game played in an electronic or electromechanical "format" (with the attendant risks of potential arguments by opponents to tribal gaming of retroactive application including as to the Johnson Act which in the view of some opponents will measure liability at the point of design and manufacture of the implicated gaming technology). The basic approach as to the Proposed Regulations, which is provided in the proposed section 502.8 of the Definitions Regulations, is then coupled with efforts by the Commission to regulate, degree-by-degree, the amount of money tribal governments can make through class II gaming through Commission imposed, detailed requirements as to method of play, technical standards, and minimum internal control standards for all such gaming, as provided in the proposed sections 502.8 and 502.9 and proposed parts 546 and 547 of the Proposed Regulations, that according to the framework proposed by the Commission would then magically not be considered by the Commission to constitute a "facsimile."

Respectfully, the fundamental framework proffered in the Proposed Regulations is flawed. Congress has already drawn the line that separates class II gaming from class III gaming. Assuming solely for the sake of argument that the Commission has the authority to re-draw the jurisdictional framework established by Congress in the IGRA by changing the Congressionally provided definitions of class II gaming, once technology is established as a "facsimile" under the Commission's proposed section 502.8, *i.e.*, a device statutorily precluded from class II gaming, the Commission would arguably not then have the authority to then "authorize" the play of such technology whether under the Commission's Classification Standards, Technical Standards, Class II MICS, or through the purported "grandfather" or "variance" provisions of the Proposed Regulations.

The current approach of the Commission evidenced in the Proposed Regulations is contrary to the express wording of the IGRA, the structure of the IGRA, the legislative history of the IGRA, and binding judicial precedent. The current approach also construes prior judicial precedent in ways inconsistent with that judicial precedent. The current approach is also contrary to prior Commission precedent on which tribes and the class II gaming industry have relied. The

Commission has not demonstrated adequate justification to reverse its prior positions on class II gaming. The Commission is limited in its actions by the rule of *administrative res judicata*.

The Commission has failed to consider less burdensome alternatives to the Proposed Regulations, even though the Proposed Regulations will have a devastating impact on tribal and local communities. *See* Meister Economic Study, *supra*, at pp. i-iv ("study" concluding that Proposed Rule and Technical Standards would impose staggering economic costs on tribal governments of from between $1.2 to $2.8 billion in lost annual gaming revenue, or an annual economic impact of from $1.8 to $3.6 billion when lost non-gaming revenue, lost revenue sharing costs, and lost capital and compliance costs are added to lost gaming revenue, with from 3,366 to 7,890 lost tribal jobs); *see also Oklahoma Indian Issues: Proposed Regulations Governing Economic Development Before the House Committee on Natural Resources*, 110th Cong., 2nd Sess (February 20, 2008) (available at http://www.indianz.com/IndianGaming/2008/007228.asp or http://resourcescommittee.house.gov/) (the Proposed Regulations would have devastating impact on local communities in Oklahoma). Moreover, the Proposed Regulations, if effective and valid, could in essence retroactively make unlawful, and in some respects criminalize, current legitimate activities of tribal governments. The grandfather and variance provisions included by the Commission in the Proposed Regulations, are inconsistent, of dubious legal validity, and do not effectively ameliorate the negative impacts of the Proposed Regulations or overcome the unlawful aspects of the Proposed Regulations. The implementation time periods stated in the Proposed Regulations would make it unfeasible for tribal governments to comply with the Proposed Regulations and would likely result in business disruptions.

The Commission's statements in connection with the Proposed Regulations that tribal governments, if they so choose, remain free to adopt regulations in addition to those contained in the Proposed Regulations is not a recognition of the jurisdiction of tribal governments. The Proposed Regulations are so restrictive and comprehensive that it is unlikely that tribal governments will adopt additional requirements. Essentially, the Commission attempts through the Proposed Regulations to occupy the entire regulatory space, even though that regulatory space was to remain with tribal governments under the IGRA.

The Commission seeks through the Proposed Regulations to impose unlawful extra-statutory pre-conditions to the right of tribes to engage in gaming. The Commission's basic approach in the Proposed Regulations of seeking to impose a detailed description of class II gaming or technology followed by mandatory certifications of all class II gaming as meeting the Commission's unauthorized extra-statutory view of class II gaming is essentially the same improper approach that the Commission considered *but* wisely abandoned in connection with its 1999 proposed game classification rule.[13] The Commission does not have the authority to "pre-approve" games or

[13] *See* Proposed Rule on Classification of Games, 64 Fed.Reg. 61234 (November 10, 1999) ("Classification Procedure Regulations"). The NIGC wisely abandoned its Classification Procedure Regulations in 2002. *See* Proposed Rule Withdrawal, 67 Fed.Reg. 46134 (July 12, 2002). Under the NIGC's prior Classification Procedure Regulations, the NIGC sought to pre-approve all games not subject to a tribal-state compact and any modifications to such games. Contrary to the NIGC's representation in its notice to the 2006 Classification Regulations as carried over into the current Proposed Rule, the effect and substance of the current Proposed Regulations is the precisely same as the previously abandoned Classification Procedure Regulations.

related technology before those games are offered by tribal governments and doing so would violate the jurisdiction of tribal governments and their agencies. Doing so would also violate the IGRA.

The Commission appears to assume that all gaming equipment currently in play with class II gaming would be replaced within five years whether or not the Proposed Regulations are adopted as a final rule. The Commission's assumption appears vendor driven or supported, and the reality is that not all tribal governments involved in class II gaming would or will choose to, need to, or possibly afford to, replace all of their class II gaming equipment during the time periods assumed by the Commission. The Tribe understands that the Proposed Regulations, if implemented as proposed, will effectively force a one hundred percent replacement of all existing class II gaming technology – a true windfall for gaming vendors at a great cost to tribal governments. *See* Meister Economic Study, *supra*, at p. iv (predicts increased capital, deployment, and compliance costs of up to approximately $347.9 million over the five-year purported "grandfather" period in the Proposed Regulations and notes that "[i]t is likely that a large proportion, if not all, of those increased costs would be borne by tribes"). The Proposed Regulations further appear to provide an unfair advantage to a few gaming vendors who are anticipated to provide the few acceptable games. These outcomes serve no legitimate public purpose and violate Congress' intent that the IGRA be for the benefit of tribes. Important trust responsibilities are implicated and violated by the Proposed Regulations.

The Commission's current rulemaking initiatives have created an environment of uncertainty making it difficult for the Tribe's agencies to determine what new games should or can be implemented in the Tribe's gaming facility as class II gaming. The Proposed Regulations have also created an environment of uncertainty between tribes and states as to the regulatory framework intended by Congress, thus discouraging negotiations for class III gaming compacts. That uncertainty will not be remedied by moving forward with the Proposed Regulations. Respectfully, if the Commission seeks to reduce the uncertainty surrounding class II gaming by virtue of the Commission's rulemaking initiatives, the Commission will abandon the Proposed Regulations.

## II. **Proposed Rule**.

### A. Overview.

The Proposed Rule is objectionable for many reasons including without limitation: (a) the Proposed Rule violates the inherent sovereignty retained by the Miccosukee Tribe of Indians of Florida and other tribal governments; (b) the Proposed Rule represents an unsupportable assertion of authority by the Commission contrary to the Commission's authority as delegated by Congress under the IGRA and the Proposed Rule violates the jurisdiction of tribal agencies, along with state agencies, other federal agencies, and the authority of the Congress; (c) the Proposed Rule violates the IGRA and binding judicial precedent with which the Commission must comply; (d) the Proposed Rule will likely cause substantial uncertainty in the regulation of tribal gaming; (e)

inadequate consultation occurred with the Miccosukee Tribe of Indians of Florida,[14] and we suspect other tribal governments,[15] including as to the need and purpose of the Proposed Rule; (f) the Commission came to the consultation table with a pre-conceived rule;[16] and, (g) the Commission failed to consider viable and less burdensome alternatives to the Proposed Rule.[17] In connection with the Commission's purported consultation, the Advisory Committee and rulemaking process established and apparently utilized by the Commission in connection with its drafting efforts as to the Proposed Rule and the interrelated Proposed Standards Regulations violated federal laws.

B. The Commission is an Agency of Limited Authority and Lacks the Authority to Promulgate or to Enforce the Proposed Rule.

The IGRA must be read in the context under which the statute was enacted, which we discuss below, and in the context of federal Indian law.[18] Prior to the enactment of the IGRA, states had attempted to enforce their gaming laws with respect to tribal government gaming on tribal lands. These efforts had uniformly been rejected by the courts[19] culminating in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Supreme Court in *Cabazon Band* held that, where state law permitted and regulated gaming activity under its laws, Indian tribes as a matter of tribal sovereignty and federal Indian law could engage in, or license and regulate, such activity free from state jurisdiction or regulation.

Similarly, prior to the enactment of the IGRA, federal law permitted the involvement of the federal government in tribal gaming in only limited respects. The Johnson Act prohibited the use or

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[14] *See* nn. 172 to 180 and accompanying discussion.

[15] Each tribal government is separate, distinct, and has unique rights. We do not purport through these comments to speak for other tribal governments. The Tribe, however, would ask for the same comity from the NIGC before the NIGC asserts that consultation occurred with the Tribe by virtue of consultation, to the extent that such consultation has occurred, between the NIGC and other tribal governments.

[16] *Id.*

[17] *See* nn. 182-184 and accompanying discussion.

[18] Tribal sovereignty serves as "a backdrop against which the applicable . . . federal statutes must be read." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 172 (1973); *see also Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 123-24 (1993) (same); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent authority over their members and territories," *quoting Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (recognizing tribes as "distinct political communities, having territorial boundaries, within which their authority is exclusive"); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 216-17 (1987) (the Supreme Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," *quoting United States v. Mazurie*, 419 U.S. 544, 557 (1975), and the review must "proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *quoting, New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983)); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 178 (1980) (where congressional intent is not "readily apparent . . . the tradition of Indian sovereignty" may serve "[a]s a guide to ascertaining that intent").

[19] *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981) (bingo falling within a category of gaming that the state has chosen to regulate and tribal bingo therefore not subject to state law), *cert. denied*, 455 U.S. 1020 (1982); *Barona Group of Capitan Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) (state laws as to bingo civil-regulatory and not applicable to tribal bingo game), *cert. denied*, 461 U.S. 929 (1983); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Williquette*, 629 F. Supp. 689 (W.D. Wis. 1986) (Wisconsin raffle laws, which were deemed civil-regulatory and construed to include pull tab gaming, not applicable to tribal gaming); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 518 F.Supp. 712 (W.D. Wis. 1981) (Wisconsin bingo laws deemed civil-regulatory and not applicable to tribal gaming).

possession of slot machines or gambling devices in Indian country.[20] Section 81 of Title 25 of the United States Code, required the approval of the Secretary of the Interior for certain kinds of tribal contracts touching tribal lands or claims.[21] Prior to the IGRA, existing law did not provide a basis for federal regulation of tribal gaming.[22]

Several years of debate over Indian gaming occurred in Congress prior to the passage of the IGRA.[23] Although some have posited that the IGRA was enacted by Congress in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, various members of Congress had explored legislation intended to protect tribal gaming from incursion or control by outside non-tribal interests over several years of debate prior to the enactment of the IGRA.[24] In any event, after the Supreme Court in the *Cabazon* decision firmly fixed the right of Indian tribes with respect to gambling activities on their lands, the Congress in the 100th Congress proposed legislation in Senate Bill 555 ("S. 555"), which was ultimately enacted as the IGRA.[25]

The primary purpose of the IGRA was to benefit tribes, whose rights were to be preserved consistent with the rest of the IGRA.[26] To protect tribal rights to gaming against arguments of state jurisdiction over or the application of state laws relating to tribal gaming, the IGRA created a comprehensive regulatory framework for tribal gaming intended to preempt state laws relating to gaming.[27]

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[20] The Johnson Act, however, is not a law permitting federal regulation of Indian gaming. The Johnson Act is a criminal law applicable to slot machines and certain gambling devices. *See* 15 U.S.C. §§1171-1178.

[21] The only Indian gaming use of the Section 81 authority, in the pre-IGRA era, was the approval of gaming management contracts entered into by tribes. Section 81 was a law for the protection of tribes and did not give the Secretary any power to regulate otherwise legal gaming on the reservation. Under the IGRA, Secretarial authority for management contracts has been transferred to the NIGC. *See* 25 U.S.C. 2711(h).

[22] 25 U.S.C. §2701(3) ("existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands").

[23] *See* F. Ducheneaux & P.S. Taylor, *Tribal Sovereignty and the Powers of the National Indian Gaming Commission* (referred as the "Tribal Sovereignty Paper") (the 2005 paper (a) discusses at length, from the experiences of persons involved in the consideration and drafting of legislation involving tribal gaming, the legislative intent behind the IGRA, and, (b) reviews the history of prior proceedings and proposed legislation considered by the Congress in connection with tribal gaming). We have borrowed, and in the instance of economy paraphrased, from the Tribal Sovereignty Paper in connection with our comments and credit should be given to the authors. Our apologies for any errors.

[24] A review of the various legislative proposals considered by Congress prior to the final enactment of the IGRA reveals that each attempt to recognize extensive regulatory authority in the states or in the federal government over class II gaming was rejected by the Congress. Tribal Sovereignty Paper, *supra*.

[25] Final agreement was apparently reached in the Senate on S. 555 in late April 1988. Tribal Sovereignty Paper, *supra*. On May 13th, the Senate Indian Affairs Committee took up consideration of S. 555. *Id.* It adopted an amendment in the nature of a substitute that was the text of the compromise and ordered the bill reported favorably, as amended, to the Senate. *Id.* On August 3rd, just prior to the adjournment of the Congress for the Labor Day recess, the Committee filed the Senate Report on S. 555. *Id.* On September 15th, the Senate passed S. 555, as amended, by voice vote. *Id.* S. 555, as passed by the Senate, was received in the House on September 22nd. *Id.* The House debate on S. 555, under suspension of the rules, was completed on September 26th. *Id.* On September 27th, the bill passed on a roll call vote of 323 ayes and 84 noes. *Id.* The bill that became the IGRA was signed into law by the President on October 17, 1988. *Id.*

[26] *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied*, 541 U.S. 974 (2004); *see* 25 U.S.C. §2702(1) and (2) (providing purposes of the IGRA as "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" and "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players").

[27] Courts have remarked on the IGRA's comprehensive nature. *See, e.g., Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 538 (9th Cir. 1994), *cert. denied*, 516 U.S. 912 (1995); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F.Supp. 645, 648 (D. Wis. 1990) (describing the IGRA as "establish[ing] a comprehensive scheme for the regulation of gaming on Indian lands"). The comprehensive

A secondary purpose of the Act was to provide for "federal standards" under which *tribal governments* would conduct and regulate such gaming. The "federal standards" are contained in the IGRA and represent, to the extent such standards are allowable, a limitation by Congress of pre-existing tribal rights. As discussed below, the "federal standards" for tribal gaming are those statutory standards established by the express terms of the IGRA, *i.e.*, the statutory requirement that all tribal gaming be conducted under tribal gaming ordinances, that tribal gaming ordinances satisfy the enumerated statutory requirements, that tribal governments license primary management officials and key employees according to the statutory requirements as to suitability, that contracts with non-tribal entities for the operation or management of tribal gaming activities meet the statutory requirements as to suitability (for class II gaming) and key contract terms including contract length and compensation, and the appropriate subject matter for tribal-state compacts for class III gaming.

Lastly, Congress through the IGRA balanced the competing interests of tribal governments, the states, and the federal government, in the regulation of gaming on Indian lands. Under the IGRA, Congress recognized three classes of gaming on Indian lands: class I gaming (social gaming played for prizes of nominal value and ceremonial gaming); class II gaming (bingo, related games and technology, and certain non-banked card games); and, class III gaming (all gaming that is neither class I nor class II gaming).[28] Congress subjected each class of gaming to a different

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treatment of tribal gaming in the IGRA gives rise to a complete preemptive effect as to state laws. *Gaming Corporation of America v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996) ("Examination of the text and structure of IGRA, its legislative history, and its jurisdictional framework likewise indicates that Congress intended it completely preempt state law . . . There is a comprehensive treatment of issues affecting the regulation of Indian gaming," and the Senate Report for the IGRA "demonstrates the intent of Congress that IGRA have extraordinary preemptive power, both because of its broad language and because it demonstrates that Congress foresaw that it would be federal courts which made determinations about gaming"); *Senate Report*, *supra*, at 3076 ("S.555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands . . . Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed").

[28] Congress provided the following clear, express definitions for the three classes of gaming:

> For purposes of this chapter -
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> * * *
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> (6) The term 'class I gaming' means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.
>
> (7) (A) The term 'class II gaming' means -
>
> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) -
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and
>
> (ii) card games that . . .
>
> * * *
>
> (B) The term 'class II gaming' does not include -
>
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
>
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
>
> * * *
>
> (8) The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming.

regulatory scheme with Congress providing under the express terms of the IGRA the respective roles to be played by tribal governments, the states, and the federal government (and as to the federal government assigning different roles to the Secretary,[29] the Commission, and the Department of Justice), for each class of gaming.[30]

Importantly, Congress recognized in the IGRA instances under which tribal governments would self-regulate their gaming activities, whether class II or class III gaming, and under which such self-regulation would be without significant involvement by non-tribal entities.[31] The provision for such self-regulation, by statute as to class II gaming, and by negotiation through a tribal-state compact or by Secretarial procedures, for class III gaming, was and is consistent with Congress' stated purpose in the IGRA of "promoting . . . self sufficiency, and strong tribal governments."[32] The provision for self-regulation by tribal governments is consistent with the intent of the IGRA, as expressed in the various provisions of the IGRA, of protecting tribal interests as to tribal gaming

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25 U.S.C. §2703. The games of pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo are referred to in these comments as the "Sub-games" to bingo because of the requirement in the IGRA that the Sub-games be played at the same location as bingo to constitute class II gaming.

[29] The term "Secretary" as used in these comments refers to the Secretary for the United States Department of the Interior, or the Secretary's designee.

[30] *Seminole Tribe, supra*, 517 U.S. 44; 25 U.S.C. §2710.

The IGRA commits the regulation of class I gaming entirely to tribal governments. See 25 U.S.C. §2703(6) and §2710(a) ("Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter"). Class I gaming is not discussed within these comments except as noted.

As discussed in these comments, and as provided in the IGRA and recognized by the courts, class II gaming was made subject to the primary regulation by tribes with *oversight* as provided in the IGRA by the NIGC. *Seminole Tribe, supra*, 517 U.S. 44, 48, n. 1 ("Regulation of class II gaming contemplates a federal role, but places primary emphasis on tribal self-regulation"); *Coeur d'Alene Tribe, et. al v. State of Idaho*, 842 F.Supp. 1268, 1273 (D. Idaho 1994) ("Indian tribes have jurisdiction over class II gaming, subject to the requirements of IGRA and the oversight of the National Indian Gaming Commission"), *aff'd.*, 51 F.3d 876 (9th Cir. 1995), *cert. denied*, 516 U.S. 916; 25 U.S.C. §§2703(7) and 2710(b);.

In turn, regulation of class III gaming, which includes slot machines (and their functional equivalents, "facsimiles"), lotteries similar to the games offered by state lotteries, and casino gaming, was made subject to good faith negotiations between tribal governments and states in the form of tribal-state compacts for class III gaming, or through procedures approved by the Secretary, with the NIGC having a minimal role (essentially none). *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 726 (9th Cir. 2003) (explaining that Congress "devised the Tribal-State compacting process as a means to resolve the most contentiously debated issue in the legislation: which authority – Tribal, State, or Federal – would regulate class III gaming"), *cert. denied*, 125 S.Ct. 51; *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 690 (1st Cir. 1994) ("[T]he tribal-state compact is the exclusive method of regulating class III gaming"), *cert. denied*, 513 U.S. 919; *see also Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 634 (D.C. Cir. 1994) ("The Commission's principal responsibilities relate to what [IGRA] designates as 'class II gaming'"), *cert. denied*, 512 U.S. 1221 (1994); *United States v. 1020 Electronic Gambling Machines*, 38 F.Supp.2d 1213, 1216 (E.D. Wash. 1998) ("The [NIGC] does have significant powers . . . However, it regulates class II gaming, whereas this case involves class III gaming"); 25 U.S.C. §2703(7) and (8) and §2710 (d); Senate Report, at 3079-3080 ("Section 2703 (7)(B) specifically excludes from class II, and thus from regulation by . . . the National Indian Gaming Commission, so-called banking card games and slot machines . . . The Committee's intent in this instance is to acknowledge the important difference in regulation that such games and machines require and to acknowledge that a tribal-State compact for regulation of such games is preferable to Commission regulation").

[31] *See* 25 U.S.C. §2710(c) (providing for certificates of self-regulation for class II gaming and providing that following certification that such self-regulated class II gaming activities are subject to reduced oversight by the NIGC); 25 U.S.C. §2710(d)(5) ("Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe"); Senate Report, *supra*, at 3084 ("The use of state regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming – many can and will"); 134 Cong.Rec. at S12651 (daily ed. September 15, 1988) ("Some tribes can assume more responsibility than others and it is entirely conceivable that a state may want to defer to a tribal regulatory system and maintain only an oversight one").

[32] 25 U.S.C. §2702(1).

while providing for only minimal intrusion by non-tribal governmental entities including by the Commission.

The IGRA also created the Commission.[33] The limited powers of the Commission are as established in the IGRA. As discussed below, the Commission's role under the IGRA is primarily one of oversight to see that a tribal government implements the "federal standards" set out in the tribe's gaming ordinance. The Commission was given other limited powers for class II gaming such as management contract review and approval, establishment of fees and assessment of fines, granting of certificates of self-regulation, *etc.*, and there is no question that the Commission has a "regulatory role" with respect to class II gaming.

The question of the meaning and nature of the Commission's "regulatory role" for class II gaming is a question of degree. Fortunately, there is no ambiguity and the question as to the degree of regulatory authority provided for the Commission was answered by Congress in the IGRA. As a review of the language, structure, purpose, and legislative history of the IGRA makes clear,[34] the role of the Commission is not one of altering the jurisdictional framework in the IGRA by altering the statutory definitions of class II gaming, or one of developing and imposing detailed regulations on Indian gaming as provided in the Proposed Rule *in lieu* of tribal government decisions on the regulation of such gaming, but one of limited "oversight" of each tribal government's own regulatory efforts under its tribal gaming ordinance and the provisions contained in the IGRA. Respectfully, the Commission can implement the IGRA, but the Commission cannot change the IGRA as the Commission would do with the Proposed Rule.

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[33] 25 U.S.C. §2704.

[34] A court reviewing the action of an agency "shall determine all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706. The reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). The court will abide by the agency's factual findings if they are "supported by substantial evidence" and affirm the agency's orders so long as there is a rational connection between the facts found and the choices made. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004).

When a court reviews an agency's interpretation of a statute, the court turns to a two-step analysis. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step is determining whether Congress has spoken directly to the "precise question at issue," for if it has, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If however, the statute is silent or ambiguous on the specific issue, "the question for the court is whether the agency's answer is based upon a permissible construction of the statute." *Id.* at 843. When the agency's construction of a statute is challenged, its "interpretation need not be the best or most natural one by grammatical or other standards . . . Rather [it] need be only reasonable to warrant deference." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (citations omitted).

As indicated, the first step of the *Chevron* test requires the Court to determine whether Congress "has directly spoken to the precise question at issue." *Chevron, supra*, 467 U.S. at 842. At this stage of the analysis, the Court employs the "traditional tools of statutory construction, including examination of the statute's text, structure, purpose, and legislative history." *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 105 (D.C.Cir.2005) (quotation omitted). "When Congress has spoken, we are bound by that pronouncement and that ends this Court's inquiry." *National Treasury Employees Union v. Federal Labor Relations Auth.*, 392 F.3d 498, 500 (D.C. Cir. 2004); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (where the will of Congress is clear, the "inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress," *quoting Chevron, supra*, 467 U.S. at 843). Only when "Congress's intent is ambiguous" does the Court proceed to the second step of the inquiry, and consider "whether the agency's interpretation is based on a permissible construction of the statute." *New York v. U.S. Envtl. Prot. Agency*, 413 F.3d 3, 17 (D.C. Cir. 2005) (quotation omitted).

1. The Commission Lacks the Authority to Change the Jurisdictional Framework in the IGRA.

Put simply, the Proposed Rule seeks to change the definitions provided by Congress for class II gaming. The Proposed Rule would improperly: (a) provide extra-statutory definitions for the game of bingo; (b) impose extra-statutory definitional limitations on the game of bingo merely if played with technology; (c) provide definitional limitations on games similar to bingo in a manner inconsistent with Congressional intent in the IGRA; (d) impose definitional limitations on games similar to bingo merely if played with technology; and, (e) impose arbitrary definitional distinctions for games of pull-tabs and instant bingo inconsistent with games such as lotto and games similar to bingo even though all such games, *i.e.*, the Sub-games to bingo, are class II gaming merely if played at the same location as bingo.[35]

Congress went to great lengths in the IGRA to create a comprehensive regulatory framework for tribal gaming by class of gaming. The definitions of class II gaming are the cornerstone of the jurisdictional and regulatory framework established by Congress in the IGRA for tribal gaming. Congress, having provided a detailed definition of bingo, clearly knew how to define bingo gaming and if Congress had intended a different or additional set of definitions to apply if technology was used, Congress would have provided those additional definitions in the statute. Only Congress, and plainly not the Commission, has the authority to alter the jurisdictional framework for tribal gaming.

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[35] Under the Proposed Rule, bingo is no longer the type of game (or class of games) defined under the IGRA but if played with technology is defined *inter alia* under the Proposed Rule as using a specified number of objects of specified characteristics, cards of specified characteristics, patterns of specified characteristics, prizes of specified characteristics, a rate of play of specified characteristics, and a specified method of play including but not limited to house "sleep" and covering rules. *Compare* 25 U.S.C. §2703 (7)(A), *with* Definition Regulations, *supra*, 72 Fed. Reg. 60482 (proposed §502.8), *and*, Classification Regulations, *supra*, 72 Fed. Reg. 60483 (proposed §502.9 and proposed part 546). As to bingo, the IGRA provides a clear definition of the game and makes no distinction as to the definition of bingo "whether or not electronic, computer, or other technologic aids are used in connection therewith." 25 U.S.C. §2703(7)(A)(i). Under the Proposed Rule, the category of games similar to bingo is no longer the catch-all category specified and intended under the IGRA but if played with technology is defined *inter alia* under the Proposed Rule as using a specified number of objects of specified characteristics, cards of specified characteristics, patterns of specified characteristics, prizes of specified characteristics, a rate of play of specified characteristics, and a specified method of play including but not limited to house "sleep, and covering rules. *Compare* 25 U.S.C. §2703 (7)(A) and (B), *with* Definition Regulations, *supra*, 72 Fed. Reg. 60482 (proposed §502.8), *and*, Classification Regulations, *supra*, 72 Fed. Reg. 60483 (proposed §502.9 and part 546). Under the Proposed Rule, the games of pull-tabs and instant bingo if played with technology are treated as the same game even though enumerated under the IGRA as distinct games. *Compare* 25 U.S.C. §2703 (7)(A)(i)(III), *with* Classification Regulations, *supra*, 72 Fed. Reg. 60483 (proposed §502.9 and proposed part 546). Under the Proposed Rule, the games of pull-tabs and instant bingo are apparently treated differently for purposes of technology than lotto and games similar to bingo even though all of the Sub-games to bingo are treated the same under the IGRA as being within the class of games of class II bingo merely if "played in the same location." *Compare* 25 U.S.C. §2703 (7)(A)(i)(III), *with* Definition Regulations, *supra*, 72 Fed. Reg. 60482 (proposed §502.8), *and*, Classification Regulations, *supra*, 72 Fed. Reg. 60483 (proposed §502.9 and proposed part 546). Additionally, the IGRA removes from class II gaming *machines or devices* that are functionally equivalent to slot machines (*i.e.*, machines or devices in which one player plays a game with or against a machine or device as compared to with or against other players) but the IGRA makes no distinction as to *the medium used in the cards* for any class II game (whether for bingo or the Sub-games to bingo). 25 U.S.C. §2703(7)(B)(ii). The carve-out from class II gaming is not as to the "medium" of the cards used for class II games, but for certain machines or devices. *Id.* Nonetheless, the Proposed Rule attempts to apply a distinction as to the medium used for the cards in the Sub-games of pull-tabs and instant bingo as compared to lotto and games similar to bingo even though all of these games appear in the same statutory provision of the IGRA, in fact right next to each other, in a list of enumerated games, without distinction and without any requirement for treatment as class II gaming other than the location requirement. *Compare* 25 U.S.C. §2703 (7)(A) and (B), *with* Definition Regulations, *supra*, 72 Fed. Reg. 60482 (proposed §502.8), *and*, Classification Regulations, *supra*, 72 Fed. Reg. 60483 (proposed §502.9 and proposed part 546).

a. The IGRA Does Not Grant the Commission the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming.

The IGRA provides a detailed and meaningful definition of class II gaming.[36] Nonetheless, the Commission has come up with the Proposed Rule and seeks to impose additional detailed and limiting extra-statutory definitions of class II gaming. In other words, the Commission through the Proposed Rule seeks to change the definitions and, intentionally or not, the jurisdictional framework in the IGRA.

The IGRA contains no express grant of authority to the Commission to re-write the definitions and the jurisdictional framework established by Congress in the IGRA.[37] The fact that Congress did not expressly negate the authority of the Commission to re-write the statutory definitions of gaming and the related jurisdictional framework does not create an ambiguity in the statute allowing the Commission to move forward with the Proposed Rule.[38] An agency has no power to act "unless and until Congress confers power upon it."[39] *The power apparently claimed by the Commission in the Proposed Rule* to change the statutory definitions of, and the jurisdictional framework for, tribal gaming *is further contradicted by the express wording of the IGRA.*

Under the IGRA, Congress found that tribal governments "*have the exclusive right to regulate gaming activity* on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming."[40] Congress provided through the IGRA a "statutory basis for the *operation of gaming by Indian tribes*" and a "statutory basis for the *regulation of gaming by an Indian tribe*."[41] The IGRA is premised on a strong foundation and presumption of primary tribal operation and regulation of tribal gaming activities.

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[36] 25 U.S.C. §2703(7).

[37] The starting point for the interpretation of a statute is "the language of the statute itself." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985); *see American Bankers Ass'n v. National Credit Union Admin.*, 271 F.3d 262, 267 (D.C.Cir.2001) ("*Chevron* step one analysis begins with the statute's text."); *Southern California Edison Co. v. FERC*, 195 F.3d 17, 22 (D.C.Cir.1999) ("Of course, the starting point, and the most traditional tool of statutory construction, is to read the text itself.").

[38] The mere failure of Congress to spell out on the fact of a statute that an agency lacks a certain power cannot alone supply the ambiguity that would permit the agency to exercise that power under *Chevron*. As the Court of Appeals for the District of Columbia has explained:

> [T]o suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power ... is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent. Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

*Oil, Chem. & Atomic Workers. Int'l Union AFL-CIO v. NLRB*, 46 F.3d 82, 90 (D.C.Cir.1995) (emphasis in original).

[39] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[40] 25 U.S.C. §2701(5) (emphasis added).

[41] 25 U.S.C. §2702 (1) and (2) (emphasis added); 25 U.S.C. §2713(d) (provides that "Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission"); 25 U.S.C. §2710(d)(5) ("Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such

"Any class II gaming on Indian lands shall continue to be *within the jurisdiction of the Indian tribes*, but shall be subject to the provisions of this chapter."[42] Further, "*[a]n Indian tribe may engage in, or license and regulate, class II gaming* on Indian lands within such tribe's jurisdiction, if – (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise prohibited on Indian lands by Federal law),[43] and (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman [of the NIGC]." The IGRA's requirement that all tribal gaming be conducted under an approved *tribal gaming ordinance* or resolution meeting certain statutory requirements includes the primary "federal standards" imposed on tribal gaming under the IGRA.[44] Additionally, "[a] separate license issued *by the Indian tribe* shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted."[45]

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regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe . . . that is in effect"). Of course, the NIGC's regulations must be authorized by the IGRA to require compliance by a tribal government.

[42] 25 U.S.C. §2710(a)(2) (emphasis added).

[43] Senate Report, *supra*, at 3082 ("The phrase 'not otherwise prohibited by Federal Law' refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175 . . . That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto . . . It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands . . . The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955 and 1961-1968; 39 U.S.C. 3005; and except as noted above . . . 15 U.S.C. 1171-1178").

[44] 25 U.S.C. §2710(b)(1)(A) and (B). The IGRA requires the Chairman of the NIGC to approve a tribal gaming ordinance if the ordinance satisfies the *standards* imposed by Congress in the IGRA. 25 U.S.C. §2710(b)(2) (provides that the "Chairman shall approve" and includes among the requirements for tribal gaming ordinances provisions that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity," "net revenues from any tribal gaming are not to be used for purposes" other than those specified in the statute, "annual outside audits, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission," "all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming will be subject to such independent audits, "the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety," "there is an adequate system which – . . . ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and . . . includes . . . tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses . . . a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment . . . and . . . notification by the Indian tribe to the Commission of the results of such background check before the issuance of any such licensees," and "Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if . . . the Indian tribe has prepared a plan to allocate revenues to uses authorized . . . [and] the plan is approved by the Secretary as adequate . . .").

The requirement of tribal gaming ordinances under the IGRA was not intended to act as a bar, or pre-condition, to the right of a tribal government to engage in, and to regulate, tribal gaming. *See* 25 U.S.C. §2710(e) (provides that "For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if its meets the requirements of this section . . . Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent that such ordinance or resolution is consistent with the provisions of this chapter"); *see also* 25 U.S.C. §2714 ("Decisions made by the Commission pursuant to sections 2710 . . . of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5").

[45] 25 U.S.C. §2710(b) (emphasis added). The NIGC, similar to the Proposed Regulations, has also sought to impose unauthorized extra-statutory conditions on tribal gaming ordinances, on the issuance of gaming facility licenses, and also on tribal laws relating to the environment, public health and safety. *See* Final Rule, Facility License Standards. 73 Fed.Reg. 6019 (February 1, 2008) ("Facility License Rule"); *see also* Letter to NIGC dated December 3, 2007, re: Comments on Proposed Rule on Facility License Standards (NIGC-2007-007-0011).

As to class III gaming, such activities apparently "shall be lawful on Indian lands only if such activities are . . . (A) authorized by an ordinance or resolution that . . . is adopted by the governing body *of the Indian tribe* . . . (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and, (C) conducted in conformance with a Tribal-State compact entered into *by the Indian tribe* and the State . . . that is in effect."[46] Upon request *of a tribe*, "having jurisdiction over the Indian lands upon *which a class III gaming activity* is being conducted, or is to be conducted," "a State shall negotiate with the Indian tribe in good faith to enter into such a compact."[47] The Congress in the IGRA also imposed statutory "federal standards" for the potential content and subject matter of tribal-state compacts for class III gaming.[48]

Under the IGRA, states have essentially no role with respect to class II gaming.[49] Essentially the only role for states with respect to tribal gaming is through the opportunity provided in the IGRA for a state to engage in good faith negotiations with a tribal government for a tribal-state gaming compact for class III gaming.

The federal government's role as to the regulation of tribal gaming is divided across several agencies. Although the Commission, as discussed below, has significant powers under the IGRA for the oversight regulation of tribal gaming those powers are not absolute and do not extend to all areas of the regulation of tribal gaming. The Secretary approves "revenue allocation plans" under which net revenues from gaming activities to make per capita payments to members of an Indian tribe.[50] The Secretary also must approve any tribal-state compact for class III gaming.[51]

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[46] 25 U.S.C. §2710(d)(1) (incorporates the requirements for tribal gaming ordinances for class II gaming into the ordinance requirements for class III gaming); *see also* 25 U.S.C. §2710(b) (imposes as a federal standard the requirement that all tribal gaming be conducted under tribal gaming ordinances or resolutions that include certain statutorily imposed standards as to licensing, regulation, and operation of tribal gaming facilities); 25 U.S.C. §2710(d)(2)(B) (requires the Chairman of the NIGC to approve such tribal ordinances meeting the requirements of 25 U.S.C. §2710(b) for class III gaming unless the Chairman determines that the ordinance was not duly adopted or that the tribal governing body was significantly and unduly influenced by a statutorily defined "bad" actor).

[47] 25 U.S.C. §2710(d)(3)(A).

[48] 25 U.S.C. §2710(d)(3)(C) (provides that "Any Tribal-State compact negotiated . . . may include provisions relating to – (i) the application of criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity . . . (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations . . . (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity . . . (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities . . . (v) remedies for breach of contract . . . (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing, and . . . (vii) any other subjects that are directly related to the operation of gaming activities"); 25 U.S.C. §2710(d)(4) (provides that "Except for any assessments that may be agreed to under [25 U.S.C. §2710(d)(3)(C)(iii)], nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe to engage in a class III activity . . . No State may refuse to enter into the negotiations . . . based upon the lack of such authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment").

[49] *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 364 (8th Cir. 1990) ("Congress intended that class II gaming be subject to tribal and federal oversight, and that the states' regulatory role be limited to overseeing class III gaming, pursuant to a Tribal-State compact . . . Permitting [a state] to apply its substantive law to the . . . game here, which is properly classified as class II gaming, conflicts with congressional intent"); *Oneida Tribe of Indians of Wisconsin v. State of Wisconsin*, 951 F.2d 757, 759 (7th Cir. 1991) ("If the games in question are class II gaming activities . . . they may be prohibited by the State, but they cannot be regulated by the State"); *Sycuan Band of Mission Indians v. Roache, supra*, 54 F.3d 535, 539 ("at least insofar as . . . Class II-type gaming . . . the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public policy off and on by minute degrees").

[50] 25 U.S.C. §2710(b)(3).

Alternatively, should a tribe and a state not be able to conclude negotiations for a compact for class III gaming, the Secretary is authorized to and "shall prescribe, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction."[52] The Department of Justice has jurisdiction to take enforcement action against gaming not conforming to the requirements of the IGRA.[53] The Department of Justice also prosecutes for theft or embezzlement from tribal gaming facilities operated by or for or licensed by an Indian tribe pursuant to a tribal gaming ordinance approved by the Commission.[54]

Turning to the Commission, the Commission through the Chairman approves tribal gaming ordinances that meet the statutorily required "federal standards" in the IGRA.[55] The Commission also reviews and comments on licenses issued by tribal governments with respect to primary management officials and key employees of tribal gaming facilities who do not meet the "federal standards" provided in the IGRA as to who may appropriately be so licensed.[56]

The Commission, through the Chairman, approves of management contracts under which a tribe has contracted for the operation and management of a class II gaming activity.[57] As to management contracts, the IGRA provides enumerated "federal standards" for the content of such management contracts[58] and for the exclusion of certain individuals from the role operation and

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[51] 25 U.S.C. §2710(d)(3)(B) ("such compact shall take effect only when notice of approval by the Secretary of the compact has been published by the Secretary in the Federal Register); 25 U.S.C. §2710(d)(8)(A) (authorizes the Secretary "to approve any Tribal State compact entered into between an Indian tribe and a sate governing gaming on Indian lands of such Indian tribe"); 25 U.S.C. §2710(d)(8)(B) (provides that "The Secretary may disapprove a compact . . . only if such compact violates . . . (i) any provision of this chapter . . . (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands . . . or (iii) the trust obligations of the United States to Indians"); 25 U.S.C. §2710(d)(8)(C) (provides that "If the Secretary does not approve or disapprove a compact described . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter"); and, 25 U.S.C. §2710(d)(8)(D) ("The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved").

[52] 25 U.S.C. §2710(d)7)(B)(vii)(II).

[53] 18 U.S.C. §1166(d).

[54] 18 U.S.C. §§1167 and 1168.

[55] 25 U.S.C. §2710(b)(2) and §2710(d)(2)(B).

[56] 25 U.S.C. §2710(c) (provides that "The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license," and, "If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license"). Consistent with the primary regulatory authority of tribal governments under the IGRA, the final licensing decision remains with the tribal government.

[57] 25 U.S.C. §2711.

[58] 25 U.S.C. 2711(b) (the Chairman may approve of a management contract for class II gaming "only if he determines that it provides at least – (1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis; (2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity; (3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs; (4) for an agreed ceiling for the repayment of development and construction costs; (5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and (6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission"); 25 U.S.C. §2711(c) ("The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of

management of the tribal gaming facility.[59] The Commission, through the Chairman, also approves of management contracts under which a tribe has contracted for the operation and management of a class III gaming activity although the Commission's review and approval authority is more limited for class III gaming activities than in the case of a management contract for class II gaming.[60]

The Commission has the authority to monitor and inspect class II gaming activities.[61] However, with the exception of review and approval of tribal gaming ordinances and management contracts, the Commission does not have regulatory authority with respect to class III gaming.[62] The Commission also has the authority to issues fines[63] and to close a game[64] for substantial violations

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surrounding circumstances . . . Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues" and, "Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe"); and, 25 U.S.C. §2711(e) ("The Chairman shall not approve any contract if the Chairman determines that . . . a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract").

[59] 25 U.S.C. §2711(e) (requires Chairman to disapprove of any contract if the Chairman determines that – (1) any person [having a direct financial interest in, or management responsibility for, such contract] (A) is an elected member of the governing body of the Indian tribe which is the party to the management contract; (B) has been or subsequently is convicted of any felony or gaming offense; (C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or (D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto . . . (2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity . . . (3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter").

[60] 25 U.S.C. §2710(d)(9) (providing that the "Chairman's review and approval of such contract [for class III gaming] shall be governed by the provisions of" only "subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title").

[61] 25 U.S.C. §2706 (b) (provides that the "Commission – (1) shall monitor class II gaming conducted on Indian lands on a continuing basis; (2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted; (3) shall conduct or cause to be conducted such background investigations as may be necessary; (4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter; (5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States; (6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations; (7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes; (8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate; (9) may administer oaths or affirmations to witnesses appearing before the Commission").

[62] *See Colorado River Indian Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006) ("This leads us back to the opening question – what is the statutory basis empowering the Commission to regulate class III gaming operations? Finding none . . .").

[63] 25 U.S.C. §2713 (a) (provides that "Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title," "The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman," and, "Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine . . . the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission").

[64] 25 U.S.C. §2713 (b) (provides that "The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions

of the IGRA, regulations promulgated by the Commission (but only as such regulations are authorized by the IGRA), or of tribal regulations, ordinances or resolutions.

The Commission has the authority to issue regulations specifically as to its enforcement authority[65] and to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter."[66] The grant of authority to the Commission to generally promulgate regulations and guidelines must be read in the context of, and as to the express terms of the IGRA.[67]

Although the Commission does have significant powers as to the review and approval of tribal gaming ordinances, the review and approval of management contracts, the monitoring and inspection of class II gaming activities, and the issuance of fines and closure of games, such powers do not extend to issuing regulations modifying the definitions of class II gaming expressly provided in the IGRA, and therefore, the overall jurisdictional framework in the IGRA. There is no indication through the wording of the IGRA that Congress intended to grant such rulemaking authority to the Commission including as to the Proposed Rule.[68]

b. The Structure of the IGRA Reveals that the Commission Lacks the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming.

The rulemaking authority assumed in the Proposed Rule is further contrary to the structure of the IGRA as outlined above. Examination of the IGRA, both its text and structure, reveals that Congress provided a comprehensive treatment of issues affecting the regulation of tribal gaming. "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming

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approved under section 2710 or 2712 of this title" and "Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved . . . Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation").

[65] 25 U.S.C. §2713.

[66] 25 U.S.C. §2706(b)(10).

[67] *Colorado River Indian Tribes v. NIGC*, 383 F.Supp.2d 123 (D.C. Dist. 2005), *aff'd*, 466 F.3d 134 (D.C. Cir. 2006).

[68] Existing court decisions regarding the Commission's prior efforts at definitions regulations are consistent with the conclusion that the Commission can implement the definitions in the IGRA (as to that portion of the IGRA included in chapter 29 of Title 25 of the United States Code) but the Commission may not change the definitions of class II gaming already expressly provided for in the IGRA as the Commission has proposed to do in the Proposed Rule. *See Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 827 F.Supp.26, 33 (D.D.C. 1993) (definition regulations of NIGC not infirm because "In its definition, the Commission included non-exclusive examples of class III gaming, all of which were either listed specifically in the statute (subsections (a)(1) and (b) of the Commission's definition) or enumerated in the accompanying Senate Report (subsections (a)(2), (c), and (d)) . . . Moreover, and most importantly, the definition retains – verbatim - the statutory definition in its opening clause . . . Merely providing clarifying examples explicitly derived from the statute or its legislative history can hardly be termed contrary to law"), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994), *cert. denied*, 512 U.S. 1221 (1994); *Shakopee Mdewakanton Sioux Community v. Hope*, 798 F.Supp. 1399, 1404 (D. Minn. 1992) ("Neither the statute nor its legislative history makes any mention of keno . . . Because the statute is silent on the precise question at hand, the Court must turn to the second part of the *Chevron* analysis and determine whether the agency's answer to the question is based on a permissible construction of the statute"), *aff'd*, 16 F.3d 261 (8th Cir. 1994). One key defect of the Proposed Rule is that the Proposed Rule seeks to change the definitions of bingo, pull tabs, instant bingo, games similar to bingo, and facsimiles, all of which games and devices have already been addressed by the Congress in the IGRA.

activity is not specifically prohibited by Federal law and is conducted within a State which does no, as a matter of criminal law and public policy, prohibit such gaming activity."[69] The IGRA establishes the "federal standards" for gaming on Indian lands.[70] The IGRA established the Commission to oversee tribal regulation including as to licensing, background checks of key employees, and other facets of gaming. The Commission has input into tribal licensing decisions, and can approve or disapprove management contracts and tribal gaming ordinances subject to the terms of the IGRA. The Commission can also suspend gaming, impose fines, perform its own background checks of individuals, and request the aid of other federal agencies.

"At no point does IGRA give a state the right to make particularized decisions regarding a specific class II gaming operation . . .The statute itself reveals a comprehensive regulatory structure for Indian gaming. The only avenue for significant state involvement is through tribal-state compacts covering class III gaming."[71] Further, "the statute classifies all gaming into three categories and places traditional (class I) gaming entirely beyond the reach of both federal and state regulation . . . States can influence class II gaming on Indian lands within their borders only if they prohibit those games for everyone under all circumstances . . . Short of a complete ban, states have virtually no regulatory role in class II gaming."[72]

The overall structure and the wording of the individual provisions of the Proposed Rule would remove from class II gaming, and thereby from tribal jurisdiction free from state interference, games and technology that Congress classified as class II gaming under the IGRA. Unless authorized by an Act of Congress, the jurisdiction of state governments and application of state laws do not extend to Indian lands.[73] Only Congress, and not the Commission, can alter the jurisdictional framework established by the IGRA through the definition of the various classes of gaming.

Additionally, as to federal interests represented by the IGRA with respect to the regulation of tribal gaming, the express terms of the IGRA provide clear evidence that for class II gaming tribal governments are to play the lead and active role in regulating their gaming activities, with the Commission playing only a secondary oversight regulatory role. In fact, only as to the approval of management contracts does the Commission appear to have a veto right.

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[69] 25 U.S.C. §2701(5).

[70] 25 U.S.C. §2702(3).

[71] *Gaming Corp. of America v. Dorsey & Whitney, supra*, 88 F.3d 536, 544.

[72] *Id.*, 88 F.3d at 544.

[73] Senate Report, *supra*, at 3075 ("It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands . . . In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands").

Such rulemaking authority as assumed by the Commission in the Proposed Rule would directly impinge on the authority and sovereignty of tribal governments for all gaming activities, and on the authority of states, in the negotiation of compacts for class III gaming activities, the approval by the Secretary of compacts for class III gaming compacts, the authority of the Secretary to approve procedures for class III gaming, and the responsibility of the Department of Justice with respect to gaming that does not conform to the requirements of the IGRA. The structure of the IGRA plainly recognizes different roles for different entities (with the IGRA recognizing the primary role of tribal governments but also providing a lesser regulatory role to states and various federal agencies as provided by the express terms of the IGRA) as to the operation and regulation of tribal gaming. The structure of the IGRA is inconsistent with the Commission's assumption of authority, as a single entity within the comprehensive framework and regulatory system fashioned by Congress in the IGRA,[74] seeking through the Proposed Rule to change the definitions in the IGRA and thereby change the jurisdictional framework affecting all of the *other* entities[75] with roles to play under the IGRA.

c. The Legislative History of the IGRA Reveals that the Commission Lacks the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming.

Congress undertook to balance, and has already balanced, in the IGRA the respective interests of tribal governments, the federal government, and the various states.[76] As discussed further below,[77] the legislative history of the IGRA demonstrates that in the balancing undertaken by Congress in the IGRA, Congress did not authorize the Commission to change the definitional framework in the

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[74] *Cf. Bowen v. American Hospital Association*, 476 U.S. 610, 642 n. 30 (1986) (plurality opinion) (Court noting that because of the large number of agencies implementing the statute there was "not the same basis for deference predicated on expertise as we found in . . . *Chevron*"); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (Court noting that "No agency . . . has been given authority to issue regulations implementing the generally applicable provisions of the [statute]").

[75] An agency is owed no deference when the subject matter of the agency's action is not within the authority delegated to the agency by the Congress. *See, e.g., Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019, 1031 (10th Cir. 2003), *cert. denied, Ashcroft v. Seneca-Cayuga Tribe of Oklahoma*, 540 U.S. 1218 (2004); *Murphy Exploration & Prod. Co. v. Dept. of the Interior*, 252 F.3d 473, 478-479 (D.C. Cir. 2001).

[76] In *Cabazon Band of Mission Indians, supra*, 480 U.S. 202, the Supreme Court determined that California could not apply its own laws regulating bingo prize limits and card games to Indian gaming because the relevant interests of the tribes and the federal government outweighed the state's regulatory interest. Congress incorporated the distinction in *Cabazon* between prohibition and regulation but rather than directing the federal courts to perform the balancing of interest between the states on the one side and the tribe and the federal government on the other, Congress conducted the balancing itself by dividing gaming into three separate classes, allowing states to prohibit class II and class III gaming only if those activities were prohibited throughout a state, and required a tribal-state compact for class III gaming. *See* 25 U.S.C. §§2703, 2704, 2705, 2706, 2710, 2711, 2713, 2714(c), and 2719. The Senate Report makes clear Congress' intent in setting up the tripartite scheme and considering state, tribal, and federal interests:

> [I]n the final analysis, *it is the responsibility of the Congress*, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands. S. 555 recognizes primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For class III casino, parimutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.

Senate Report, *supra*, at 3073 (emphasis added).

[77] See nn. 84 to 94 and accompanying discussion.

IGRA by changing the definitions of class II gaming. The Proposed Rule is not within the powers authorized by Congress to the Commission.

2. The Commission's Oversight Role Under the IGRA Does Not Include the Authority to Impose Detailed and Pervasive Regulations of the Type Included in the Proposed Rule.

a. The IGRA Does Not Grant the Commission the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Rule.

The IGRA contains no express grant of authority to the Commission to promulgate pervasive regulations as to the regulation and operation of tribal gaming activities. Here too, the fact that Congress did not expressly negate the authority of the Commission does not create an ambiguity in the statute allowing the Commission to move forward with the Proposed Rule.[78] An agency has no power to act "unless and until Congress confers power upon it."[79] *The power apparently claimed by the Commission in the Proposed Rule* to promulgate pervasive regulations for the operation and regulation of tribal gaming activities *is further contradicted by the express wording of the IGRA*. Beyond the Commission's approval authority for tribal gaming ordinances, and its approval authority for management contracts, the bulk of the Commission's authority for class II gaming resides in the monitoring of and enforcement as to the efforts of tribal governments to comply with the provisions of their tribal gaming ordinances and the IGRA. Quite simply, the powers of the Commission under the IGRA of monitoring and enforcement do not equate with an authority, as assumed under the Proposed Rule, of promulgating still additional standards for tribal governments to comply with so as to give the Commission still more to monitor and enforce.[80]

b. The Structure of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Rule.

Similarly, the structure of the IGRA reveals that the Commission lacks the authority to promulgate detailed or pervasive regulations as to the operation of class II gaming of the type included in the Proposed Rule. The Congress provided in the IGRA for standards of operation for tribal gaming in only two areas. First, the issue of operating standards was made by Congress a valid subject for negotiations between tribal governments and states for class III tribal-state gaming compacts.[81]

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[78] See n. 38 and accompanying discussion.

[79] See n. 39 and accompanying discussion.

[80] *Cf. Colorado River Indian Tribes v. NIGC, supra*, 383 F.Supp.2d at 135, n. 8 ("the power to investigate and enforce does not also imply the authority to create new rules for the agency to investigate and enforce").

[81] 25 U.S.C. §2710(d)(3)(C) (includes among the authorized topics for a tribal-state compact for class III gaming "standards for the operation of such activity and the maintenance of the gaming facility, including licensing"); *see also* 25 U.S.C. §2710(d)(7)(B)(vii) (provides that when a state and a tribe cannot agree on a tribal-state compact for class III gaming that the Secretary can step in to "prescribe . . . procedures . . . under which class III gaming may be conducted by the tribe).

Second, the issue of operating standards are included among the "federal standards" required as to tribal gaming ordinances including as to class II gaming.[82] Neither provision in the IGRA, *i.e.*, as to tribal-state compacts for class III gaming, or tribal ordinances including for class II gaming, mentions or implies any significant involvement by the Commission in developing the actual standards of operation for tribal gaming. Although the Commission has oversight for a tribe's compliance with its gaming ordinance, that oversight does not amount to a power to promulgate terms in addition to the terms required by the IGRA with respect to tribal gaming ordinances. Other provisions in the IGRA also portend a limited role for the Commission that is at odds with the assumption of authority undertaken by the Commission in the Proposed Rule.[83]

c. The Legislative History of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming or of the Type Included in the Proposed Rule.

A review of the proceedings and the various legislation proposed and considered by Congress over a five year period prior to the enactment of the IGRA makes clear that the Commission does not have the authority to adopt pervasive regulations for class II or class III gaming. In fact, a thorough review of the consideration by the Congress of Indian gaming legislation during that period leading up to the enactment of IGRA reveals that each of several legislative attempts to provide extensive regulatory authority in the states or in federal agencies over tribal class II gaming was rejected by Congress.[84]

The Senate Report[85] on S. 555 almost immediately restates the several year record of congressional intent in the enactment of Indian gaming legislation: "S. 555 recognizes the *primary tribal jurisdiction over bingo* and card parlor *operations* although *oversight and certain other powers* are vested in a federally established National Indian Gaming Commission. For class III casino, pari-mutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues."[86]

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[82] *See* 25 U.S.C. §2710(b)(2)(E) and (F) (includes among the "federal standards" for tribal gaming ordinances a requirement that the ordinances provide "the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety," and, "there is an adequate system which . . . ensures . . . that oversight of such officials and their management is conducted on an ongoing basis"). The Proposed Rule calls into question the prior approvals by the NIGC of countless tribal gaming ordinances for tribal gaming.

[83] For example, the IGRA provides for limited funding for the Commission. 25 U.S.C. §§2717 and 2718. Second, the implication in the IGRA as originally enacted was that the Commission would meet "at least once every 4 months" and that the associate commissioners might not serve on a full-time basis. 25 U.S.C. §§2704(f) and 2706(c)(1).

[84] Tribal Sovereignty Paper, *supra*.

[85] Other than Senate and House floor debate, the Senate report is the only formal legislative history on S. 555 as enacted into law. *Cf. Garcia v. United States*, 469 U.S. 70, 76 (1984) ("The authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation," internal quotation marks omitted). This does not, however, entirely discount the value of the legislative history in the 98th, 99th, and 100th Congress as to other bills relating to tribal gaming, including bills with identical or nearly identical language as contained in S. 555, as reported, or the floor debates on the bill that became the IGRA.

[86] Senate Report, *supra*, at 3073 (emphasis added). The Senate Report sets out with clarity congressional intent that tribal governments retained their inherent right to regulate class II gaming and that this inherent right was not divested in favor of the NIGC.

Comments made by Senator Inouye, who managed the bill on the Senate floor, are also helpful in understanding the underlying intention of Congress with respect to the limited regulatory role of the Commission. Senator Inouye stated: "(T)he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, *with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands*."[87] The strong federal interest in preserving the sovereign rights of tribal governments is directly contrary to the powers and authority presumed by the Commission in the Proposed Rule.

Senator Evans also evidenced his understanding of the limited scope of the Commission's role. In discussing the amendment to the federal criminal code made by section 23 of S. 555, he noted: "It is my understanding that this language would, for purposes of Federal law, make applicable to Indian country all State laws pertaining to licensing, regulation, or prohibition of gambling *except class I and II gambling which will be regulated by a tribe* and class III gambling which will be regulated by a tribal-state compact."[88] In stating that class II gaming would be regulated by the tribe, Senator Evans made no mention at all of the Commission.[89] The comments by Senator Evans make sense because in a bigger context the IGRA was intended to protect tribal rights to engage in gaming and to set apart those types of tribal gaming for which the states would be allowed a right to have a say.

After the House received the bill as passed by the Senate, Congressman Udall, the House Manager of the bill, had the bill held at the desk and did not seek its referral to his committee. S. 555 was as he stated: "[A] compromise, hammered out in the Senate after considerable debate and negotiations. It is a solution which is minimally acceptable to me and I support its enactment."[90] The bill was taken up in the House under suspension of the rules, a House procedure that permits no amendments to the bill, but which requires a two-thirds vote for passage. Mrs. Vucanovich of Nevada, who managed the bill for the Republicans, made clear her understanding of the limited

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[87] 134 Cong.Rec. at S24022 (daily ed. September 15, 1988) (emphasis added).

[88] 134 Cong.Rec. at S24025 (daily ed. September 15, 1988) (emphasis added).

[89] Senator Evans made another comment that day, which reveals his understanding of the primary role of the tribes in regulation class II gaming:

> Given this fact [tribal success in keeping out organized crime], *the Indian gaming regulatory act should not be construed, either inside or outside the field of gaming, as a derogation of the tribes' right to govern themselves and to attain economic self-sufficiency* . . . With that set of important caveats and warnings, Mr. President, I believe the act which we have before us has come as close as we can to providing appropriate regulation while at the same time not stepping over the boundary and derogating rights of Indian people any more than the rights they gave up 150 years ago in the signing of our treaties.

134 Cong.Rec. at S24028 (daily ed. September 15, 1988) (emphasis added).

[90] 134 Cong.Rec. at H25367 (daily ed. September 26, 1988). Congressman Udall also noted that the language of S. 555 was contained in other bills considered in the House:

> While the Interior Committee did not consider and report S. 555, certain members and committee staff did participate actively in negotiations in the Senate which gave rise to the compromise of S. 555. In addition, many of the provisions of S. 555 are included in House legislation which has been considered by the Interior Committee and the House in this and past congresses.

134 Cong.Rec. at H25376 (daily ed. September 26, 1988).

oversight role of the NIGC with respect to class II gaming, stating: "Under the bill, class II gaming will be regulated by the tribes with oversight by a five [sic] member national Indian gaming commission."[91]

Before the enactment of IGRA, it was admitted that the federal government had no statutory power to impose its regulations on the conduct of otherwise legal gaming activities by tribal governments on Indian lands. This was a sovereign right of the tribes. If IGRA took that right away from the tribes and gave it to the Commission, that would be an abrogation of the right. The Senate and the House both made clear the understanding that tribal rights not expressly abrogated were not intended to be affected by the legislation. As Senator Evans so eloquently stated, "[i]f tribal rights are not explicitly abrogated in the language of this bill, no such restriction should be construed."[92] Congressman Udall also set forth on the record the applicability of the Indian canons of construction and the intent that the canons be applied to the IGRA when he stated: "Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the time-honored rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor."[93]

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[91] 134 Cong.Rec. at H25377 (daily ed. September 26, 1988).

[92] 134 Cong.Rec. at H25377 (daily ed. September 26, 1988). Senator Evans was also familiar with those canons when he stated on the Senate floor:

> Furthermore, this bill was drafted with the full understanding of the principles of law which guide our relationship with the Indian tribes.
>
> The inherent sovereign rights of the Indian tribes were reserved by the tribes for the fullest and unencumbered benefit of the Indian people. These rights have been recognized time and time again by the highest courts of our Nation, and they continue in existence except in rare instances where the Congress has exercised its power to restrict them. When this body has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogation of tribal rights must have been done expressly and unambiguously.
>
> Many long hours were devoted to this legislation to iron out any possible ambiguities, and we hope to have achieved a bill both clear and concise in this regard. Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision.

134 Cong.Rec. at S24027 (daily ed. September 15, 1988).

[93] 134 Cong.Rec. at H25377 (daily ed. September 26, 1988). "The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (quotation marks, citation, and alterations omitted). In issues arising under Indian law, "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id. (citing McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973)); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) ("[I]f there is ambiguity . . . the doubt would benefit the tribe, for ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence"); *Cobell v. Norton*, 240 F.3d 1081, 1101, 1103 (D.C. Cir. 2001) ("while ordinarily we defer to an agency's interpretations of ambiguous statutes entrusted to it for administration, Chevron deference is not applicable in this case . . . [T]he canon of liberality of construction in favor of Indians acts with its 'special strength' even where a federal agency would in other cases enjoy the implied authority to implement ambiguous statutory language supporting a competing interpretation").

The Indian canon only has a role in the interpretation of an ambiguous statute. *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633, 637 (D.C. Cir. 1994) ("Which construction of the Act favors the Indians . . . In this case there is no need to choose . . . When the statutory language is clear, as it is here, the canon may not be applied"); *Negonsott v. Samuels*, 507 U.S. 99, 110 (1993) (court concluding where statute "unambiguously confers jurisdiction" "we therefore have no occasion to resort to this [Indian] canon of statutory construction"). Where as here the statute is clear as to the limited oversight role and rulemaking authority of the NIGC for class II gaming (and as discussed in these comments the statute plainly did not authorize the NIGC to promulgate regulations such as the Proposed Rule), there is no need to apply the canons. However, if the NIGC (as it has in recent public meetings) seeks to advance the position that the IGRA is ambiguous as to the NIGC's rulemaking authority and the Proposed Rule is intended to "help" the tribes, that position would not be a proper application of the Indian canon of construction. *See, e.g., Colorado River Indian Tribes v. NIGC, supra*, 383 F.Supp.2d 123, 146-147 ("Except in rare cases where it has acted recklessly, the federal

The powers assumed by the Commission in the Proposed Rule do not appear in and were not authorized by the Congress under the express terms of the IGRA. The secondary stated purpose of the IGRA, *i.e.*, to provide for "federal standards," refers to the standards stated in the statute. The power of the Commission to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter," as provided for at 25 U.S.C. section 2706, subdivision (b)(10) (referring to only the provisions of the Act codified in Title 25, Chapter 29), refers only to the limited oversight role of the Commission and not to an authority to promulgate additional extra-statutory limitations on the regulatory authority of tribal governments. The Commission is charged with executing the substantive provisions, or standards, of the IGRA as written by Congress, but the Commission does not have the authority to change the IGRA as provided in the Proposed Rule. Again, an agency is owed no deference when the subject matter of the agency's action is not within the authority delegated to the agency by the Congress.[94]

3. The General Purposes of the IGRA Do Not Grant the Commission the Authority to Change the Jurisdictional Framework in the IGRA by Changing the Definitions of Class II Gaming or to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Rule.

The Commission cannot properly, and should not, rely upon the general purposes of the IGRA to support an ever increasing role for the Commission in the oversight regulation of tribal gaming, including as provided in the Proposed Rule.

First, the general purposes of the IGRA, and its substantive provisions, do not support the Proposed Rule.[95] Second, several oversight and legislative hearings have been held since 1988 by committees of the Congress on the implementation of the IGRA and on Indian gaming in general.[96] These oversight and legislative hearings have demonstrated the clear, post-IGRA understanding of the limited scope of the Commission's authority over class II gaming. Representations made by the Commission in these oversight hearings contained explicit denials of power in the Commission to promulgate and enforce pervasive class II gaming regulations such as

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government will claim in every case to have the best interests of the Indian tribes in mind . . . To hold that the canon always favors the conduct of the federal government in such a circumstance would strip the canon of its salutary role in protecting the position of the Indian tribes in the trust relationship . . .The MICS for class III gaming represents a significant incursion on tribal sovereignty, superseding less stringent tribal gaming ordinances . . .and subjecting tribes to a range of new controls and lengthy audits . . . The Court will not read the Indian canon to favor the agency's position simply because the agency is well intentioned"); *United States v. Errol D., Jr.*, 292 F.3d 1159, 1163-64 (9th Cir. 2002) ("Because the [statute] constitutes an incursion into the tribal sovereignty of Indian tribes, justified by the 'guardianship' powers of Congress, ambiguous provisions in the [statute] must be interpreted in favor of the tribes"); *Michigan v. EPA*, 268 F.3d 1075, 1085 (D.C. Cir. 2001) ("If anything, by claiming independent federal jurisdiction over 'in question' areas, [the agency] is construing these statutes for its own benefit").

[94] See n. 75 and accompanying discussion.

[95] *See* 25 U.S.C. §2702.

[96] See 25 U.S.C. §2706(c) (requiring periodic reports to the Congress).

the Proposed Rule.[97] Representations made by the Commission in these prior oversight hearings also demonstrated the Commission's recognition and understanding of a difference in type and degree of regulation, *i.e.*, between that of oversight as intended and provided by the Congress in the IGRA and the type of pervasive regulation envisioned now by the Commission in the Proposed Rule.[98]

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[97] For example, on April 20, 1994, the Senate Committee on Indian Affairs held an oversight hearing in part on the role of the federal government in the regulation of Indian gaming activities. Anthony J. Hope, Chairman of the NIGC, testified. The following excerpt from his written statement reveals that even the NIGC understood that it lacked general regulatory authority over class II gaming:

> In enacting IGRA, the Congress recognized that different degrees of regulation are required for different forms of gaming. However, it made the regulation of Indian gaming more complicated by dividing regulation among several federal agencies, the tribes, and the many states where Indian gaming is conducted . . . [C]lass II gaming is bingo, bingo related games and certain non-banking card games and is regulated primarily by the tribes with *oversight* by the Commission . . . The primary responsibility for the regulation of class II gaming falls to the Indian tribes . . . *In class II, the post-licensing regulation, or the day-to-day operational regulation, is performed by the tribe with oversight by the Commission . . . The Commission lacks the authority usually found in a comprehensive independent regulatory agency.* For example, the Commission has *no authority* to impose (1) *standards for the conduct of class II games*, (2) *internal and financial controls*, or, (3) standards for licensing vendors and suppliers.

Testimony of Anthony J. Hope, *cited in*, Tribal Sovereignty Paper (emphasis added); *see Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) ("[a]n agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view," quotation omitted); *Pennsylvania Medical Society v. Snider*, 29 F.3d 886, 895 (3d Cir. 1994) (holding under *Chevron* step one that "the statutory language, context and legislative history demonstrate that Congress has spoken on the issue" averse to the agency, and emphasizing that even the agency had previously shared that view of the statute); *Colorado River Indian Tribes v. NIGC, supra*, 383 F.Supp.2d at142 (court noting that "it would blink reality to ignore the fact even the defendant agency tasked with implementing the statute had earlier taken the view that it lacked the authority to issue the regulations in question").

[98] Chairman Hope's statement on April 20, 1994, also discussed a need from the perspective of the NIGC for standards for class II and III gaming. The following extensive quote from his statement further makes clear the fact that IGRA did not vest in the NIGC the powers it now claims:

> If Congress is going to impose responsibility on the federal government, however, it must recognize that the logical instrumentality, the NIGC, as presently structured, cannot possibly provide the type and degree of regulation required. Its *powers* and *staffing* would have to be greatly expanded and restructured.
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> If the Commission is authorized to regulate class III gaming, it must be authorized to impose such regulations as it deems appropriate on the tribal operations. The federal regulator should not be expected or required to negotiate with the tribes as the states now are under the IGRA. The compact negotiation mechanism was designed to allow two sovereign governments to negotiate as equals to accommodate their respective interests. The decisions of an agency of the federal government as to what regulation is necessary should not be subject to negotiation. The agency's decisions and actions would, of course be subject to judicial review under the usual standards.
>
> **Minimum Standards**
>
> The Congress should set minimum standards for the regulation and monitoring of class III gaming, or authorize the Commission to prescribe them by regulation. In addition to responsibility for initial procedures, such as ordinance and contract review and arranging for background checks, the Commission should be empowered to prescribe rules for the *internal control* over money and chips, extension of credit, security, auditing, *and similar functions*. If it is given responsibility of regulating class III gaming, it should be empowered to regulate in the same manner as gaming commissions in the states. *It should be empowered to enforce standards set by statute or committed by statute to its discretion.*
>
> *These powers should also be extended to class II operations.*

Testimony of Anthony J. Hope, *cited in*, Tribal Sovereignty Paper (emphasis added), *see also* NIGC Website, http://www.nigc.gov/AboutUs/FrequentlyAskedQuestions/tabid/57/Default.aspx#q_31 (website visited November 13, 2006, and last visited on March 8, 2008) ("Although the budget of the Commission has not grown proportionately to the growth of the Indian gaming industry, it is important to note that *tribal gaming commissions are the primary regulators of gaming operations . . . The role of the Commission is to monitor and validate the work of tribal gaming regulators* . . . Further, depending on individual Tribal-State compacts, some states may also play a regulatory role in Indian gaming operations" and "In general, the Commission does not specifically approve the opening of every Indian casino or gaming facility . . . However, before a tribe may operate a gaming facility, the NIGC must have reviewed and approved a tribe's gaming ordinance . . . A tribe must also license every gaming facility . . . In addition, the land upon which the gaming operation will be located must be Indian land for gaming purposes . . . If a tribe wishes to have management by a third party, the Commission must review and approve the management contract").

The requirements, as contemplated by the Proposed Rule, of certifications prior to the play of class II gaming, represent an improper back-door attempt by the Commission to regulate the issues raised in the Proposed Rule and improperly intrude upon tribal sovereignty and matters or decisions reserved for tribal governments under the wording and structure of the IGRA, *i.e.*, on matters already addressed by the Congress in the IGRA. The combination of certifications and detailed classification standards in the Proposed Rule represents a pre-condition not authorized in the IGRA to a tribal government's decision to engage in gaming. The attempted assumption of jurisdiction by the Commission in areas for which jurisdiction has not been authorized by the Congress will lead to increased tensions and confusion between tribal governments and other agencies for which jurisdiction has appropriately been authorized by tribes, by agreement, or by Congress by statute.

The Proposed Rule is not a valid exercise of the provision in the IGRA appearing to authorize the Commission to "promulgate such regulations and guidelines as it deems proper to implement the provisions of this chapter."[99] An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority.[100]

"All questions of government are ultimately questions of ends and means."[101] Agencies such as the Commission are therefore "bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate and prescribed, for the pursuit of these purposes."[102] Here,

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[99] 25 U.S.C. §2706(b)(10). For the reasons stated in these comments, and others, the Proposed Rule does not fit into the holding or rationale of *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973). The notion that a statute may be interpreted to conform to some view of its general purposes, even if the resulting interpretation is at odds with the statute's clear language, structure, and legislative history, has long been rejected. As the Supreme Court has explained:

> Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

*Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 373-374 (1986).

Read in context, the IGRA does not contain a broad delegation of rulemaking authority to the NIGC. However, even if such a broad delegation existed in the IGRA, a broad delegation of rulemaking authority would not allow an agency to ignore the plain text of the statute. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27, 33-34 (D.C. Cir. 1992) (holding that it is "far-fetched" to read a provision that directs agencies to "utilize their authorities in furtherance of the purposes" of the Endangered Species Act to "implicitly supersede" statutory language channeling the agency's powers and thereby authorize an agency "to do 'whatever it takes' to protect the threatened and endangered species"); *Public Serv. Comm. of State of New York v. FERC*, 866 F.2d 487, 491-492 (D.C. Cir. 1989) (grant of authority to an agency "to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter" does not "overrid[e] the balance achieved" in the rest of the statute and such authority "cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections and the functions there defined," quotations omitted).

[100] *See Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006); *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002) ("Our previous decisions, *Mourning* included, do not authorize agencies to contravene Congress' will in this manner").

[101] *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 290 (D.C. Cir. 1993).

[102] *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231, n. 4 (1994); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220 (2002) ("vague notions of a statute's basic purpose are . . . inadequate to overcome the words of its text regarding the specific issue under consideration," quotation and emphasis omitted); *Orca Bay Seafoods v. Northwest Truck Sales, Inc.*, 32 F.3d 433, 436 (9th Cir. 1994) ("We would be writing a different statute, not just construing it, by treating the words as having no meaning and looking instead to the values underlying the language to be construed so that we can create law effectuating those values," quotations omitted).

Congress provided not only the purposes of the IGRA but also the means to accomplish these purposes through the "statutory basis for the regulation of gaming by an Indian tribe" provided in the IGRA. The Proposed Rule does not comport with the means selected by the Congress for effectuating the purposes of the IGRA.

The Commission lacks the statutory authority under IGRA to promulgate, and impose upon tribal governments, the very kind of detailed controls that the Commission is now attempting to adopt in the Proposed Rule. The present Proposed Rule goes to the core of the jurisdictional framework between tribes and states imposed by Congress on tribal gaming. On both scores, *i.e.*, overly pervasive regulation and the attempted alteration of the jurisdictional framework in the IGRA, the Proposed Regulations violate the basic rules of federal Indian law and the IGRA. The IGRA does not authorize or support the NIGC's Proposed Rule. The IGRA is clear and unambiguous as to the limited scope of the NIGC's authority. Any effort by the NIGC to occupy a regulatory role with respect to the subject matters at hand in the Proposed Rule, including a redefining of the jurisdictional framework established by Congress in the IGRA, is arbitrary, capricious, and contrary to law.[103]

C. The Proposed Rule Effectively Calls into Question Eighteen Years of Judicial and Administrative Decisions on Which Tribes, States, and Others have Relied; A Clear Need for the Proposed Rule does not Exist.

In connection with the definition of class II gaming, the federal government, states, and tribes, have invested substantial time, energy and money. The authorities on game classification under the IGRA presently include the IGRA, its legislative history, to a limited extent the Johnson Act and its legislative history, and eighteen year's worth of federal cases applying the IGRA and the Johnson Act to tribal gaming, prior regulations and other final agency actions by the NIGC,[104] and, to the extent well-reasoned, prior informal statements and opinions of the NIGC.[105] The result is a well-defined classification scheme that has been established from and after the enactment of the

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[103] Any effort by the NIGC to occupy an "assumed" regulatory role subjects tribal governments to an illusory regulation (*i.e.*, a regulation not authorized by Congress) under which tribes must either comply with an invalid regulation or face the time, energy, and money associated with defending against merit less efforts by the NIGC to claim jurisdiction and take enforcement actions. The Proposed Rule also constitutes an abuse of discretion to the extent that the NIGC has discretion as to the subject matter of the Proposed Rule. Our concern in this area continues given the NIGC's recent practice in connection with other regulatory initiatives of "assuming authority until the NIGC is told otherwise" as is the case in the area of minimum internal control standards, the Proposed Rule, the Proposed Standards Regulations, health and safety standards, facility licensing standards, *etc.* In that regard, the Proposed Rule represents an unauthorized expenditure by the Commission of funds collected by the Commission from tribal governments. Fees collected by the Commission from tribal governments may be used by the Commission only to carry out duties authorized by the IGRA. 25 U.S.C. §2717a ("fees collected . . . shall be available to carry out *the duties* of the Commission . . .," emphasis added). Again, the limited provision of funding for the NIGC in the IGRA is consistent with the fact that the NIGC, although having an important role to play, has a limited role under the IGRA.

[104] *See* n. 34 and accompanying discussion.

[105] Courts also "consider the opinion letters issued by the Commission that the interpret [IGRA] and the interpretations of [IGRA] set forth by the Commission in the Federal Register." *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 719 (10th Cir. 2000). Although such informal statements of the NIGC are not entitled to the same deference as may be provided the agency's regulations under *Chevron*, such informal statements and opinions may be "entitled to respect" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Christensen v. Harris County*, 529 U.S. 576, 586-588 (2000). Under *Skidmore*, the weight to be afforded non-binding agency interpretations "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and those factors giving it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

IGRA and that includes relevant statutes,[106] legislative histories,[107] federal court cases,[108] NIGC regulations and agency actions,[109] and NIGC informal statements published in the federal register,[110] bulletins,[111] and advisory opinions.[112]

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[106] *E.g.*, 25 U.S.C. §§2703 and 2710; 18 U.S.C. §1166; and, 15 U.S.C. §§1171, *et seq.*

[107] *See Senate Report, supra*; 126 Cong. Rec. S23883 (September 15, 1988) (Sens. Domenici, Reid, and Burdick) ("IGRA Debate"); H.R. Rep. No. 2769, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. Serv. 4240 ("1950 Gambling Devices Report"); and, H.R. Rep. No. 1828, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Ad. News Serv. 4240 ("1962 Gambling Devices Report").

[108] *E.g.*, *California v. Cabazon Band of Mission Indians, supra*, 480 U.S. 202; *Cabazon Band of Mission Indians v. NIGC*, 827 F. Supp. 26 (D.D.C. 1993), *aff'd*, 14 F.3d 633 (D.C. Cir. 1994); *Cabazon Band of Mission Indians v. NIGC, supra*, 14 F.3d 633 (D.C. Cir. 1994); *Diamond Game Enterprises v. Reno*, 9 F.Supp.2d 13 (D.D.C. 1998), *rev'd*, 230 F.3d 365 (D.C. Cir. 2000); *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 2000); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 742 F.Supp. 1033 (W.D. Wisc. 1990), *aff'd* 951 F.2d 757 (7th Cir. 1991); *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757 (7th Cir. 1991); *Shakopee Mdewakanton Sioux Community v. NIGC*, 798 F.Supp. 1399 (D. Minn. 1992), *aff'd*, 16 F.3d 261 (8th Cir. 1994); *Shakopee Mdewakanton Sioux Community v. NIGC*, 16 F.3d 261 (8th Cir. 1994); *Spokane Tribe of Indians v. United States*, 782 F.Supp. 520 (E.D. Wash. 1991), *aff'd* 972 F.2d 1090 (9th Cir. 1992); *Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992); *Sycuan Band of Mission Indians v. Roache*, No. 91-1648 (BTM) (S.D. Cal., March 30, 1992), *reprinted in* 19 Indian L.Reptr. 3079 (April 1992), *aff'd.*, 54 F.3d 535 (9th Cir. 1995); *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995), *cert. denied*, *Sycuan Band of Mission Indians v. Pfingst*, 516 U.S. 912 (1995); *United Santee v. Santee Sioux Tribe of Nebraska*, 174 F.Supp.2d 1001 (D.Neb. 2001), *aff'd*, 324 F.3d 607 (8th Cir. 2003); *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th Cir. 2003), *cert. denied*, 540 U.S. 1229 (2004); *United States v. 103 Electronic Gambling Devices*, 1998 W.L. 827586 (N.D. Cal., November 23, 1998), *aff'd* 223 F.3d 1091 (9th Cir. 2000); *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 1998 U.S. Dist. Lexis 17293 (N.D. Okla., October 23, 1998); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); and, *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), *cert. denied*, *Ashcroft v. Seneca-Cayuga Tribe*, 540 U.S. 1218 (2004).

[109] *E.g.*, 25 C.F.R. §§502.2, 502.3, 502.4, 502.7, 502.8, 502.9, and 502.11. *See* 57 Fed. Reg. 12382 (April 9, 1992) ("1992 Definitions"). Sections 502.7, 502.8, and 502.9 of the NIGC's initial definitions were replaced effective July 17, 2002, by NIGC's Final Rule on Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002) ("2002 Definitions").

[110] *E.g.*, NIGC's Final Rule on Definitions Under the Indian Gaming Regulatory Act, 57 Fed.Reg. 12382 (April 9, 1992); NIGC's Final Rule on Definitions: Electronic, Computer or Other Technologic Aid; Electronic or Electromechanical Facsimile; Game Similar to Bingo, 67 Fed. Reg. 41166 (June 17, 2002); and, NIGC Notice of Withdrawal of Proposed Rule on Classification of Games, 67 Fed.Reg. 46134 (July 12, 2002); *see also*, NIGC Proposed Rule on Classification of Games, 64 Fed.Reg. 61234 (November 10, 1999); NIGC Proposed Rule Withdrawing Definitions: Electronic or Electromechanical Facsimile, 66 Fed.Reg. 33494 (June 22, 2001); and, NIGC Proposed Rule on Definitions: Electronic or Electromechanical Facsimile, Games Similar to Bingo, and Electronic, Computer, or other Technologic Aids to Class II Games, 67 Fed.Reg. 13296 (March 22, 2002).

[111] *E.g.*, NIGC Bulletin 93-4 (July 19, 1993) (*Cabazon Band of Mission Indians v. NIGC*); NIGC Bulletin 93-6 (October 26, 1993) (Commission enjoined in *Cabazon* case); NIGC Bulletin 94-1 (February 4, 1994) (*Cabazon Band of Mission Indians v. NIGC*); NIGC Bulletin 95-2 (October 24, 1995) (Pull-tab sales on Indian lands); NIGC Bulletin 98-1 (January 14, 1998) (Charitable Gaming); NIGC Bulletin 99-2 (August 18, 1999) (Class II games); and, NIGC Bulletin 03-3 (December 23, 2003) (Guidance on Classifying Games with Pre-Drawn Numbers).

[112] *E.g.*, NIGC Letter (September 14, 1992) (Cashpot); NIGC Letter (May 25, 1993) (Oasis); NIGC Letter (May 23, 1994) (Instant Scratch-Off); NIGC Letter (June 7, 1994) (Wildfire); NIGC Letter (November 14, 1994) (Pull-tabs); NIGC Letter (March 20, 1995) (Shooter Bingo); NIGC Letter (July 10, 1996) (MegaMania); NIGC Letter (November 12, 1996) (Wild Ball Bingo); NIGC Letter (April 9, 1997) (MegaMania); NIGC Letter (July 22, 1997) (Rocket Classics); NIGC Letter (July 23, 1997) (MegaMania); NIGC Letter (August 1, 1997) (Rocket Ante Up); NIGC Letter (June 8, 1998) (Tab Force); NIGC Letter (October 15, 1998) (All Star); NIGC Letter (April 7, 1999) (Crazy Reels); NIGC Letter (June 18, 1999) (Challenger 9); NIGC Letter (November 2, 1999) (Play Pull-Tab); NIGC Letter (February 29, 2000) (Magical Irish); NIGC Letter (June 9, 2000) (U-PIK-EM Bingo); NIGC Letter (June 21, 1999) (Tele Bingo); NIGC Letter (August 9, 1999) (NIB); NIGC Letter (November 2, 1999) (Evergreen); NIGC Letter (October 26, 2000) (Internet Bingo); NIGC Letter (November 2000) (NIB); NIGC Letter (March 13, 2001) (Win Sports Betting); NIGC Letter (March 27, 2001) (Wild Ball Bingo); NIGC Letter (May 31, 2001) (Break the Bank); NIGC Letter (2002) (Lima); NIGC Letter (April 15, 2002) (MegaNanza); NIGC Letter (November 5, 2002) (VGT Bingo); NIGC Letter (September 23, 2003) (Reel Time Bingo); NIGC Letter (September 26, 2003) (Mystery Bingo); NIGC Letter (October 17, 2003) (Phone Card Sweepstakes); NIGC Letter (January 7, 2004) (Reel Time Bingo); NIGC Letter (May 7, 2004) (Mystery Bingo); NIGC Letter (May 26, 2004) (Mystery Bingo); NIGC Letter (June 4, 2004) (Classic II Pull Tab System); NIGC Letter (October 18, 2004) (Rocket FastPlay Bingo 1.0); NIGC Letter (December 21, 2004) (DigiDeal Digital Card System); NIGC Letter (December 23, 2004) (Triple Threat Bingo); NIGC Letter (April 4, 2005) (Nova Gaming Bingo System); NIGC Letter (June 24, 2005) (Electronic Game Cards); and, NIGC Letter (August 25, 2005) (Nova Gaming Bingo System version 4.2.5.9). We do not agree with the analysis employed by the NIGC in each of its advisory opinions or other informal statements.

A careful review of these existing authorities on game classification reveals that the present Proposed Rule calls into question the extensive and detailed classification framework developed by the federal government, states, and tribes, and relied upon by tribes and states over the eighteen year period following the enactment of the IGRA. A careful review of these existing authorities on game classification reveals that the purported "need"[113] argued by the Commission for further "clarification" through the Proposed Rule of the classification scheme in the IGRA does not exist. A number of courts have indicated that the classification scheme in the IGRA is both clear and unambiguous including as to the Commission's principal focus in the Proposed Rule on the definition of bingo and as to allowed technology.[114]

As to allowable class II technology, the courts have already squared the relationship of the Johnson Act's prohibition for gambling devices with the IGRA's permitted use of technologic aids with class II gaming. The lack of an express exemption under the IGRA from the Johnson Act for class II gaming[115] early on raised a question over the Johnson Act's application to aids to the play of

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[113] As discussed below, the stated goal of the NIGC in support of adoption of the 2002 Definitions was also a purported "need" for amending the existing definition regulations to bring added clarity and, yet, the NIGC did not do so as to the then two key, potentially open issues surrounding game classification, *i.e.*, the relationship of the Johnson Act to technology played with class II gaming and the relationship between class II bingo-related games and class III lottery games. Fortunately, the distinction between class II bingo games (which are by definition lottery games Congress specifically made class II gaming under the IGRA), and class III lottery games, has previously been addressed in a series of court cases and otherwise addressed by the NIGC in its regulatory Definitions. The relationship between the Johnson Act and the IGRA has also been addressed in a series of prior court cases.

[114] *See. e.g.*, *Oneida, supra*, 742 F.Supp. 1033, 1038 (meaning of "lotto" in class II gaming); *Oneida, supra*, 951 F.2d 757, 764 (same); *Cabazon Band, supra*, 827 F.Supp. 26, 33 (meaning of "facsimile"); *Cabazon Band, supra*, 14 F.3d 633, 637 (meaning of "facsimile"); *Sycuan Band, supra*, 54 F.3d 535, 543 (meaning of "facsimile"); *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 (IGRA's definition of bingo). As the meaning of "facsimile" and "bingo" are clear from the wording of the statute, further definitions as included in the Proposed Rule are both unnecessary and improper.

[115] Congress included an express exemption in the IGRA from the Johnson Act only for certain class III gaming subject to a tribal-state compact. 25 U.S.C. §2710(d)(7) ("The provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that . . . is entered into . . . by a State in which gambling devices are legal"). Although not providing an express exemption in the IGRA from the Johnson Act for class II gaming, Congress allowed for the use of technologic aids to class II bingo related gaming. 25 U.S.C. §2703 (7). Congress' intention under the IGRA that the Johnson Act's prohibitions of gambling devices defined under 15 U.S.C. section 1171(a)(2) (gambling devices other than mechanical reel devices) not be applied to prohibit "electronic, computer, or other technologic aids" used in connection with class II bingo-related gaming is evidenced in part through the legislative history of the IGRA. A part of that legislative history provides:

> *Class II gaming* is defined in section 4(8)(A)(B)(C) and (D) Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends in section 4(8)(A)(i) that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.
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> The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands. The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303-1307, 1952-1955 and 1961-1968; 39 U.S.C. 3005; and except as noted above 15 U.S.C. 1171-1178.

class II bingo related gaming. The courts early on recognized that, except for the IGRA's repeal of the Johnson Act with respect to certain compacted class III gaming, "there is no other repeal of the Johnson Act, either express or by implication, in the IGRA . . . [I]n 25 U.S.C. §2710(b)(1)(A), Congress specifically states that class II gaming is subject to Federal law and the Senate Report states that the applicable "Federal law" is the Johnson Act, 15 U.S.C. §1175."[116]

The courts have uniformly concluded that the IGRA and the Johnson Act can be read together.[117] The courts have applied this conclusion (namely, that the Johnson Act and the IGRA can be read together), but have used two different paths of analysis, to allow "aids" to class II bingo gaming and without violation of the Johnson Act's prohibition against "gambling devices."

Under the first path of analysis, a number of courts have held that if technology used with a class II game is an "aid," then the technology does not violate the Johnson Act. *E.g.*, *Seneca-Cayuga Tribe*, *supra*, 327 F.3d 1019, 1035 ("we hold that if a piece of equipment is a technologic aid to an IGRA class II game, its use . . . within Indian country is then necessarily not proscribed as a gambling device under the Johnson Act . . . If a piece of equipment is an IGRA class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a 'gambling device' proscribed by the Johnson Act").[118] The first path of analysis employed by the courts may be viewed as giving the Johnson Act's definition of "gambling device" a narrow interpretation when applied to "aids" to class II gaming.[119]

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Senate Report, *supra*, at 3079, 3082.

[116] *Cabazon Band*, *supra*, 827 F.Supp. 26, 31.

[117] *103 Electronic Gambling Devices*, *supra*, 223 F.3d 1091, 1101 ("What matters now is how the two are to be read together – that is how two enactments by Congress over thirty-five years apart most comfortably coexist, giving each enacting Congress' legislation the greatest continuing effect"); *162 MegaMania Gambling Devices*, *supra*, 231 F.3d 713 ("We conclude that the Johnson and [Indian] Gaming Acts are not inconsistent and may be construed together in favor of the Tribes"); *Santee Sioux Tribe*, *supra*, 324 F.3d 607, 611 ("We agree with the government that the two acts can be read together"); *Seneca-Cayuga Tribe*, *supra*, 327 F.3d 1019, 1035 ("our task, as we have explained, is to read the Johnson Act and IGRA together giving each Congress' enacted text the greatest continuing effect").

[118] *See also 103 Electronic Gambling Devices*, *supra*, 223 F.3d 1091, 1102 (9th Cir. 2000) ("while complete, self-contained electronic of electromechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA . . . we hold that mere technologic aids to bingo . . . are not"); *162 MegaMania Gambling Devices*, *supra*, 231 F.3d 713, 725 (10th Cir. 2000) ("We further conclude Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid"); *Diamond Game Enterprises*, *supra*, 230 F.3d 365, 367 (D.C. Cir. 2000) ("Both the Commission's regulations and this court have interpreted IGRA as limiting the Johnson Act prohibition to devices that are neither Class II games approved by the Commission nor class III games covered by tribal-state compacts"); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (holding "Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA . . . Thus, the IGRA makes 15 U.S.C. §1175 . . . inapplicable to class II bingo and lotto gaming"), *aff'd sub nom.*, *United States v. Cook*, 922 F.2d 1026 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991); *cf. Cabazon Band*, *supra*, 827 F.Supp. 26, 31-32 (concluding the Johnson Act does not apply to aids to a class II game).

[119] A number of courts have noted that the Johnson Act is to be given a narrow interpretation so as to allow "aids" to class II bingo gaming. *E.g.*, *Cabazon Band*, *supra*, 827 F.Supp. 26, 31 ("Plaintiffs' main objection . . . stems from their perception that the definition of gambling device sweeps within its ambit any device that might be used in gambling. . . When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiffs fear"), and, *162 MegaMania Gambling Devices*, *supra*, 1998 U.S. Dist. Lexis 17293 (N.D. Okla., October 23, 1998) ("Tribes have objected in other litigation to the effect of the interpretation presented by the government . . . asserting that it sweeps within the definition of 'gambling device' any device that might be used in gambling . . . The objection has been rejected, based on a narrowed definition . . . The court finds this narrowed definition correct, and necessary to reconcile the statutory language and case law"), *aff'd*, 231 F.3d 713.

Using a second path of analysis to read the Johnson Act together with the IGRA as to class II gaming, one court has held that to be permitted under the IGRA the technology used with a class II game must violate neither the IGRA's exclusion of facsimiles from class II gaming nor the Johnson Act's prohibition against gambling devices. *Santee Sioux Tribe, supra*, 324 F.3d 607 (stating that "the argument that the IGRA implicitly repeals the Johnson Act with respect to class II devices is not well taken, even though some version of this view has been expressed by several courts," and concluding that "the Tribe must not violate either act").

The two paths of analysis are not irreconcilable and, in fact, the Supreme Court refused to hear either the *Santee Sioux* case or the *Seneca-Cayuga* case. Both paths of analysis can be squared by concluding, as have the courts, that:

> As several cases have held . . . Congress has acknowledged . . . and the Commission has noted in the preamble to its rules [the 1992 Definitions], the Johnson Act applies only to *slot machines and similar devices* . . . not to aids to gambling (such as bingo blowers and the like). When the scope of the Johnson Act is properly determined, it is clear that the definition of gambling devices is significantly less broad than plaintiffs fear.

Emphasis added. *Cabazon Band, supra*, 827 F.Supp. at 31-32 (*citing* Senate Report, *supra*, at 3082); *see also Diamond Games, supra*, 230 F.3d 365, 367 (*citing Cabazon Band, supra*, 14 F.3d at 635, n. 3, as supporting the proposition that "Class II aids, permitted under IGRA, do not run afoul of the Johnson Act").[120] The Commission has not provided adequate justification for the drastic revision of the IGRA's classification scheme as presented in the Proposed Rule.[121]

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[120] In revising its definitions regulations in 2002, in which the Commission removed the 1992 Definitions equating "facsimile" with Johnson Act "gambling device" and restated the definition in its current form (which the Commission now seeks to change again in the Proposed Rule) of a modified standard of "replicates," the Commission stated:

> The Commission now believes that in the infancy of IGRA, its original definitions simply had not fully reconciled the language of IGRA with the Johnson Act. The Commission now determines that IGRA does not in fact require an across-the-board treatment of all Johnson Act gambling devices as class III games. Stated differently, 'Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a class II game, and is played with the use of an electronic aid.' *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000) . . . From the Commission's perspective, the Johnson Act has proven remarkably troublesome as a starting point in a game classification analysis under IGRA. . . . This is due in large part to its fundamentally different purpose. The Johnson Act is intended to determine whether something is a 'gambling device.' IGRA, on the other hand, is intended to distinguish between classes of gaming. Within the context of IGRA, there is no question as to 'gambling' per se – all Indian gaming is 'gambling.' Accordingly, determining whether the Johnson Act covers a particular device simply does not answer the question relevant to Indian gaming: whether the game is class II or class III. The appropriate threshold for a game classification analysis under IGRA has to be whether or not the game played utilizing a gambling device is class II. If the *device* is an aid to the play of a class II game, the game remains class II; if the *device* meets the definition of a facsimile, the game becomes class III.

Final Rule, *supra*, 67 Fed.Reg. at 41169-70 (emphasis added). The Commission in revising its definitions regulations in 2002 stated the relationship between the IGRA and the Johnson Act, particularly as the definitions regulations in 2002 related to games of bingo, lotto, and other games similar to bingo, namely, the Johnson Act definition of "gambling device" does not extend to prohibit "aids" to class II gaming. This conclusion is apparently paraphrased sometimes as "the Johnson Act is not relevant to game classification under the IGRA."

[121] *In* fact, after page after page of detailed extra-statutory requirements in the proposed part 546, the Proposed Rule remains founded on vague and ambiguous extra statutory terms in proposed §502.8 (using vague and ambiguous terms such as "replicates," "incorporating," "all," "fundamental characteristics of the game," and, "format") and in proposed §502.9 (using vague and ambiguous terms such as "variant," "compete," and "common"). Respectfully, the Proposed Rule will not bring clarity to class II gaming.

D. The Proposed Rule Violates the IGRA and Binding Judicial Precedent.

Congress provided a clear definition of class II gaming in the IGRA. Congress defined class II gaming *inter alia* as follows:

> (7)(A) The term "class II gaming means –
> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,
> including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other game similar to bingo . . .
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> (B) The term "class II gaming" does not include –
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
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> (8) The term "class III gaming" means all forms of gaming that are not class I or class II gaming.

25 U.S.C. §2703, subds. (6), (7), and (8).

The federal courts have held that "IGRA's three explicit criteria . . . constitute the sole legal requirements for a game to count as class II bingo."[122] The courts have also recognized that Congress intended that class II bingo-related gaming constitute *a class or set of games*.[123] The sole exclusion of bingo-like games from class II gaming are live lottery games with a method of play similar to those played by state lotteries.[124] The courts have also held that technology may be used

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[122] *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 (noting "There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria . . . The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?").

[123] "IGRA includes within its definition of bingo 'pull tabs, . . . punchboards, tip jars, [and] instant bingo . . . [if played in the same location as the game commonly known as bingo]' . . . none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children." *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096; *Oneida Tribe of Indians of Wisconsin, supra*, 951 F.2d 757, 763 ("Although not all the games named in §2703 (7)(A) may be bingo-like, either physically or procedurally, clearly the emphasis is bingo").

[124] *Oneida Tribe of Indians of Wisconsin, supra*, 951 F.2d 757 (7th Cir. 1991) (defines game of lotto as included in the IGRA as class II gaming and determining that lotto as used in the IGRA "does not mean lottery in general or the type of lottery operated by various states and denominated 'lotto' or some derivative thereof"); *Spokane Indian Tribe, supra*, 972 F.2d 1090 (defines game of lotto under the IGRA noting that "the legislative history of the IGRA demonstrates that Congress did not intend to include lotteries when it used the term 'lotto' in the definition of class II gaming . . .").

with all class II bingo-related gaming.[125] Again, a number of courts have indicated that the classification scheme in the IGRA is both clear and unambiguous.[126]

The basis for these court decisions is found in the statute and in the legislative history for the IGRA.[127] Although often quoted in support of the use of technology with class II gaming, the Senate Report also speaks to congressional intent not to limit bingo games to only certain bingo game designs. Congress specifically recognized in the Senate Report that bingo comes in different forms.[128] In that regard, the Senate Report also makes clear Congress' intent that state law limitations on the method of play of charitable or commercial bingo games do not apply to class II bingo *or to pull-tab gaming*.[129]

Congress intended that tribes have the benefit of advances or evolution in both game design and technology. However, a review of the Proposed Rule reveals that the Commission seeks to impose many extra-statutory limitations on the *method of play* of class II bingo-related gaming in much the

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[125] *Seneca-Cayuga Tribe of Oklahoma, supra*, 327 F.3d 1019, 1032 ("IGRA further provides that 'electronic, computer, or other technologic aids' to such games are class II gaming, and therefore permitted in Indian Country" and ". . . through IGRA, Congress specifically and affirmatively authorized the use of class II technologic aids . . .); *see Diamond Games Enterprises, supra*, 230 F.3d 365 (holding that an electromechanical dispenser of pull-tabs is a permitted class II aid); *cf. Santee Sioux Tribe of Nebraska, supra*, 324 F.3d 607, 613 (8th Cir. 2003) (noting that "we believe that the phrase 'whether or not electronic, computer, or other technologic aids are used in connection therewith' applies only to bingo," but concluding that "nothing in the statute proscribes the use of technologic aids for any games, so long as the resulting exercise falls short of being a facsimile").

[126] *See, e.g., Oneida, supra*, 742 F.Supp. 1033, 1038 (meaning of "lotto" in class II gaming); *Oneida, supra*, 951 F.2d 757, 764 (same); *Cabazon Band, supra*, 827 F.Supp. 26, 33 (meaning of "facsimile"); *Cabazon Band, supra*, 14 F.3d 633, 637 (meaning of "facsimile"); *Sycuan Band, supra*, 54 F.3d 535, 543 (meaning of "facsimile"); *103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 (IGRA's definition of bingo).

[127] The Senate Report, in explaining Congress' intent behind the IGRA, states:

> Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends . . . that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribe should restrict *class II games* to existing *game sizes, levels of participation*, or *current technology*.

Senate Report, *supra*, at 3079 (emphasis added). "Under S. 555, class II is the term used for bingo, lotto, some types of card games, as well as other forms of bingo-type gaming such as pull-tabs, punch cards, tip jars, and the like." Senate Report, *supra*, at 3073.

The proposed S.555 was amended prior to its enactment. The new (and now current) language allowed pull tabs, lotto, punchboards, tip jars, instant bingo, and other games similar to bingo to be classified as class II gaming only if played at the same location as bingo. Senator Domenici made the following statement: "Mr. Chairman, I want to thank you for including an amendment to clarify that lotto games are played only at the same location as bingo games which are class II games under the bill. I believe there are other Senators who have questioned whether lotto and lotteries are interchangeable terms. This Amendment makes it clear that they are not and that traditional type lottery games are indeed class III." 134 Cong.Rec. at S24023 (daily ed. September 15, 1988). Later in the proceedings, Senator Burdick, noted his pleasure that "the issue of whether tribes can operate statewide lotteries without a tribal/state compact has been resolved in the Committee amendments." 134 Cong.Rec. at S24028 (daily ed. September 15, 1988). The Commission's disparate treatment in the Proposed Rule of bingo and the Sub-games to bingo (*e.g.*, pull-tabs, lotto, instant bingo, and other games similar to bingo) is contrary to the Congress' expressed legislative intent in the IGRA.

[128] *See* Senate Report, *supra*, at 3081-82 ("In the other 45 States, *some forms* of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill," emphasis added).

[129] The Senate Report provides:

> Section (4)(8)(A)(ii) [codified at 25 U.S.C. §2703, subd. (7)] also makes clear the Committee's intent that pull-tabs, punch boards, tip jars, instant bingo and similar sub-games may be played as integral parts of bingo enterprises regulated by the act and, as opposed to free standing enterprises of these sub-games, *state regulatory laws are not applicable to such sub-games, just as they are not applicable to Indian bingo*.

Senate Report, *supra*, at 3079 (emphasis added).

same way that various (but not all) states have imposed limitations on the method of play of state authorized bingo.[130] The extra-statutory limitations in the Proposed Rule on the method of play constitute an impermissible imposition of state-regulatory mechanisms on tribal class II bingo and appear to represent an effort to undo numerous pre-IGRA cases, culminating in *California v. Cabazon Band of Mission Indians*, in which the Supreme Court held such state regulatory limitations on tribal bingo operations to be invalid.

An agency must follow established judicial precedent.[131] The Commission's interpretations in the Proposed Rule, as written, will be assessed against the settled law.[132] A court's interpretation of a statutory provision trumps an agency's later interpretation that is inconsistent with the court's precedent, particularly when the court's interpretation is not based on deference to the agency's interpretation.[133] The agency is not entitled to deference by the courts if the statute is clear (or its intent is evidenced by the statute's legislative history), or if the agency's interpretation is unreasonable.[134]

Here, the Commission attempts to define permitted technology by defining the permitted games. Congress defined the games included as class II gaming under the IGRA and allowed for technology to be used as aids to those games. To the extent that binding judicial precedent exists, as is the case here, the agency must follow the judicial precedent. To the extent the wording of the statute is clear, or is made clear by the legislative intent, as is also the case here, that should be the end of discussion for the agency. Further, ambiguities in a statute dealing with Indians are to be construed in favor of the tribe. That rule of law, read in conjunction with Congress' intent that tribes have flexibility in both game design and use of technology, two separate issues, and

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[130] If the NIGC wishes, we would consider supplementing these comments with a discussion of various state law definitions of bingo and lotto (which range from mere statements allowing the game of "bingo" to detailed definitions including specific requirements as to card design, technology limitations, pattern design, numbers of objects having specified characteristics, rate of play of specified characteristics, prizes of specified characteristics and limitations, and specified methods of play including but not limited to house "sleep" rules and covering rules) and for games of pull-tabs, punchboards, tip jars, instant bingo and similar games (for which state law definitions also vary from mere authorizing statements to detailed definitions including specific requirements as to card design, technology limitations, prize limitations, and method of play). The state law definitions for bingo indicate a wide variety in bingo gaming. *See, e.g., People v. 8,000 Punchboard Devices*, 142 Cal.App.3d 618, 621-22 (Cal.Ct.App. 1983) (in a dispute over whether an instant bingo game played on punch cards was outside of a constitutional amendment authorizing bingo for charitable purposes, the court held that the instant bingo game was within the scope of the term 'bingo;' the court conducted an extensive review of bingo games and noted that "[v]arious sources indicated, however, that the term 'bingo' may include any number of different but related games" and that after hearing extensive evidence about the variations of bingo the court concluded that "[n]o common meaning of the term bingo emerges"). The literature surrounding bingo gaming also reveals an amazing breadth as to the games that fit within the definition provided by the Congress in the definition of class II bingo gaming. After five years of proposed legislation, hearings, and debate on proposed legislation, culminating with the enactment of the IGRA, Congress was assuredly clear as to the definitions provided in the IGRA for class II gaming. Instead of intending that class II bingo be limited by the use in the statute of the phrase "the game of chance commonly known as," found at 25 U.S.C. §2703(7)(A)(i), it is clear that Congress intended that the statutory definitions provided in the IGRA for class II bingo gaming constitute a wide variety of games available to tribes as class II gaming free from state interference. The effect of the Proposed Rule, with each of its many individual extra statutory definitional requirements, will be to exclude a wide variety of games that Congress intended as class II bingo gaming.

[131] *See e.g. Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997); *BPS Guard Services, Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991).

[132] *See Neal v. United States*, 516 U.S. 284, 295 (1996); *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992); *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990).

[133] *Banker's Trust New York Corp. v. United States*, 225 F.3d 1368 (Fed.Cir. 2000), *citing, Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988).

[134] *See* nn. 34, 106-108, and, 114-129, and accompanying discussion.

Congress' intent that the NIGC be an agency of limited authority to avoid unnecessary infringement of tribal rights, a third issue, requires a minimalist approach, as adopted by prior Commissions, to any definitional regulations implementing the express definitions in the IGRA.

The Commission's Proposed Rule violates binding judicial precedent and the IGRA itself. Congress did not delegate authority to the Commission to adopt legislative or pervasive regulations. Congress did not delegate authority to the Commission to alter the jurisdictional framework established by Congress in the IGRA.[135] The Commission's Proposed Rule is arbitrary, capricious, and manifestly contrary to the law.

The Proposed Rule also represents a radical departure from prior positions of the Commission on which tribes and others have relied in their actions, operations, and investments. The Commission first adopted definitions regulations in 1992.[136] Although tribes (and some of the Commissioners) did not agree with all of the definitions implemented by the Commission, the 1992 definitions regulations reflected a recognition by the Commission that, in the case of definitions regulations, less is more. This regulatory approach was and is consistent with Congress' intent, again, that tribes "have maximum flexibility to utilize games such as bingo and lotto for tribal economic development."[137]

A key issue raised in the Commission's Proposed Rule is that the definition of class II bingo games, and related technology, included in the Proposed Rule is so detailed that in essence technology and game design will be frozen at pre-2004 levels, or the point at which the Commission came to the table with what the Commission intended ultimately to be the current Proposed Rule. By its nature, a detailed definition excludes everything not within the definition. A fair read of the IGRA is that Congress left open the options available to tribal governments as to game design for class II bingo gaming, and related technology, so as to be consistent with Congress' stated intentions for the IGRA allowing for further advances in game design and technology in connection with class II gaming. Accordingly, when the Commission adopted its original definition regulations in 1992 (which definitions, again, were not perfect), the Commission wisely concluded that "Congress enumerated those games that are classified as class II gaming activity (with the exception of 'games similar to bingo')... adding to the statutory criteria would serve to confuse rather than clarify" and "the Commission believes that the rule published today provides ample guidance to anyone who needs to classify a game under the IGRA."[138]

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[135] Each of the games, and the catch-all category of "games similar to bingo," addressed in the Proposed Rule are specifically enumerated in the IGRA. Therefore, the resulting deference to the agency applied by the court in *Shakopee Mdewakanton Sioux Community, supra*, 16 F.3d 261, in response to a challenge to the NIGC's decision to classify keno as class III gaming does not apply here. *In Shakopee*, the court noted that "keno was rarely mentioned during congressional deliberations, and nothing in the legislative history evinces a clear congressional intent with regard to the classification of keno under the statute." *Id.*, at 264.

[136] Final Rule, *supra*, 57 Fed.Reg. 12383.

[137] Senate Report, *supra*, at 3079.

[138] Final Rule, *supra*, 57 Fed.Reg. 12382.

In 1999, the Commission issued a proposed rule on the classification of games played under the IGRA.[139] That 1999 proposed rule, if adopted by the Commission, would have provided that (a) "tribes shall not offer games on Indian lands without a classification decision which concludes that the game is a class II game unless the game is offered pursuant to a tribal-state compact or class III gaming procedures issued by the Secretary of the Interior," (b) "a classification decision is a determination that a game falls within class II or III" obtained from the Chairman of the Commission, and (c) "tribes are subject to enforcement action by the Chairman if they offer games as class II without a classification decision."[140] The proposed rule from 1999, similar to the Proposed Rule, violated tribal sovereignty and was contrary to the IGRA.

As the Commission itself recognized, the proposed rule from 1999 was widely criticized including on the grounds that (i) "the rule failed to recognize that the Commission shares responsibility for the regulation of class II gaming with tribal governments . . . the process minimizes the role of tribal gaming commissions in making classification decisions in the first instance," (ii) "the rule was far too sweeping in that no game, even those games unquestionably falling within the class II criteria, could be introduced for play without first receiving a classification decision from the Commission," and, (iii) "the Commission's capacity to produce decisions under the rule would be overwhelmed by the sheer volume of the workload."[141]

The Commission subsequently withdrew the 1999 proposed rule but noted that "the commission recognizes that its lack of a uniform process for making gaming classification decisions fosters a climate of uncertainty, exacerbating disputes and increasing the likelihood of long, drawn out litigation,"[142] "the proposed rule would have more likely satisfied the concerns of all if there had been greater opportunity for tribal input during its development," and, "if at a future time, the Commission reconsiders promulgation of a rule establishing a formal procedure for the classification of games, a tribal advisory committee should be established to advise the Commission as to the nature and content of such a rule."[143]

In addition to violating the jurisdiction of tribal gaming commissions (and tribal governments), the proposed "procedural" game classification rule from 1999 would have created an untenable regulatory situation as it relates to the efforts by tribes in several states to negotiate tribal-state compacts for class III gaming. Tribes located in a state that has refused to negotiate in good faith for a class III tribal-state gaming compact would potentially have been placed at a disadvantage

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[139] 64 Fed.Reg. 61234 (November 10, 1999).

[140] *Id.*

[141] Proposed Rule Withdrawal, 67 Fed.Reg. 46134 (July 12, 2002).

[142] The difficulties to be experienced by the regulated community by the NIGC inserting itself into classification decisions were presaged by the NIGC's preamble to the 1992 definitions which states: "Some commenters suggested that the Commission evaluate certain games to determine whether they are games similar to bingo. In the view of the Commission, the final rule provides a simple test; therefore, there is no need to provide evaluations for most games. For new games, however, the Commission may provide advisory opinions before those games are offered for play in a class II gaming operation." Final Rule, *supra*, 57 Fed.Reg. 12383, 12387.

[143] *Id.*

with respect to the regulations. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (invalidating the cause of action provided by Congress in the IGRA in favor of tribes when a state refuses to negotiate in good faith for a class III gaming compact and the state does not consent to suit). The same is true with respect to the Proposed Rule which is in essence nothing more apparently than an attempt by the Commission to resurrect, with the same effects, the withdrawn 1999 proposed rule.[144]

The withdrawal by the Commission of the 1999 proposed rule came at about the same time in 2002 as the Commission adopted amended definitional regulations for the meaning of "electronic, computer, or other technologic aid," "electronic or electromechanical facsimile," and "other game similar to bingo," which are presently found at 25 C.F.R. §§502.7, 502.8, and 502.9.[145] The stated goal of the Commission in support of the adoption of the 2002 amended definitions was a purported "need" for amending the definition regulations to bring added clarity. The definition regulations amended by the Commission in 2002 in fairness did not effectively address (1) the relationship between the Johnson Act (codified at 15 U.S.C. sections 1171-1178, prohibiting in part the use or possession of gambling devices on Indian lands) and the IGRA's allowance for technologic aids used in connection with class II bingo-related gaming, and, (2) the relationship between class II other games similar to bingo (redefined by the Commission in 2002 as a "variant" of bingo that is not house banked) and lottery games that are class III gaming.[146]

As to the 2002 amended definitions, fortunately the distinction between class II bingo games (which are by definition lottery games that Congress specifically made class II gaming under the IGRA), and class III lottery games, has previously been addressed in a series of court cases and otherwise addressed by the Commission in the 1992 definitions regulations.[147] The relationship between the Johnson Act and the IGRA has also been addressed in a series of prior court cases.[148]

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[144] The Secretary of the Interior is required under the IGRA to review and approve (or disapprove) compacts for class III gaming negotiated between tribes and states. *See* 25 U.S.C. §2710(d)(8) The Secretary has previously expressly or implicitly approved of class III gaming compacts that include excessive revenue sharing and other payments to states and their subdivisions in amounts never intended by the Congress in the IGRA thereby creating at the least an implied complicity between the Executive Branch and various states of a continued undermining of the important rights reaffirmed by the Congress in the IGRA as existing in tribes of self-determination, strong tribal government, and vital tribal governmental economic development activity through tribal gaming activities. Indeed the Secretary has sided in legal proceedings with states like Florida, who argue that the Secretary does not have jurisdiction to issue procedures where a state refuses to negotiate in good faith. *See Seminole Tribe of Florida v. United States*, 07-60317-Civ-Middlebrooks, S.D. Fla.

[145] Final Rule, *supra*, 67 Fed.Reg. 41166 (June 17, 2002).

[146] The 2002 definitional regulations also provided regulatory support for some but not other gaming activity which under the IGRA, its legislative history, and case law is class II gaming. One direct fall-out of the 2002 definition regulations was a further weakening, contrary to the law, of the legal support in the IGRA for the play of pull-tab and similar games in connection with class II bingo-related gaming.

[147] *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757 (7th Cir. 1991) (defines game of lotto as included in the IGRA as class II gaming); *Spokane Indian Tribe v. United States*, 972 F.2d 1090 (9th Cir. 1992) (defines game of lotto under the IGRA); *Shakopee Mdewakanton Sioux Community v. NIGC*, 16 F.3d 261 (8th Cir. 1994) (distinguishes keno from a game similar to bingo); *see also* currently effective 25 C.F.R. §§502.3 (defines class II gaming), 502.4 (defines class III gaming), 502.7 (defines aids), 502.8 (defines facsimiles), 502.9 (defines other games similar to bingo), and 502.11 (defines house banking games). As in the comments to the 2006 Proposed Rule submitted for the Tribe on August 15, 2006, we do not have a strong objection to removing the term "house banked" from the definition of "game similar to bingo." However, we do not believe that single change would warrant the whole scale revision to definitions of class II gaming envisioned first in the 2006 Proposed Rule and now in the instant Proposed Rule.

[148] *See, e.g., United States v. 103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1102 ("while complete, self-contained electronic of electromechanical facsimiles of a game of chance, including bingo, may indeed be forbidden by the Johnson Act after the enactment of IGRA . . . we hold that mere technologic aids to bingo . . . are not"); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000)

Again, there is no demonstrated need for additional definitions or classification standards regulations including as provided in the Proposed Rule.

As indicated above, the Proposed Rule places arbitrary (outside the language or the intent of the IGRA) limitations on the variety of lottery games that may be played as class II bingo-related gaming. The standards in the Proposed Rule are so restrictive that even older, recognized electronic bingo games such as MegaMania and Wild Ball Bingo may not qualify.[149] The Proposed Rule further places arbitrary and disparate limitations on the play of the Sub-games of bingo including pull-tabs and instant bingo,[150] including by the requirement in the Proposed Rule that pull-tab and instant bingo games use only paper cards.[151]

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("We further conclude Congress did not intend the Johnson Act to apply if the game at issue fits within the definition of a Class II game, and is played with the use of an electronic aid"); *Seneca-Cayuga Tribe of Oklahoma v. NIGC, supra*, 327 F.3d 1019, 1035 ("we hold that if a piece of equipment is a technologic aid to an IGRA class II game, its use . . . within Indian country is then necessarily not proscribed as a gambling device under the Johnson Act . . . If a piece of equipment is an IGRA class II technologic aid, a court need not assess whether, independently of IGRA, that piece of equipment is a 'gambling device' proscribed by the Johnson Act"); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (holding "Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA . . . Thus, the IGRA makes 15 U.S.C. §1175 . . . inapplicable to class II bingo and lotto gaming"), *aff'd sub nom., United States v. Cook*, 922 F.2d 1026 (2d Cir.), *cert. denied*, 500 U.S. 941 (1991); *cf., United States v. Santee Sioux Tribe of Nebraska, supra*, 324 F.3d 607 (stating that "the argument that the IGRA implicitly repeals the Johnson Act with respect to class II devices is not well taken, even though some version of this view has been expressed by several courts," concluding that "the Tribe must not violate either act," and then holding that an electromechanical dispenser of pull-tabs was lawful class II gaming). A full discussion of the relationship between the IGRA and the Johnson Act is beyond the scope of this statement and is further rendered difficult by the uncertain status of the DOJ's present legislative proposal.

[149] As to such older games, most of the technology used with such games would be unlikely to satisfy the Commission's separately proposed Technical Standards for equipment used with class II gaming, meaning that the cumulative effect of the Commission's regulatory initiatives as to class II gaming would essentially require tribal governments to start over completely with respect to class II gaming. Moreover, it could effectively expose current and past manufacturers and distributors of these games to criminal liability under the Johnson Act.

[150] The confusion in the Proposed Rule appears to be the NIGC's proposed application in its proposed definition of "facsimile" of a standard based on "formats," as compared to a standard based on "devices" as provided in the IGRA. The IGRA did not exclude certain formats, *i.e.*, electronic formats, from the definition of class II gaming. *See* 25 U.S.C. §2703(7)(B).

Although it may be tempting for the NIGC to read section 2703 as carving out from class II electronic formats, as well as devices, it is clear that all Congress meant to exclude from class II gaming were mechanical slot machines and their functional self-contained electronic or electromechanical equivalents, *i.e.*, devices. The focus in the IGRA, as to the carve-outs from class II gaming, is not on "formats" but instead on certain "devices." 25 U.S.C. §2703(7)(B)(ii) (removing from class II gaming a hierarchy of devices including "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind"); 25 U.S.C. §2710(b) (providing that tribes may engage in class II gaming if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law"); Senate Report, *supra*, at 3082 (the phrase not otherwise "prohibited by federal laws" refers to "gaming that utilizes mechanical *devices* as defined in 15 U.S.C. §1175" and "It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal *devices* used solely in aid of or in conjunction with bingo or lotto or other such gaming . . . The Committee specifically notes the following sections . . . 18 U.S.C. . . . and except as noted above . . . 15 U.S.C. 1171-1178," emphasis added); Senate Report, *supra*, at 3079 (distinguishing technology that constitutes an aid from technology that is a facsimile based on one criteria, *i.e.*, "a single participant plays a game with or against a *machine* [*i.e.*, a device] rather than with or against other players," emphasis added); *Id.*, at 3079-80 (noting that the IGRA removes from class II gaming "so-called banking card games and *slot machines*," emphasis added). Moreover, the NIGC itself early on recognized that the carve-out by Congress in the IGRA from class II gaming for facsimiles was appropriately focused on certain devices, *see* 1992 Definitions, *supra*, 57 Fed. Reg. 12382, although the NIGC went too far in the 1992 Definitions by defining "facsimile" as apparently including any gambling device under the Johnson Act in contravention of Congressional intent to exclude from class II gaming only certain devices otherwise subject to the Johnson Act. *Cf. United States v. Burns, supra*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) ("Congress intended that no federal statute should prohibit the use of gambling devices for bingo or lotto, which are legal class II games under the IGRA . . . Thus, the IGRA makes 15 U.S.C. §1175 . . . inapplicable to class II bingo and lotto gaming"); *see also103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1101-02 ("while complete, self-contained electronic or mechanical facsimiles of a game of chance, including bingo, may be forbidden by the Johnson Act after the enactment of the IGRA . . . we hold that mere technologic aids to bingo, such as the MegaMania terminal, are not," *citing* then current 25 C.F.R. §502.8 (defining "electronic facsimile" under the IGRA as "any gambling device . . ."), and, *Cabazon Band, supra*, 827 F.Supp. at 31 ("[I]t is plainly evident that IGRA's 'facsimiles' are the Johnson Act's 'gambling devices'"). The law is also clear that the cards used with class II gaming do not, by themselves, constitute devices. *See, e.g., Iowa Tribe of Kansas and Nebraska v. Kansas*, 787 F.2d 1434, 1440 (8th Cir. 1996) (court held that pull-tabs themselves do not constitute gambling devices).

The Proposed Rule includes proposed individual provisions that go to compound concepts as those concepts relate to the classification of the class II game or games in question. As game classification is a game specific determination, global statements made in the Proposed Rule in proposed part 546 as to individual characteristics of class II games with which every game must comply may not properly be applied in the context of specific games. In reviewing the classification of a game under the IGRA, the entire game, not just one of its components, should be considered.[152]

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The NIGC essentially seeks in the Proposed Rule to add a new, and extra statutory, definition of facsimile based upon "format," as compared to "device." The additional test now proposed by the NIGC of "format," as included in the Proposed Rule, would not be helpful in clarifying and in fact would be contrary to what the courts have determined to be an unambiguous and consistent statutory scheme.

[151] Neither the IGRA nor the case law requires that all pull-tab and instant bingo games be played with paper cards under all circumstances (or for that matter that any of the other Sub-games to bingo be played with paper cards). *Cf. 162 MegaMania Gambling Devices, supra*, 231 F.3d 713, 724, 725 n.10 (noting that "MegaMania . . . is played with an electronic card that looks like a regular paper bingo card" and that "Having determined that MegaMania is a class II game, we have no reason to go any further, and leave the specific question whether MegaMania is bingo or a 'game similar to bingo' for future resolution"). Nothing in the IGRA or its legislative history supports the NIGC's arbitrary distinction between the Sub-games to bingo for lotto and games similar to bingo, for which the NIGC in the Proposed Rule allows the use of electronic cards, and the other Sub-games to bingo such as pull-tabs or instant bingo, for which the NIGC seeks to prohibit the use of electronic cards. *See* 25 U.S.C. 2703(7)(A)(i) (making all of the Sub-games to bingo class II gaming merely if "played at the same location"). Contrary to the NIGC's position in the Proposed Rule, the legislative history supports the use of electronic cards for all of the Sub-games to bingo. *See* Senate Report, *supra*, at 3079 (as to the IGRA's allowance for "maximum flexibility" in the use of technology for class II gaming, the "Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues . . . For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take"). Linking and coordination between gaming facilities is obviously not possible if tribal governments are limited to paper cards for class II gaming.

The cases apparently relied upon by the NIGC in support of the Proposed Rule do not support a global requirement that all pull-tab and instant bingo games use paper cards. *See Cabazon Band, supra*, 14 F.3d 633, 636 (noting that "whatever might be said about the breadth of the regulations with respect to other games, 'without a doubt' computerized pull-tab games of the type involved here 'clearly are facsimiles of games of chance,'" and noting that with respect to "'communications technology that might be used to link bingo players in several remote locations' . . . That sort of technology is, as the [Senate] Report itself recognizes, distinguishable from electronic facsimiles of the game itself," *citing, Spokane Tribe of Indians v. United States, supra*, 972 F.2d 1090, 1093 (the Ninth Circuit concluding that with respect to the Pick Six lottery terminal that "a single player picks six numbers and tries to match them against numbers picked by a computer . . . The player can participate in the game whether or not any else is playing at the same time . . . Rather than broadening potential participation . . . Pick Six is an electronic facsimile in which a single participant plays against the machine . . . it cannot be classified as a class II gaming device)); *Sycuan Band, supra*, 54 F.3d 535, 542-43 (holding that the subject "game at issue here", *i.e.*, the "Autotab Model 101 electronic pull-tab dispenser" (a self-contained unit containing a computer linked to a video monitor and a printer within which unit a computer-chip cartridge insures a predetermined and known number of winning tickets from a finite pool of tickets with known prizes), to constitute a class III facsimile, and against the operator's argument that "the player plays not against the machine using random odds, but against other players in a closed board," the court concluding "the pull-tab machines have the effect over time, perhaps, but any given player is faced with a self-contained machine into which he or she places money and loses it or receives winning tickets after the electronic operations are concluded . . . In that sense, the gambler plays 'with the machine' even though not against it"). The cases relied upon by the NIGC in the Proposed Rule are early cases involving issues surrounding self-contained facsimiles, *i.e.*, devices, and those cases are now stale and of significantly diminished precedential value. The parties in those earlier cases made concessions not made or agreed to by the Miccosukee Tribe and, at the very least in the absence of such concessions, a fair question exists as to whether those cases were correctly decided. The rulings in those early cases were limited to the old technology specifically at issue in those cases. New technologies are available which allow the play of electronic pull-tab games with technologic aids as class II gaming under the rationale of the MegaMania court decisions (including without limitation pull-tab games in which unlike the games in *Cabazon* and *Sycuan* one player cannot play the pull-tab game alone, in which either paper or electronic cards may be used, in which the player and not the device plays the game, and in which the element of chance, *i.e.*, the creation of the deal of pull-tabs, is not present within the device with which the game is played). *Cf. 103 Electronic Gambling Devices, supra; 162 MegaMania Gambling Devices, supra*. By limiting all pull-tab and instant bingo games to paper cards, the NIGC is again changing the definitions for class II gaming, and thereby the jurisdictional framework, provided by the Congress in the IGRA.

[152] *United States v. 103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1098 ("The question before us, though, is whether *MegaMania*, not one of its constituent parts, satisfies IGRA's statutory criteria for class II gaming . . . Thus, MegaMania *as a whole* is "the game" to which Section 2703(7)(A)(i)(III) pertains"). For this reason, among others, the definitions in the Proposed Rule for Sections 502.8 and 502.9, and proposed part 546, are arbitrary, capricious, and contrary to law. To constitute class II bingo gaming under the IGRA, not every class II game using technology must meet all of the many detailed requirements to be imposed by the Proposed Rule. We do not believe, based upon the text, structure, and legislative history of the IGRA, and the important tribal rights involved, that Congress intended for the NIGC to pre-adjudicate and thereby exclude by regulation games that are within Congress' definition of class II gaming.

The question of what is an allowed class II game is different than what technology is permitted with an allowed class II game. Game classification under the IGRA is based on the answer to two questions: (1) is the game one of the games included by Congress as class II gaming, and, (2) if the game uses technology, is the technology merely an aid (class II gaming) or a facsimile or slot machine (class III gaming). These questions necessarily follow from the structure and express wording of the definitions included in the IGRA.[153] By mixing concepts of definitions of permitted games with definitions of permitted technology, as the Commission has done in the Proposed Rule, the Commission will bring greater uncertainty to the issue of game classification.

Many of the requirements in the Proposed Rule go to operational, marketing, security and other unrelated issues, *i.e.*, issues that do not affect game classification.[154] For example, and without limitation, we note that the Proposed Rule in proposed part 546 improperly purports to include requirements for class II gaming not only as to method of play, card design, prize limitations, and display design, but also as to the technical standards and minimum internal control standards included in the Proposed Standards Regulations. The Proposed Rule does not add clarity to the definition of class II bingo-related gaming and, if adopted as a regulation, is likely to result in few games (and possibly not even the games on which the courts have already favorably ruled or those few games for which the Commission has already issued favorable advisory opinions or the games) surviving as viable class II gaming. The Tribe is validly concerned that this appears to be the exact goal of the Commission.

The Proposed Rule appears founded in part on a mistaken analysis that because Congress defined class II bingo to include both the "game of chance commonly known as bingo," and "other games similar to bingo," that a separate definition is required for both types of "games." The courts have made clear that Congress' intent was to include a catch-all category for bingo games to avoid disputes between tribal and non-tribal agencies that a game was properly included in class II gaming.[155] The use by Congress of the catch-all category was not intended to require a detailed definition of both the defined "game of chance commonly known as bingo" and the catch-all category of games included in the term "other games similar to bingo" so as to force an arbitrary distinction between two sets of related and similar games.

The Commission is correct in maintaining a distinction between class II and class III gaming but that distinction must be the boundary set by Congress. To maintain the distinction between class II and class III gaming made by Congress, the Commission's focus in connection with the Proposed

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[153] *See* 25 U.S.C. §2703.

[154] *See* Final Rule, 57 Fed.Reg. 12382 ("such considerations are marketing decisions and outside the Act's purview" and "[s]everal commenters suggested that, if the operational characteristics and security demands of a game are similar to those for bingo, those qualities should weigh heavily in determining whether the game is indeed similar to bingo . . . The Commission believes that Congress did not intend other criteria [besides the criteria in the statute and the 1992 definitions] to be used in classifying games in class II").

[155] *Cf. 103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096 ("Moreover, §2703(7)(A)(i)'s definition of bingo includes "other games similar to bingo . . . explicitly precluding any reliance on the exact attributes of the children's pastime").

Rule might be more appropriate if shifted to defining the distinctions between class II "other games similar to bingo" and class III lottery games. In other words, the Commission might more appropriately seek to make clearer what does not constitute a "game similar to bingo" as in the case of a live game, not played with pre-vested cards, in which the method of play is the same as for games played by state lotteries. These distinctions could be stated, based upon existing judicial precedent and Commission regulations, in a few short requirements, not in the many pages and detailed requirements of the Proposed Rule.

Or, as the distinctions between class II and class III lottery games have already been addressed by the courts, a fair question exists as to the need for any additional definitions regulations. The Commission, in implementing its existing regulations, could simply follow the judicial precedent, or to the extent the Commission feels a need to provide guidance to the tribes as to the Commission's interpretations and enforcement policies, the Commission could simply issue a bulletin.

In any event, a fair read is that the Commission is apparently attempting in the Proposed Rule to accomplish what the Commission failed to accomplish with the 1999 proposed rule on a procedure for game classification decisions by the Commission. The Proposed Rule includes a very detailed description of games "allowed" (in the eyes of the Commission) as class II gaming, and thus prohibits all current and future variants thereof. The Proposed Rule then perniciously requires all tribal governments to institute a compliance program that would require an independent testing laboratory to certify that each game played by the tribe as class II gaming meets the detailed definition included in the Proposed Regulations. In essence, the Commission is attempting to "approve" in advance the games that tribes may offer as class II bingo gaming by imposing a very detailed definition of those games by regulation. The Proposed Rule is no less objectionable than the 1999 proposed rule which the Commission wisely abandoned.[156]

A concern we have with the Proposed Rule is that it fails to resolve the basic problems associated with the Commission's existing game classification process. One such problem is that there effectively is no procedure for appeal with respect to individual games outside the enforcement context, a framework that avoids judicial oversight and violates fundamental principles of fairness and due process of law. As the primary regulators of Indian gaming, tribal governments should be able to challenge a game classification opinion by the Commission on a government-to-government basis, without first having to risk adverse enforcement action.

Not only does the Proposed Rule fail to address this problem, but it actually compounds it by outsourcing the classification process from tribal regulators and the Commission to private sector gaming laboratories. Nothing in the IGRA suggests that testing laboratories should be placed in the position of interpreting the IGRA. Instead, their role should be limited to ensuring the integrity

[156] Our concerns are based in part on the separate Request for Proposal ("RFP") issued by the NIGC in December 2003 for a paid contractor to actually write the regulations on class II gaming that the Advisory Committee was or is to "bless" (and which resulted in the development of the instant Proposed Regulations). Based on the RFP, the NIGC apparently proposed with the help of the paid contractor to adopt new regulations establishing (1) definitions of class II gaming, (2) a procedural rule akin to the rule proposed by the NIGC in 1999 but subsequently withdrawn requiring all games to be classified by the NIGC before the games may be played in tribal gaming facilities, and, (3) enforcement procedures.

of equipment and operating systems through objective techniques. The process set forth in the Proposed Rule not only deprives tribal regulators of their legitimate regulatory authority over Indian gaming, but also relinquishes a critical federal responsibility to the private sector and deprives tribal governments of appropriate due process of law. Additionally, a tribal government never reaches a point of certainty under the Proposed Rule because the certification on which the tribal government is relying may always be withdrawn by the Chairman of the Commission (and in the event that a tribal government was not the original requesting party the tribal government apparently lacks any right to participate in an appeal of the Chairman's action).

## III. Proposed Standards Regulations.

### A. Overview.

The Proposed Standards Regulations are objectionable for many reasons including without limitation: (a) the Proposed Standards Regulations violate the inherent sovereignty retained by the Miccosukee Tribe of Indians of Florida and other tribal governments; (b) the Proposed Standards Regulations represent an unsupportable assertion of authority by the Commission contrary to the Commission's authority as delegated by the Congress under the IGRA and the Proposed Standards Regulations violate the jurisdiction of tribal agencies and the authority of Congress; (c) the Proposed Standards Regulations violate the IGRA; (d) the Proposed Standards Regulations will cause substantial uncertainty in the regulation of tribal gaming; (e) inadequate consultation occurred with the Tribe,[157] including as to the need and purpose of the Proposed Standards Regulations; (f) against the backdrop of inadequate consultation, the Commission apparently came to the table with a pre-conceived rule (or at least the essential elements of the framework for the rule);[158] and, (g) the Commission failed to consider viable and less burdensome alternatives to the Proposed Standards Regulations.[159] In connection with the Commission's purported consultation, the Advisory Committee and rulemaking process established by the Commission in connection with its drafting efforts as to the Proposed Standards Regulations and the interrelated Proposed Rule violated federal laws.[160]

### B. The Commission is an Agency of Limited Authority and Lacks the Authority to Promulgate or to Enforce the Proposed Standards Regulations.

The powers of the Commission are as established in the IGRA. As discussed in these comments, the Commission's role under the IGRA is primarily one of oversight to see that a tribal government implements the "federal standards" set out in the tribe's gaming ordinance. The Commission was given other certain limited powers for class II gaming such as management

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[157] *See* nn. 172 to 183 and accompanying discussion.

[158] *Id.*

[159] *See* n. 184 and accompanying discussion.

[160] *See* nn. 172 to 180 and accompanying discussion.

contract review and approval, establishment of fees and assessment of fines, granting of certificates of self-regulation, *etc.*, and there is no question that the Commission has a "regulatory role" with respect to class II gaming.

However, as a review of the language, structure, purpose, and legislative history of the IGRA makes clear,[161] the role of the Commission is not one of altering the jurisdictional framework in the IGRA, or one of developing and imposing detailed regulations on Indian gaming as provided in the Proposed Standards Regulations *in lieu* of tribal government decisions on the regulation of such gaming,[162] but one of limited "oversight" of each tribal government's own regulatory efforts under its tribal gaming ordinance and the provisions contained in the IGRA. Respectfully, the Commission can implement the IGRA, but the Commission cannot change the IGRA as the Commission would do with the Proposed Standards Regulations.

1. The Commission's Oversight Role under the IGRA Does Not Include the Authority to Impose Detailed and Pervasive Regulations of the Type Included in the Proposed Standards Regulations.

a. The IGRA Does Not Grant the Commission the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Standards Regulations.

The IGRA contains no express grant of authority to the Commission to promulgate pervasive regulations as to the regulation and operation of tribal gaming activities. Here too, the fact that Congress did not expressly negate the authority of the Commission does not create an ambiguity in the statute allowing the Commission to move forward with the Proposed Standards Regulations. An agency has no power to act "unless and until Congress confers power upon it."[163] *The power apparently claimed by the Commission in the Proposed Standards Regulations* to promulgate pervasive regulations for the operation and regulation of tribal gaming activities *is further contradicted by the express wording of the IGRA*. Beyond the Commission's approval authority for tribal gaming ordinances, and its approval authority for management contracts, the bulk of the Commission's authority for class II gaming resides in the monitoring of and enforcement as to the efforts of tribal governments to comply with the provisions of their tribal gaming ordinances and the IGRA. Quite simply, the powers of the Commission under the IGRA of monitoring and enforcement do not equate with an authority, as assumed under the Proposed Standards Regulations, of promulgating still additional standards for tribal governments to comply with so as to give the Commission still more to monitor and enforce.[164]

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[161] *See* nn. 18 to 103, *supra*, and accompanying discussion.

[162] *Id.*

[163] *See* n. 39, *supra*, and accompanying discussion.

[164] *Cf. Colorado River Indian Tribes v. NIGC*, *supra*, 383 F.Supp.2d at 135, n. 8 ("the power to investigate and enforce does not also imply the authority to create new rules for the agency to investigate and enforce").

b. The Structure of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Standards Regulations.

The structure of the IGRA reveals that the Commission lacks the authority to promulgate detailed or pervasive regulations as to the operation of class II gaming of the type included in the Proposed Standards Regulations.[165] Congress provided in the IGRA for standards of operation for tribal gaming in only two areas. First, the issue of operating standards was made by Congress a valid subject for negotiations between tribal governments and states for class III tribal-state gaming compacts.[166] Second, the issue of operating standards are included among the "federal standards" required as to tribal gaming ordinances including as to class II gaming.[167] Neither provision in the IGRA, *i.e.*, as to tribal-state compacts for class III gaming, or tribal ordinances including for class II gaming, mentions or implies any significant involvement by the Commission in developing the actual standards of operation for tribal gaming. Although the Commission has oversight for a tribe's compliance with its gaming ordinance, that oversight does not amount to a power to promulgate terms in addition to the terms required by the IGRA with respect to tribal gaming ordinances. Other provisions in the IGRA also portend a limited role for the Commission that is at odds with the assumption of authority undertaken by the Commission in the Proposed Standards Regulations.[168]

c. The Legislative History of the IGRA Reveals that the Commission Lacks the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Standards Regulations.

A review of the proceedings and the various legislation proposed and considered by the Congress over a five year period prior to the enactment of the IGRA makes clear that the Commission does not have the authority to adopt pervasive regulations[169] including as provided in the Proposed Standards Regulations. In fact, a thorough review of the consideration by the Congress of Indian

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[165] *See* nn. 82 to 83, *supra*, and accompanying discussion.

[166] 25 U.S.C. §2710(d)(3)(C) (includes among the authorized topics for a tribal-state compact for class III gaming "standards for the operation of such activity and the maintenance of the gaming facility, including licensing"); *see also* 25 U.S.C. §2710(d)(7)(B)(vii) (provides that when a state and a tribe cannot agree on a tribal-state compact for class III gaming that the Secretary can step in to "prescribe . . . procedures . . . under which class III gaming may be conducted by the tribe).

[167] *See* 25 U.S.C. §2710(b)(2)(E) and (F) (includes among the "federal standards" for tribal gaming ordinances a requirement that the ordinances provide "the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner which adequately protects the environment and the public health and safety," and, "there is an adequate system which . . . ensures . . . that oversight of such officials and their management is conducted on an ongoing basis"). The Proposed Regulations call into question the prior approvals by the Commission of countless tribal gaming ordinances for tribal gaming.

[168] For example, the IGRA provides for limited funding for the Commission. 25 U.S.C. §§2717 and 2718. Second, the implication in the IGRA as originally enacted was that the Commission would meet "at least once every 4 months" and that the associate commissioners might not serve on a full-time basis. 25 U.S.C. §§2704(f) and 2706(c)(1).

[169] *See* nn. 84 to 94, *supra*, and accompanying discussion.

gaming legislation during that period leading up to the enactment of IGRA reveals that each of several legislative attempts to provide extensive regulatory authority in the states or in federal agencies over tribal class II gaming was rejected by Congress.

The powers assumed by the Commission in the Proposed Standards Regulations do not appear in and were not authorized by Congress under the express terms of the IGRA. The secondary stated purpose of the IGRA, *i.e.*, to provide for "federal standards," refers to the standards stated in the statute. The power of the Commission to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter," as provided for at 25 U.S.C. section 2706, subdivision (b)(10) (referring to only the provisions of the Act codified in Title 25, Chapter 29), refers only to the limited oversight role of the Commission and not to an authority to promulgate additional extra-statutory limitations on the regulatory authority of tribal governments. The Commission is charged with executing the substantive provisions, or standards, of the IGRA as written by Congress, but the Commission does not have the authority to change the IGRA as provided in the Proposed Standards Regulations. Again, an agency is owed no deference when the subject matter of the agency's action is not within the authority delegated to the agency by the Congress.

2. The General Purposes of the IGRA Do Not Grant the Commission the Authority to Promulgate Detailed or Pervasive Regulations for Class II Gaming of the Type Included in the Proposed Standards Regulations.

The Commission cannot properly, and should not, rely upon the general purposes of the IGRA to support an ever increasing role for the Commission in the oversight regulation of tribal gaming including as provided in the Proposed Standards Regulations.

First, the general purposes of the IGRA, and its substantive provisions, do not support the Proposed Standards Regulations. Second, several oversight and legislative hearings have been held since 1988 by committees of the Congress on the implementation of the IGRA and on Indian gaming in general. These oversight and legislative hearings have demonstrated the clear, post-IGRA understanding of the limited scope of the Commission's authority over class II gaming. Representations made by the Commission in these oversight hearings contained explicit denials of power in the Commission to promulgate and enforce pervasive class II gaming regulations such as the Proposed Standards Regulations.[170] Representations made by the Commission in these prior oversight hearings also demonstrated the Commission's recognition and understanding of a difference in type and degree of regulation, *i.e.*, between that of oversight as intended and provided by Congress in the IGRA and the type of pervasive regulation envisioned now by the Commission in the Proposed Standards Regulations.

The requirements, as contemplated by the Proposed Standards Regulations, of certifications prior to the play of class II technology, represent an improper back-door attempt by the Commission to

[170] *See* nn. 97 and 98, *supra*, and accompanying discussion.

regulate the issues raised in the Proposed Standards Regulations (and in the intertwined Proposed Rule) and improperly intrude upon tribal sovereignty and matters or decisions reserved for tribal governments under the wording and structure of the IGRA, *i.e.*, on matters already addressed by the Congress in the IGRA. The combination of certifications and detailed classification-technical-operating standards in the Proposed Standards Regulations represents a pre-condition not authorized in the IGRA to a tribal government's decision to engage in and then to regulate and operate gaming. The attempted assumption of jurisdiction by the Commission in areas for which jurisdiction has not been authorized by the Congress will lead to increased tensions and confusion between tribal governments and the Commission.

The Proposed Standards Regulations are not a valid exercise of the provision in the IGRA appearing to authorize the Commission to "promulgate such regulations and guidelines as it deems proper to implement the provisions of this chapter." An agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority. Agencies such as the Commission are "bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate and prescribed, for the pursuit of these purposes." Here, Congress provided not only the purposes of the IGRA but also the means to accomplish these purposes through the "statutory basis for the regulation of gaming by an Indian tribe" provided in the IGRA. The Proposed Standards Regulations do not comport with the means selected by the Congress for effectuating the purposes of the IGRA.

The Commission lacks the statutory authority under IGRA to promulgate, and impose upon tribal governments, the very kind of detailed controls that the Commission is now attempting to adopt in the Proposed Standards Regulations. The instant Proposed Standards Regulations, like the Proposed Rule, goes to the core of the jurisdictional framework imposed by Congress on tribal gaming. On both scores, *i.e.*, overly pervasive regulation and the attempted alteration of the jurisdictional framework in the IGRA, the Proposed Regulations violate the basic rules of federal Indian law and the IGRA. The IGRA does not authorize or support the NIGC's Proposed Standards Regulations. The IGRA is clear and unambiguous as to the limited scope of the NIGC's authority. Any effort by the NIGC to occupy a regulatory role with respect to the subject matters at hand in the Proposed Standards Regulations, is arbitrary, capricious, and contrary to law.[171]

C. Additional Comments to the Technical Standards and Class II MICS.

The Tribe understands that the Commission is attempting to effect appropriate technical standards that will benefit the class II gaming industry as a whole. While the Tribe believes in the effective regulation of its gaming activities, as discussed above in these preliminary comments the Tribe does not believe that the Technical Standards (and the interrelated Class II MICS) are an appropriate vehicle for achieving that goal. The Technical Standards provide an extreme level of detail. The Technical Standards contain a number of unsupported assumptions, inconsistencies, or impossible requirements. The net effect of the Proposed Standards Regulations, as written, will be

[171] *See* nn. 18 to 103, *supra*, and accompanying discussion.

to specifically limit, preclude, or discourage both old and new technologies. The current provisions for variances by tribal regulatory authorities, and grandfathering, do not overcome the infirmities of the Proposed Standards Regulations as currently stated.

Congress intended that tribes have "the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility." The Technical Standards appear to mandate specific solutions even though more than one solution may be appropriate to the issue addressed. The Technical Standards are design or implementation specific and overly restrictive. In a number of provisions of the Proposed Standards Regulations, requirements are placed on one solution but not on others even though the other solutions would logically require the same requirements for consistency or to achieve the stated objectives.

The documents reflect an inherent bias, possibly reflective of the bias in the Proposed Rule. The Proposed Standards Regulations do not adequately reflect the growth of the class II gaming industry, or the history and evolution of technology used in connection with the play of class II bingo-related games in the United States. The Proposed Standards Regulations provide a number of requirements which to the Tribe's understanding most of the currently installed class II games of many tribes do not meet, nor are these requirements likely to be met in the future.

The Technical Standards further assume an ongoing and continuing formal or legal relationship between each tribal government and the various vendors which previously provided equipment to that tribal government's gaming facility. We suspect that in many instances this assumption will turn out not to be the case, and that lacking such an ongoing relationship many tribal gaming facilities will not be in a position to go back to their former vendors to obtain all of the material or other items required to be collected and submitted in connection with the certifications required under the Proposed Regulations. Alternatively, where a tribal government has only one server, the effect of the Proposed Regulations would be to require the tribal government to close its operations so as to comply with the testing requirements for that server in the Proposed Regulations. The net effect of the Proposed Regulations will likely be a requirement that large numbers of class II games are turned off merely because the required submission items or testing cannot be obtained by the affected tribal governments. Such a result is plainly at odds with the purposes of the IGRA, federal Indian law, and general law.

We do not believe that the Commission has the authority to render substantial investments made by tribal governments obsolete in the manner provided by the Proposed Regulations. The retroactive application of the classification or technical standards to technology that was perfectly acceptable at its inception is improper given that it serves no legitimate purpose. Nor is the "grandfathering" provision proposed by the Commission at all effective, in that it does not apply to most machines/devices/technology currently in use and in that it basically requires tribal governments to confess to "sins" they never committed. The only acceptable grandfathering is grandfathering without strings or conditions.

As is the case with the Proposed Rule, the standards in the Technical Standards are overly strict and create an appearance that the NIGC is attempting by regulation to allow essentially only one game (and presumably only a few vendors) in class II gaming. As the NIGC's contractor stated at the meeting of the Advisory Committee in North Carolina, "in the end there will be only bingo, and the focus will only be content." The provisions in the Proposed Standards Regulations remain anti-competitive.

As the Commission has previously noted, properly, "[t]he Commission believes that Congress did not intend other criteria [operational characteristics and security demands of game] to be used in classifying games in class II." The Tribe respectfully submits, as stated elsewhere in these comments, that the Commission has no authority to, and that Congress did not envision that the Commission would, assume a broad, pervasive, regulatory role as to class II gaming including security, operational, and marketing considerations of the regulation and operation of tribal gaming facilities. The Proposed Standards Regulations, including security, accountability, reliability, and appropriate customer focused functionality, should be left for tribal governments and the operators of tribal gaming facilities as matters that are fundamentally day-to-day regulatory and operational concerns.

The Tribe also believes that the Proposed Standards Regulations as written will require the Commission to continually revisit the technical and minimum internal control standards either in the form of requested variances or in the form of future proposed regulations. The Tribe respectfully suggests that the limited resources of the Commission will not permit the Commission to keep up with changes in technology applications in connection with class II gaming. The Proposed Standards Regulations as written appear unworkable as a regulation.

## IV. Inadequate Consultation Occurred on the Proposed Regulations; The Process Used to Develop the Proposed Regulations Did Not Comply with the Law; Further Review and Analysis of the Impacts of the Proposed Regulations is Required.

### A. Inadequate Consultation Occurred on the Proposed Regulations; The Process Used to Develop the Proposed Regulations Did Not Comply with the Law.

The Proposed Regulations constitute a matter of the utmost importance to the government-to-government relationship between the United States of America and the several Native American Indian tribes within its boundaries. The Proposed Regulations would make illegal the legitimate economic development activities of Indian tribes.[172] The right to engage in these economic

[172] The Proposed Regulations would dramatically limit the scope of class II gaming presently available to tribal governments. We are aware of comments by others that essentially no currently available or played games would survive the Proposed Rule. We believe that a similar result occurs under the Proposed Standards Regulations. The Proposed Regulations cumulatively, and individually through the Definitions Regulations, Classification Regulations, the Technical Standards, and the Class II MICS, constitute a significant regulatory action that would have an annual effect on the economy of more than $100 million and would adversely affect in a material way the economy, a defined sector of the economy, jobs, or tribal governments. *See* Executive Order 12866 (September 30, 1993) (entitled "Regulatory Planning and Review"), as amended or replaced including by Executive Order 13422 (January 23, 2007). As is discussed in these comments, the Proposed Regulations will further likely lead to less consistency and predictability in the regulation of tribal gaming, will promote disharmony between tribal and state governments, and within inherent tribal regulatory and other governmental functions, and are contrary to basic notions of equity. Under the jurisdictional framework inherent in the IGRA (under which statute various federal agencies and the various states have differing roles for class II and class III gaming), the proposed

development activities represent vested property rights[173] that have been long available to tribes by virtue of their inherent sovereignty.[174] These tribal rights, and moreover the overriding federal interest in protecting these rights, have been clearly acknowledged by Congress including through the IGRA,[175] and by the Executive Branch including through its agencies.[176] Inherent in the protection of these vested tribal rights are the concepts of respect for tribal self-government, sovereignty and the unique legal relationship between the federal government and tribal governments, and the demonstration of that respect through meaningful government-to-government consultation on matters of import affecting tribal interests. The Proposed Regulations are precisely such a matter of import.

Against the important tribal rights implicated by the Proposed Regulations, the Commission has not engaged in meaningful consultation with the Miccosukee Tribe.[177] The Tribe has not declined

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legislative amendments by the DOJ and the current regulatory actions by the NIGC further raise important federalism issues. *See* Executive Order 13132 (August 10, 1999) (entitled "Federalism"), as amended or replaced.

[173] Property interests protected by the Fifth and Fourteenth Amendment are not created by the Constitution; instead, such interests are created and measured by existing rules or understandings that stem from independent sources that secure certain benefits and support claims of entitlement to those benefits. *Brock v. McWherter*, 94 F.3d 242 (6th Cir. 1996). The right of tribes to engage in class II gaming, and the entitlement that flows therefrom, pre-dates and then was re-affirmed in the IGRA. *E.g. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *see* 25 U.S.C. §2710(a)(2) (reaffirming the tribes' property interest by placing jurisdiction over class II gaming with the tribes); Senate Report, *supra*, at 3081 ("the [c]ommittee recogniz[ed] that tribal jurisdiction over class II gaming has not been previously addressed by Federal statute and thus there has heretofore been no divestment or transfer of such inherent tribal governmental powers by the Congress"). The Proposed Regulations violate the protections of the Constitution and implicate the takings provisions therein. *See also Kaiver Aetna v. United States*, 444 U.S. 164, 175 (1979) (interference with investment backed expectations lead to a claim under the Fifth Amendment takings clause).

[174] *California v. Cabazon Band of Mission Indians*, *supra*, at 207 and 216 ("The Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory . . ." and "[t]he inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development").

[175] *See* 25 U.S.C. §2701(4) ("a principal goal of Federal Indian Policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal governments"); 25 U.S.C. §2702 (The purpose of this chapter is – (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

[176] Executive Order 13175 (November 6, 2000) (entitled "Consultation and Coordination with Indian Tribal Governments"); Presidential Memorandum for the Heads of Executive Departments and Agencies (September 23, 2004) (affirming that "President Nixon announced a national policy of self-determination for Indian tribes in 1970 . . . More recently, Executive Order 13175 . . . was issued in 2000 . . . I reiterated my Administration's adherence to a government-to-government relationship and support for tribal sovereignty and self-determination . . ."); Notice, Policy Statement, 69 Fed.Reg. 16973 (March 31, 2004) (sets forth tribal consultation policy of the NIGC).

[177] Again, our comments specifically address the interests of the Miccosukee Tribe. While the Tribe did receive invitations from the NIGC to attend "consultation meetings" the invitations did not appear to refer or to relate to the Proposed Rule or the Proposed Standards Regulations. Towards that same end, discussions with tribal associations (e.g., NCAI, NIGA, or CNIGA), or at conferences held by tribal associations, may provide information valuable to the consideration of proposed legislative amendments or related regulations but do not constitute consultation on a government-to-government basis with individual tribal governments. Tribal associations are not empowered to bind or to speak for individual tribal governments and, further, many tribes that will be affected by the proposed legislative amendments and related regulations may or may not even belong to such tribal associations. Moreover, holding group panel discussions with hundreds of people present (including persons representing a variety of tribal and non-tribal interests), as apparently occurred at NCAI, NIGA, and CNIGA meetings, does not constitute government-to-government consultation with individual tribal governments. At best, such meetings constitute informational meetings.

Although we do not and cannot speak for other tribal governments, we strongly suspect that many other tribal governments find themselves in the same position of a lack of consultation having occurred on the important issues raised in the Proposed Regulations even when other tribal governments attended meetings with the NIGC. For example, in comments submitted by the Sault Ste. Marie Tribe of Chippewa Indians to the Proposed Regulations, the meetings that occurred between the NIGC and tribal representatives (which the NIGC apparently considers as consultation regarding its Proposed Regulations) are described as follows:

to consult with the Commission on the Proposed Regulations and the Tribe has on a number of occasions extended an invitation to the Commission and indicated a present willingness to meet with the Commission. To the extent that meetings occurred between the Commission and other tribal governments, such meetings do not constitute consultation between the Commission and the Miccosukee Tribe.

On October 10, 2007, correspondence for the Tribe was forwarded to the Commission expressing the Tribe's concerns over the lack of consultation that had occurred as to what would subsequently become the Proposed Regulations and over the process being employed by the Commission with respect to the instant rulemaking and the development of the Proposed Regulations. A copy of the correspondence of October 10, 2007, is attached to these comments and is hereby incorporated herein for all purposes.[178] The Commission's response was to publish the Proposed Regulations on October 24, 2007. The Commission has not complied with its own Consultation Policy in connection with the Proposed Regulations.[179]

Instead of consultation with individual tribal governments,[180] the Commission's primary emphasis during the development of the Proposed Regulations has been on the purported use of an "Advisory Committee" process developed by the Commission. However, the Advisory Committee process employed by the Commission deviated from established precedent and law. The Commission did not comply with the Federal Advisory Committee Act, which renders the product of the process (*i.e.*, the Proposed Regulations) invalid in itself. No charter was adopted for the Advisory Committee. No record was maintained for the meetings of the Advisory Committee. We understand that request was made on more than one occasion that meetings of the Advisory

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> The Commission has not consulted with Tribal governments in regard to the proposed rules. Although the NIGC has had "meetings" with Tribal officials, those meetings do not constitute "consultation." Throughout Indian Country, it has been learned that the meetings, usually lasting a half hour in length, invariably follow the same pattern: Introductions, then ten to fifteen minutes of the Commission telling Tribal leaders (in summary fashion) of future plans it had regarding Class II and Class III gaming. The meeting would include a photo to mark the occasion, and then Tribal leaders were allotted about ten minutes to ask questions or provide comments. The meetings were not recorded. The meetings did not include details or specific information regarding the purpose or type of regulations that were currently being considered by the Commission. Nor did the meetings include information regarding the likely economic impact of those regulations. Often, the meetings focused on other issues, unrelated to the proposed regulations.

*See* Letter to Vice Chairman Des Rosiers, NIGC, of March 5, 2008, regarding objections of the Sault Ste. Marie Tribe of Chippewa Indians to the process of the NIGC in attempting to promulgate Class II gaming regulations.

[178] The Tribe has on several prior occasions but to no avail expressed concerns to the NIGC over the rulemaking and consultation process employed by the NIGC first with respect to the 2006 Proposed Regulations and then with respect to the rulemaking and consultation process that yielded the instant Proposed Regulations. *See, e.g.*, Letter dated August 15, 2006, Letter dated November 15, 2006, and Letter dated December 15, 2006, to the NIGC, *supra*, available at http://www.nigc.gov (website last visited March 8, 2009) (documents available under web page for laws and regulations – proposed amendments and regulations – class II game classification standards – withdrawn).

[179] *See* Notice, Policy Statement, 69 Fed.Reg. 16973 (March 31, 2004).

[180] The NIGC's consultation policy states (a) "IGRA's statutory system of shared regulatory authority and responsibility for Indian gaming will work most effectively to further the act's declared policies and purposes, when the three involved sovereign governmental authorities work, communicate and cooperate with each other in a respectful government-to-government manner," (b) "to the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines . . . which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA," (c) "the primary focus of the NIGC's consultation activities will be with individual tribes," and, (d) "the commission will promptly notify the affected tribes and initiate steps to consult and collaborate directly with the tribe(s) regarding the proposed regulation and its need, formulation, and implementation, and related issues and effects." Notice, Policy Statement, *supra*, 69 Fed.Reg. 16973.

Committee be transcribed but the request was apparently refused by the Commission. We understand that representatives of the Commission took notes of the discussion but those notes apparently have not been circulated. On at least one instance, a substantial portion of the meeting of the Advisory Committee was closed to the public (in Cherokee, North Carolina). We understand that the Advisory Committee also held telephonic meetings that were not open to the public. Advance notice of meetings of the Advisory Committee was not published in the federal register. We understand that, in the end, the Commission failed to consider or to adopt important input from the Advisory Committee (or the vendor's working group) with respect to the Proposed Regulations.

As useful as advisory committees may be, such committees are no substitute for true government-to-government consultation with tribal government leaders. The Tribe finds unacceptable the Commission's apparent expectation that a handful of tribal representatives on the Advisory Committee and a select group of vendor representatives were to be the primary means of the Commission's consultation with tribal governments about the impact and content of this rulemaking. The Tribe's concern as to the consultation process adopted by the Commission is that the Commission may view consultation as a "to-do" procedural item and not one of substantive import. If so, the Commission's apparent view of the meaning and effect of government-to-government consultation is at odds with federal Indian policy and the publicly stated policies of the current Administration.

The Commission has not complied with the Paperwork Reduction Act of 1995, 44 U.S.C. section 3501, *et seq.* ("PRA"), in connection with the Definitions Regulations or the Class II MICS, both of which rules are subject to the requirements of the PRA. The Commission has failed to evaluate whether the Proposed Definitions Regulation and Class II MICS are necessary for the proper performance of the functions of the agency, including whether the information has practical utility, the Commission has failed to estimate the burden of the proposed collection of information, the Commission has failed to adequately justify the legality of, or its needs for, the Definitions Regulations or the Class II MICS, and the Commission has failed to take steps to minimize the burden of the collection of information on tribal governments with respect to the Proposed Definitions Regulations or the Class II MICS. Compliance with the PRA with respect to the Definitions Regulation and Class II MICS would require notice and comment.

Contrary to the Commission's certification as to the Regulatory Flexibility Act, the Proposed Regulations will have a very significant economic effect on a substantial number of small entities. At the least, the Proposed Regulations will impact small entities formed by tribal governments to operate their gaming facilities. The Commission should have but has not complied with the Regulatory Flexibility Act.

B. Further Review and Analysis is Required of the Impacts of the Proposed Regulations.

The Meister Economic Study appears to have been based on a number of unsupported or non-relevant assumptions in reaching its conclusions as to the likely impacts of the Proposed Regulations:

> The Meister Economic Study appears to continue to use MegaMania as a benchmark for performance of class II machines under the proposed regulation changes and yet not even MegaMania would likely remain compliant under the Proposed Rule.
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> The Meister Economic Study appears premised on an assumption that the current state of tribal class II gaming industry constitutes the baseline against which the regulatory impact of the Proposed Regulations should be measured. However, as discussed in the Tribe's comments previously, the Commission has for some time sought to limit the definitions of class II gaming beyond the simple and straightforward statutory limits imposed by Congress. As a result, the starting baseline for the size of the class II gaming industry is already less than what Congress reasonably intended for class II gaming and the impacts identified in the Meister Economic Study are understated.
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> The Meister Economic Study (and the rulemaking leading to the Proposed Regulations) appears mistakenly focused on the purely economic effects of the Proposed Regulations. This focus appears through the unsupported but recurring assumption that tribal governments with a viable alternative to class II machines (*e.g.*, class III machines) would not be likely to suffer losses in gaming revenue. Congress did not intend that tribal governments would lose their rights (as proposed by the Commission in the Proposed Regulations) to engage in class II gaming (as such class II gaming is in fact defined and recognized by Congress in the IGRA) merely because a tribe could agree to a compact or could obtain Secretarial procedures.[181] The *context* of class II gaming rights, which recognizes tribal primary jurisdiction of that gaming subject to limited oversight by the Commission, as provided in the IGRA, is not equivalent to class III gaming which likely requires more invasive intrusions to tribal jurisdiction through the compacting or Secretarial procedures process. Thus, any assumption based on mere economics that tribes have a "viable alternative" to class II gaming, *i.e.*, class III machines, would be unfounded. A number of tribal governments may choose to engage in class II gaming alone, without engaging in the transfer of jurisdiction (and often outright taxation through revenue sharing provisions) involved with a tribal-state compact, because tribal governments do not equate jurisdiction/sovereignty with dollars. Or stated another way, the methodology employed by

[181] *See* Senate Report, *supra*, at 3075-3076 (" . . . the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities . . . it is the Committee's intent that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might otherwise have reserved, the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes, or as a general abrogation of other reserved rights or sovereignty").

> the Commission in the rulemaking leading to the Proposed Regulations implies that tribal governments are free to keep their sovereignty and jurisdiction intact, by foregoing a compact or Secretarial procedures, so long as tribal governments are satisfied with being less well off financially than was intended by Congress in the definitions provided by Congress in the IGRA for class II gaming.

As evidenced by the Meister Economic Study, the Proposed Rule and Technical Standards individually and collectively represent: (a) a "significant economic effect on a substantial number of small entities," (b) a "major rule" having an annual effect on the economy of more than $100 million, and, (c) a "significant regulatory action" imposing annual costs on tribal governments of more than $100 million. The Commission should complete the regulatory analysis required by law including providing the public with an assessment of costs, benefits, and alternatives available, with respect to the Proposed Regulations.

## V. NIGC Failed to Consider Viable and Less Burdensome Alternatives.

Meaningful consultation might well have avoided the current situation of the Proposed Regulations which violates the IGRA and established law.[182] Meaningful consultation is intended to bring to light viable alternatives respectful of the important tribal interests to be affected by the proposed governmental action.

### A. Viable Alternatives to the Proposed Rule.

Through the Proposed Rule, the Commission apparently seeks to add extra-statutory restrictions on the definitions of bingo gaming and allowable technology. The Commission further apparently seeks to add an extra-statutory pre-condition to tribal gaming that a tribe obtain a certification that a game meets the Commission's detailed definition of class II gaming before the tribe may offer the game for play as class II gaming without necessity of a compact or Secretarial procedures.

Congress, however, intended in the IGRA for tribal governments to have flexibility as to game design for class II gaming, and to have maximum flexibility as to the technology used with that gaming. Congress excluded from class II gaming slot machines, and their functional equivalents "facsimiles" in which one player can play with or against a machine as compared to with or against other players. Congress further excluded from class II gaming certain lottery games offered by state lottery games; the excluded games included games with pre-vested cards such as pull-tabs if not played at the same location as the game Congress described as bingo, and games played with non pre-vested cards if the method of play was the same as that offered by state lotteries. Congress further did not intend for tribes to be confronted with pre-conditions to gaming other than the adoption and approval by the tribe, with subsequent approval by the Chairman of the Commission,

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[182] Towards that same end, a change in the current regulations might not be effective or even necessary. A careful review may reveal that the law, as cited and discussed in these comments, on the distinction between class II and class III gaming is presently clear. Or, further discussions may well reveal that alternate regulatory mechanisms such as negotiated rulemaking, if a regulation is necessary, or a bulletin or interpretive rule, if an informal statement is adequate, should be considered.

of an ordinance or resolution authorizing gaming. Even as to the approval by the Chairman of tribal gaming ordinances, the approval of tribal gaming ordinances was made mandatory under the IGRA if certain carefully enumerated requirements were satisfied. The Proposed Rule, and the fundamental regulatory framework underlying the Proposed Rule and the Proposed Standards Regulations, thus violates IGRA and established law.

We don't believe that any changes are necessary as to the Commission's current regulatory definitions for tribal gaming. However, assuming that the Commission is in fact seeking clarity in its own definitions, and recognizing that the Commission, like tribal governments, must adhere to IGRA and established law, a viable alternative would have been for the Commission to do no more than: (1) provide in its definition of "game similar to bingo" that a game similar to bingo, stops being class II gaming and starts being a class III lottery game, when the method of play is such that: (a) the game is played without *a* designated winning pattern, (b) the game can end before a player has achieved a designated winning pattern, or, (c) *none* of the objects used in the play of the game are drawn or electronically determined during the game (which under the classification scheme enacted by Congress in IGRA makes the game an instant bingo game);[183] (2) provide in its definition of "facsimile" that a "facsimile" means a machine or device [that but for the IGRA would be subject to 15 U.S.C. 1171 (a)(2) or (3) *and*] by which a player plays a game of chance without at least one other player playing the game at the same time; and, (3) eliminate the provisions of proposed parts 546 and 547 (which as discussed above are in fact arbitrary, capricious, and contrary to law). The Commission would further make clear that a card used in the play of a class II game does not constitute a machine or device so as to avoid the confusion in the current Proposed Rule between class III facsimiles (which under the IGRA applies to machines or devices) and the "medium" used for the cards played with class II gaming (which medium in and of itself is not relevant to game classification under the IGRA including as to the Sub-games to bingo).

Lastly, a viable alternative to the Proposed Rule would leave the existing 2002 definitions regulations intact and provide that tribal regulatory agencies would make the first classification determination as to class II gaming, the Commission would have an opportunity within a reasonable time to concur or object, and the Commission's action would be a final agency action subject to judicial review.

Such alternatives would make the Commission's regulatory initiative as apparently intended in the Proposed Rule, if the Commission determined to move forward at all, consistent with IGRA and existing law and would avoid the legal difficulties with the current Proposed Rule.

Additionally, instead of subjecting all class II gaming played with technology to the detailed requirements of the Proposed Rule, the Commission should consider the addition of substantial grandfather provisions allowing the continued play of existing, related, or comparable games for

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[183] We believe that the NIGC goes too far in the Proposed Rule by excluding from games similar to bingo games of bonanza bingo in which some but not all of the balls or objects are drawn or determined before the play of the game thereby excluding games that Congress clearly intended as class II bingo gaming.

which favorable treatment has already been afforded by the courts or the Commission. Alternatively, the Commission should provide that the specific and detailed definitional requirements in the Proposed Rule are not exclusive but instead are merely examples of characteristics the Commission views to constitute class II gaming with the Commission providing that a game is not necessarily outside of class II gaming merely because the game lacks some or all of the characteristics in the proposed part 546. Alternatively, the Commission should delay the implementation of the Proposed Rule, if any form of the rule is adopted, for a minimum of eighteen months to allow the affected parties adequate time to address the impacts of the Proposed Rule.

B. Viable Alternatives to the Proposed Standards Regulations.

Again, the Tribe does not oppose technical or minimum internal control standards for the play of class II gaming, or the security and integrity that such standards provide, but the Tribe does object to the apparent attempt by the Commission to impose requirements that under the IGRA are for tribal governments to establish. The IGRA intended that tribes have the "opportunity to take advantage of modern methods of conduction class II games and the language regarding technology is designed to provide maximum flexibility." Nonetheless, and against the plain language and intent of the IGRA, the net effect of the Commission's Technical Standards and class II MICS as written will be to specifically limit, preclude, or discourage both old and new technologies in direct contravention of the IGRA.

Against the Commission's stated intention for the Technical Standards of "[t]he Commission has determined that it is in the best interests of Indian gaming to adopt technical standards . . .because no such standards currently exist,"[184] the Commission has not demonstrated a need or purpose for the Technical Standards (and indirectly the intertwined Class II MICS). We would strongly suggest that the Commission schedule a series of regional consultations with tribal governments, tribal regulators, and tribal operators, and their consultants (including technical and legal advisers with experience with existing, previous, and planned product designs and implementations in the United States and specifically in tribal class II gaming) to review past, present, and future technology trends, and, if a need and purpose for the regulations is identified, to establish agreed objectives for the Proposed Standards Regulations (with appropriate limitations as to areas reserved to tribal governments, regulators, and operators, consistent with the IGRA, its legislative history, and the law), and to revamp the Proposed Standards Regulations.

In any event, the Technical Standards should be revised to include provisions that permanently grandfather existing games and the related equipment, or which allow tribal discretion under both the Technical Standards and the Class II MICS as to variances without involvement by the Commission.

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[184] 2006 Technical Standards Regulation, *supra*, 71 Fed. Reg. 46336.

## VI. Conclusion.

The Indian Gaming Regulatory Act was intended to be part of America's effort at recompense for its history and track record in dealing with tribal governments. The IGRA recognized a federal-tribal relationship intended to allow tribal governments to rebuild and maintain their communities through class II and class III gaming with minimal federal or state interference.

The Miccosukee Tribe of Indians of Florida has recognized the opportunity provided in the IGRA. The Tribe uses gaming revenues to fund important governmental programs including a health clinic, police department, court system, day care center, senior center, Community Action Agency, as well as an educational system ranging from a Head Start pre-school program through senior high school, adult, vocational and higher educational programs and other social services, and to protect important resources such as the Everglades. The IGRA has not been satisfactory in all ways, but at the least tribal governments should be allowed to receive the full benefit of the IGRA as the IGRA is written.

The Tribe believes in the importance of the regulation of its gaming activities. The Tribe has created its own, independent regulatory body to govern gaming on the Tribe's lands. The Miccosukee Tribe of Indians of Florida Gaming Commission is well-funded and is comprised of experienced regulators who have their own investigative, oversight and enforcement authority. The tribal gaming commission carefully regulates the Tribe's gaming operations, allowing the Miccosukee people to use gaming to rebuild and support their culture in a clean, responsible way, without a need for intrusive federal or state interference. As provided in the IGRA, the Miccosukee Tribal Gaming Commission is the primary regulator of the gaming conducted by the Miccosukee Tribe on its lands.

While the Miccosukee Tribe attempts to use Class II gaming rules to benefit its people, the Commission continues to take a more restrictive view of Class II gaming, especially as it pertains to the use of technology for bingo and pull tab gaming. Notwithstanding that the Tribe has used and is using Class II gaming to support its culture, traditions, and governmental programs, the federal government seeks unilaterally to change the nature of its relationship with Indian tribes by creating regulations through the Proposed Rule (and the related Proposed Standards Regulations) that do not reflect the intent of Congress in the IGRA as to class II gaming.

Congress intended for tribal governments to have maximum flexibility in game design and in technology in playing the games of chance identified by Congress as class II gaming. The Tribe has found it difficult to take advantage of these rights since the Commission first enacted regulations in 1992. For tribal governments not able to obtain a compact or procedures as envisioned by Congress in the IGRA, not as envisioned currently by state governments after the *Seminole* decision, the restrictive nature of the Commission's class II regulations, and continued interference by the Commission in tribal regulation of tribal gaming, is unfortunate. The Commission may be well intentioned, but the effect of the regulation of Class II gaming as contained in the Proposed Regulations is yet another retreat toward the days when America

changed the rules simply because it no longer liked the original deal it entered with tribal governments.

The federal government should not unilaterally change its relationship with tribal governments as to tribal gaming. The Miccosukee Tribe of Indians of Florida respectfully urges the Commission not to adopt the Proposed Rule or the Proposed Standards Regulations. As always, the Tribe remains willing to meet and to discuss with the Commission viable alternatives on matters of mutual import but any such alternatives must comply with the law and protect the Tribe's interests.

Nothing in these comments or this letter constitutes or should be construed as a waiver of any rights of the Miccosukee Tribe of Indians of Florida under the law or otherwise. The Tribe reserves the right at any time to take any and all positions, including positions that are different, or even contrary, to those stated above.

Very truly yours,

Stephen B. Otto

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|---|---|---|
| *Electronic Mail to Addressees | : | phil_hogen@nigc.gov<br>norm_desrosiers@nigc.gov |
| *Electronic Mail via Submission to | : | facsimile_definition@nigc.gov<br>classification_standards@nigc.gov<br>bingo_mics@nigc.gov<br>technical_standards@nigc.gov |

LAW OFFICES OF

GARY ALDO DAFELD *
ROBERT W. DYERS, JR. *
GREGORY D. FISHER
MARSHA GABLE
PAUL C. HEGNESS *
HEIDI STILB LEWIS
NIKKI A. PRESLEY
MICHAEL P. RIDLEY
JOHN A. STILLMAN
THOMAS E. WALLEY

* A PROFESSIONAL CORPORATION

**GOOD, WILDMAN, HEGNESS & WALLEY**

5000 CAMPUS DRIVE

NEWPORT BEACH, CALIFORNIA 92660

ROY M. GOOD
(1923-2003)

PAUL WILDMAN
(1924-1983)

OF COUNSEL:
DOUGLAS M. VICKERY
STEPHEN B. OTTO

AUTHOR'S DIRECT:
TELEPHONE (949) 720-1300
TELECOPIER (949) 720-9622

October 10, 2007

**Via Telecopier at (202) 632-7066***

Hon. Philip N. Hogen, Chairman
Hon. Cloyce V. Choney, Commissioner
Hon. Norman H. DesRosiers, Commissioner
National Indian Gaming Commission
1441 L. Street N.W., Suite 9100
Washington, District of Columbia 20005

Re: Current Rulemaking and Legislative Initiatives by the National Indian Gaming Commission

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Dear Chairman Hogen and Commissioners Choney and DesRosiers:

On behalf of our client, the Miccosukee Tribe of Indians of Florida ("Tribe"), we write to you as representatives of the federal government of the United States of America. The Tribe has a number of concerns regarding the current rulemaking and legislative efforts by the National Indian Gaming Commission ("Commission," or "NIGC"). The various rulemaking efforts (collectively, the "Draft Rules") of the Commission about which the Tribe is concerned include: (a) class II definitions regulations ("Definitions Regulations"); (b) class II game classification standards regulations ("Game Classification Regulations"); (c) class II technical standards ("Technical Standards Regulations"); (d) class II minimum internal control standards ("Class II MICS Regulations"); (e) tribal gaming ordinance and facility license regulations ("Tribal Ordinance Regulations"); and, (f) revision regulations to other existing regulations of the NIGC ("General Regulations").

The legislative efforts ("Legislative Proposals") of the Commission about which the Tribe is concerned include proposals apparently seeking broad regulatory authority for the Commission for class III gaming including as to detailed operating standards (topics currently left to negotiations between tribal governments and the various states in connection with tribal-state class III gaming compacts, or to the Secretary of the Interior in connection with procedures for class III gaming). The Draft Rules and Legislative Proposals involve *intertwined and related issues* going to the core of the jurisdictional framework established by the Congress in the Indian Gaming Regulatory Act, as codified at 25 U.S.C. §2701, *et seq.* ("IGRA").

I talked with Billy Cypress, Chairman of the Miccosukee Tribe of Indians of Florida, last evening and the Chairman requested that we forward the enclosed comments and concerns to you at this point in time with the understanding that the Tribe will need additional time to review, analyze, and to consider all of the various proposals incorporated in the Commission's Draft Rules and Legislative Proposals. The Tribe

reserves the right and may wish to submit subsequent comments as to the Draft Rules and Legislative Proposals.

The Tribe believes that the Commission's consultation policy ("Consultation Policy"), and federal policy and law regarding the government-to-government relationship and consultation with tribal governments, requires that meaningful consultation occur with the Tribe *before* the Commission moves forward to publish any proposed rules in the Federal Register and *before* the Commission moves forward with its Legislative Proposals. The time needed for the Tribe to evaluate adequately the Commission's Draft Rules and Legislative Proposals will be impacted by the apparent length (we understand more than 100 pages) and complexity (going to many different aspects of the Tribe's regulation and operation of its gaming facility) of the Commission's Draft Rules and Legislative Proposals. As explained below, these efforts have been and will continue to be prejudiced by the Commission not providing the Tribe with the Commission's current versions of the Draft Rules and Legislative Proposals. The Tribe (and we suspect other tribal governments) may reasonably need through the upcoming holiday season to adequately review, analyze, and consider the Commission's various lengthy and complex proposals and to be in a reasonable position to consult with the Commission in that regard. The Tribe is concerned that the current Commission is seeking to rush through multiple interrelated and complex regulatory and legislative proposals in the waning days of the tenure of the current Commission.

The Tribe is concerned that the Commission has developed the Draft Rules without any effective or meaningful tribal consultation but instead through essentially private negotiations with three "advisory committees" including a so-called Tribal Gaming Working Group ("TGWG") comprised of select vendors and tribal "representatives," the Commission's Minimum Internal Control Standards ("MICS") Tribal Advisory Committee ("M-TAC"), and the Commission's Technical Standards Tribal Advisory Committee ("T-TAC") (we believe that the T-TAC represents the Commission's prior class II gaming tribal advisory committee but we are not aware of the Commission ever giving public notice of a change in the prior committee or the initiation of a new committee). The Tribe is further concerned that the Commission has developed the Legislative Proposals without any effective or meaningful tribal consultation.

The Commission should not move forward with any of the various components of the Draft Rules or Legislative Proposals, and should not publish in the federal register any proposed rules, until key matters relating to the Draft Rules and the Legislative Proposals are disclosed by the Commission to all affected tribal governments, the administrative record associated with the Commission's rulemaking initiatives is made clear, and meaningful consultation occurs between the Commission and each affected tribal government wishing to be heard on the Draft Rules and Legislative Proposals. In fairness, the Commission should not move forward with the Draft Rules until the ground rules for the Commission's regulatory authority are made clear through final resolution of the Commission's Legislative Proposals.

**I. The Draft Rules and Legislative Proposals.**

The focus of the Commission in the negotiation of the Draft Rules with select vendors has been misdirected to purely economic issues while completely missing the basic thrust of the IGRA, namely the jurisdictional boundaries established by Congress for the regulation and operation of tribal gaming by tribal governments. The regulatory approach apparently pre-selected by the Commission in connection with the Draft Rules, *i.e.*, that of the adoption of Commission mandated, detailed operating standards coupled with compliance through advance certification essentially by non-tribal commercial entities, is completely outside of the powers authorized by Congress under the IGRA to the Commission.

The Commission's apparent attempts to appease industry and perhaps a handful of tribal governments by appearing to make concessions in the Commission's definitions and detailed standards sought to be included in the Draft Rules will not make lawful the otherwise unlawful exercise of regulatory authority represented by the Commission's approach to the Draft Rules. The Commission's repeated changes in position on the Commission's views on the details of its proffered operational standards, such as the specific methods of operation of bingo games including as to the timing and sequence of the play of bingo games, only highlight the arbitrary and capricious nature of the determinations (really opinions) the Commission is attempting to impose on tribal governments on subject matters that the Congress has already clearly dealt with through the express wording of the IGRA.

Although the Commission has an important role to play under the IGRA, principally that of oversight and enforcement of tribal regulation and operation of tribal gaming facilities, the power to enforce does not also imply the power to create additional rules and obligations to monitor and enforce. The IGRA provides clear federal standards, and a clear and comprehensive jurisdictional framework, for the operation and regulation of tribal gaming by tribal governments. The standards and the framework established by Congress in the IGRA carefully balanced the relationship between tribal governments and the federal and state governments. That balance is threatened by the Commission's Draft Rules and Legislative Proposals in at least two key ways.

First, the Draft Rules seek to change the jurisdictional framework established by Congress in the IGRA by attempting to alter the scope of gaming included by Congress within class II and class III gaming. The thrust of the Commission's efforts appears to be two-fold: (1) limit the technology available for class II gaming through the imposition of detailed operating standards; and, (2) limit the scope of games allowed for class II gaming by imposing arbitrary and capricious extra-statutory definitions of class II gaming. The Draft Rules seek to do this even though the courts have already ruled that two principal subjects addressed in the Draft Rules, *i.e.*, the meaning of class II bingo and class III facsimiles, are clear and unambiguous under the IGRA and, therefore, both the courts and the Commission must follow the statute.

Second, the Commission's Draft Rules and Legislative Proposals seek to grab and to usurp power and jurisdiction reserved under the IGRA to tribal governments and, in some instances with respect to class III gaming, state governments. Other components of the Draft Rules, *i.e.*, the Tribal Ordinance Regulations, interfere with tribal relationships with other agencies of the federal government such as the Department of the Interior, the Bureau of Indian Affairs, the Department of Justice, the Environmental Protection Agency, *etc.* The Draft Rules and Legislative Proposals, collectively and individually, strike at the core of the IGRA, namely the relationship between tribal governments, on the one hand, and the federal and state governments on the other hand.

The Draft Rules are in a sense premature unless the Congress alters the jurisdictional framework in the IGRA to authorize the Commission to engage in the types of regulation implicit in the Draft Rules. The Commission has placed tribal governments in a difficult position by asking tribal governments to acquiesce to the Draft Rules while the Commission seeks to have Congress change the basic ground rules established by the jurisdictional framework in the IGRA.

Actual injury has already occurred to tribal governments who have been subjected to unauthorized governmental processes by the Commission in connection with the Draft Rules and Legislative Proposals. The Commission has used tribal funds, in the form of the fee assessments used to fund the Commission's operations, to engage in governmental activities not authorized under the IGRA in its current form. We understand that the vendors that are a part of the TGWG have expended more than twenty million dollars to

date on drafting the language to be used by the Commission in the Draft Rules. We suspect that the Commission has likewise expended substantial time, energy, and money on the Draft Rules.

The Draft Rules and Legislative Proposals impinge on and violate important and vested tribal rights, including as provided in the clear and unambiguous wording of the IGRA. The Draft Rules and Legislative Proposals will injure the rights of tribal governments to engage in economic development as essential governmental activities in support of the health, safety and welfare of each tribal government and its members and the jurisdiction (sovereignty) of tribal governments and their agencies to manage and govern their own affairs as an essential expression of the rights of tribal governments to self-determination and self-governance. Tribal governments had the right to engage in gaming prior to the enactment of the IGRA. The nature of the tribal rights involved provide all the more reason that the Commission cannot and should not attempt to take away important and vested tribal rights by rules or regulations such as the Draft Rules that go beyond and that violate the express terms established by the Congress in the IGRA.

The Draft Rules involve important takings considerations and constitute major and significant rules. We understand that no player stations currently offered by tribal governments as class II gaming will survive the standards of the Draft Rules. We understand that based on the Commission's economic impact studies on its prior proposed game classification standards the economic impact from the Draft Rules would likely exceed one billion dollars. The Draft Rules and Legislative Proposals threaten the longevity of tribal gaming and its productivity as a source of tribal governmental revenues.

Since the enactment of the IGRA in 1988, tribal governments have attempted to follow the rules (*i.e.*, the deal) set by Congress. Tribes, in reliance of those rules, court decisions, and prior actions of the Commission, have invested substantial time, energy, and money, into the development and regulation of tribal gaming facilities and the offering of games legal for play under the IGRA. Tribes have further invested substantial time, energy, and money into the negotiation of compacts with states for class III gaming but have increasingly found unwilling negotiating partners in various states within which those tribes are located. By upsetting the delicate but established *status quo* that has existed between tribal governments, the federal government (and its various agencies), and state governments with respect to tribal gaming, *i.e.*, the balance established by Congress through the clear jurisdictional framework contained in the IGRA, the Draft Rules and Legislative Proposals will likely lead to increased litigation, not less, over the regulation and operation of tribal gaming.

As to all areas touched by the IGRA, namely the regulation and operation of gaming by tribal governments, tribal rights to self-government were recognized and protected by the Congress. Involvement by outside, non-tribal government entities such as the Commission was minimized to the full extent possible. That was the deal that was expressed by Congress in the IGRA. The understanding was clearly expressed in the IGRA and to the extent unclear any ambiguity is resolved by the legislative history for the IGRA. The Draft Rules seek to impose unlawful extra-statutory conditions on the regulation and operation of tribal gaming by tribal governments. The Draft Rules violate the basic purposes of the IGRA.

Basic notions of equity and fair play are threatened by the Draft Rules which seek (1) to change the rules late in the day with respect to the tribal regulation and operation of tribal gaming; and, (2) to take away currently legitimate activities of tribal governments with respect to their tribal gaming facilities. The Draft Rules, as we understand the Draft Rules, are contrary to the express wording of the IGRA, the structure of the IGRA, the legislative history of the IGRA, and binding judicial precedent. The current approach to the Draft Rules, as we understand the Draft Rules, also construes prior judicial precedent in ways inconsistent with that judicial precedent.

The current approach by the Commission through the Draft Rules is further contrary to prior NIGC precedent and interpretations on which tribal governments and industry have relied. There has been no demonstration by the Commission of adequate justification to reverse its prior positions on tribal gaming. Against a statute that has remained essentially unchanged since 1988, one would fairly question the deference to be given by the courts to what as to some subject matters included the Draft Rules represents the third or fourth contrary or different position by the Commission.

The Draft Rules and Legislative Proposals do not exist in a vacuum. The Draft Rules and Legislative Proposals must fairly be read and evaluated in the context of the Commission's prior positions and rulemaking efforts. For example, the Class II MICS Regulations must be read against the Commission's prior positions in multiple prior versions of its MICS. The Definitions Regulations, Game Classification Regulations, and Technical Standards Regulations must be read against the Commission's prior positions in its 1992 definitions regulations, its game classification procedural rule in the late 1990's, and its 2002 definitions regulations (and the various proposed and abandoned formulations of those rules). The Commission has further applied a long list of detailed standards in its game classification advisory opinions (presented by the Commission as non-agency action but which by consistency and repetition of application may fairly be construed as unpublished rules for which there has been no compliance with the Administrative Procedure Act). The Tribal Ordinance Regulations must be read against the Commission's prior interpretive rule on environmental, health and public safety standards (as well as the Commission's abandoned rulemaking efforts on those subject matters). Read as a whole, the Draft Rules, Legislative Proposals, and the various above-mentioned prior rulemakings, paint a picture of yet another Executive Branch agency who, unhappy with the rules established by Congress, seeks to establish its own rules.

The Tribe would respectfully submit that the Commission lacks the authority to engage in regulation of tribal gaming either as to the regulatory approach apparently adopted by the Commission in the Draft Rules or as to the detailed substance of the standards sought to be imposed on tribal gaming through the Draft Rules. A careful review of the Draft Rules, were tribal governments at large allowed to see the Draft Rules, would most likely lead to the conclusion that the details included by the Commission in the standards to be included in the Draft Rules are arbitrary, capricious, and against the law.

The Tribe believes that early, effective, and meaningful consultation with tribal governments, as required under federal policy and law, and the Commission's own Consultation Policy, could have avoided the needless and expensive exercise by the Commission thus far in formulating the Draft Rules. Such consultation could yet lead to a mutually acceptable outcome as to the issues believed of import to the Commission but such an outcome will only be possible if the Commission takes a step back, makes clear the administrative record thus far, provides all affected tribal governments with the information necessary to engage in meaningful consultation, and the Commission then engages in such meaningful consultation on a government-to-government basis with tribal governments in advance of moving forward in the promulgation of new regulations.

## II. The Commission has not Engaged in Meaningful Advance Consultation with Tribal Governments; the Commission has not Complied with its Own Consultation Policy.

The important issues raised in the Draft Rules and Legislative Proposals are exactly the type of issues that require thoughtful and meaningful consultation between tribal governments and the federal government. The Tribe is specifically concerned at present with the following issues: (a) the Commission's process in developing its Draft Rules and Legislative Proposals has precluded effective participation by tribal governments; (b) the Commission has not engaged in meaningful consultation with the Tribe with respect to the Draft Rules and Legislative Proposals; (c) the Commission has not complied with its own Consultation

Policy, on which tribal governments have relied and have formed reasonable expectations of compliance by the Commission, in connection with the Draft Rules and Legislative Proposals; and, (d) the Commission has not complied with important federal laws and policies as to the rulemaking and legislative processes, especially as those processes relate to tribal rights.

In 2004, the Commission heralded the Commission's Consultation Policy as a major commitment by the Commission to the rights of tribal governments and to the government-to-government relationship between individual tribal governments and the federal government. The Commission's Consultation Policy was published in the Federal Register following notice and comment. Under the Commission's Consultation Policy, the Commission committed to adhere to existing federal law especially as to the relationship between tribal governments and the federal government (the IGRA is precisely one such law), to engage in early, meaningful and effective consultation with Indian tribes (as compared to vendors, citizen groups, state governments, and other third-parties) *in advance of* the formulation of proposed regulations, to minimize the burden and cost to tribal governments of regulations proposed by the Commission, and, to seek out tribal governments (not the other way around of tribal governments having to pursue the Commission to ascertain what the Commission is up to in connection with its rulemaking and legislative efforts) for consultation on the Commission's rulemaking and legislative initiatives.

The Miccosukee tribal government, and we suspect other tribal governments, fairly relied on the Commission's Consultation Policy. The Commission represented in connection with the Commission's previously published game classification standards and technical standards that the Commission would adhere to its Consultation Policy in connection with the Commission's various rulemaking initiatives.

The Tribe is not in a position to provide specific comments as to the Commission's Draft Rules and Legislative Proposals because the Commission has not made the current drafts of its Draft Rules and Legislative Proposals available to tribal governments in general, nor to the Tribe in particular, nor sought consultation with all tribal governments as to these important matters. Yet, we learned that in a letter dated September 27, 2007, from the Commission to its so-called Technical-Tribal Advisory Committee ("T-TAC") that:

> The Commission is preparing to make final decisions about the substance and timing for the promulgation of all of the Class II regulations before it. The Commission has taken great care to listen to the concerns and issues raised from all interested parties. We are now moving forward to the formal part of the process, which will lead to finalization of these regulations.

The Commission's statement of consultation with tribal governments, implicit in its letter of September 27, 2007, is incorrect. Consultation has not happened. The Commission has not complied with its Consultation Policy (or with the longstanding and well-established principles and understandings between tribal governments and the federal government as to the meanings and proper applications of advance consultation). The Tribe fears that the Commission's statement in its letter, however, is telling as to the Commission's pre-judgment of the issues involved with its Draft Rules.

The Commission should comply with its own Consultation Policy, on which the Tribe and other tribal governments have relied, before moving forward to publish in the Federal Register any proposed rules. The Commission should, before moving forward to publish in the Federal Register any proposed rules, engage in meaningful government-to-government consultation with all (not just selected) tribal governments, by doing at least the following: (a) the Commission should distribute the current drafts of each component of its Draft Rules to all tribal governments so that all tribal governments engaged in tribal gaming may have an opportunity to prepare for effective consultation with the Commission (as each tribal government believes

appropriate); (b) the Commission should post on its website each of the various drafts exchanged between the Commission and its three purported advisory committees (including the TGWG, M-TAC, and T-TAC), or its contractor BMM International, which have been considered or relied upon by the Commission in formulating the current Draft Rules; (c) the Commission should post on its website the various communications and comments received by the Commission to date concerning the Draft Rules (including all communications from all non-tribal entities including but not limited to vendors, other persons within the Executive or Congressional Branches, state governments or their subdivisions, and other private parties); (d) following a reasonable and adequate time for each affected tribal government to review and to consider the materials in items (a) to (c) above, the Commission should hold a series of consultation sessions with elected tribal leaders or their duly authorized representatives from each tribal government wishing to be heard or to provide input on the Draft Rules (in this regard, a mere circulation by the agency of draft proposals coupled with a request for comments does not represent meaningful tribal consultation); (e) the consultation sessions (and it may be necessary to hold more than one consultation session in light of the complexity of the issues raised by the Commission) should honor the customs and traditions of each tribal government wishing to be heard and should not be limited by the Commission to arbitrary time limits (restricted time blocks of fifteen or thirty minutes are simply inadequate in the case of what we understand to be more than a hundred pages of detailed standards included in the Draft Rules) or locations; and, (f) as to each substantive proposal previously submitted to the Commission (and either accepted or rejected), the Commission in connection with any proposed rule to be published in the Federal Register should identify the proposal and discuss the incorporation or rejection of the proposal into the proposed rule so that each affected tribal government can effectively participate in any subsequent notice and comment rulemaking.

**III. The Commission has not Complied with Federal Laws Regarding Advisory Committees.**

The three "advisory committees" apparently used by the Commission in connection with the Draft Rules, *i.e.*, the TGWG, the M-TAC, and the T-TAC, have not complied and do not comply with the Federal Advisory Committee Act ("FACA"). The advisory committees are not chartered (leading to the obvious problem of the M-TAC being tasked to work with the Commission to develop standards to distinguish between class II and class III gaming even though the issue of MICS and game classification under the IGRA are two separate issues), no notice has been given in the federal register of meetings with the advisory committees, no minutes have apparently been kept of the meetings between the committees and the Commission or the Commission's staff, and no budget or reports have been made in compliance with the FACA. The TGWG is not comprised solely of elected tribal officials or their authorized employees (in fact the bulk of its participants appears to include vendors such as IGT, Bally's, Rocket Bingo, Nova Gaming (a key client of the Commission's contractor BMM International), Multimedia Gaming, VGT, *etc.*). The T-TAC is apparently comprised of only four members and is not representative of the tribal governments affected by the Draft Rules. Although the Tribe does not question the experience of the members of the T-TAC, the Tribe does question the ability of only four members to represent effectively the interests all of the tribal governments to be affected by the Draft Rules. The Tribe also believes that not all members of the M-TAC or the T-TAC are either elected tribal officials or their authorized employees (some appear only to be paid consultants).

Against, this backdrop, the Commission apparently has engaged in private negotiations with the TGWG, M-TAC, and T-TAC regarding the substance and wording of the Draft Rules. Many meetings and telephone conferences have apparently already occurred between these select industry groups and the Commission, and the Commission's staff, on the Draft Rules. Many drafts of the Draft Rules have apparently been exchanged and reviewed by the Commission and these essentially select industry groups. The drafts have not been circulated by the Commission to all affected tribal governments (as could easily have been done by the use of the Commission's website or through the mails).

Although the efforts of the TGWG, M-TAC, and T-TAC may be valuable and well-intentioned, their efforts with the Commission have been to the exclusion of affected tribal governments. No effort has apparently been made by the Commission to ensure that the internal discussions and drafting efforts by the TGWG, M-TAC, and T-TAC, be made available to all affected tribal governments so that the spirit of the FACA, or the consultation requirements of the Commission or federal laws and policies on tribal consultations, would be met. Tribal governments should not have to turn to a vendor's working group to learn the current status of the Commission's drafting efforts as to proposed regulations. The efforts of the TGWG, M-TAC, and T-TAC would not be and are not a substitute for effective consultation by the Commission with tribal governments. The Commission's advisory committees do not comply with the FACA and are not within any exception to the FACA.

**IV. The Commission Apparently has not Complied with Federal Laws Regarding Informal Rulemaking.**

The Commission's current Draft Rules as to the Definitions Regulations, Game Classification Regulations, Technical Standards Regulations, and MICS Regulations are in essence a continuation of the Commission's prior efforts to promulgate game classification and technical standards regulations. The courts have specifically addressed the negative impacts occasioned in informal rulemakings when an agency has kept one record for the public, and thus for a court to review, and another for the agency. Additional concerns exist here, because to the extent that the Draft Rules represent no more than a continuation of its prior informal rulemakings, the Commission appears to have engaged in unlawful and repeated *ex parte* communications with selected segments of the industry.

The Commission does not appear to have kept or allowed a clear record as to its informal rulemaking efforts. The Commission has met in private and exchanged drafts in private of its proposed rules with a select, narrow segment of the industry. As the drafts form the basis for the Draft Rules, the Commission appears to have essentially developed the Draft Rules with only a select segment of the industry. Stated another way, it appears that a select segment of the industry has been allowed in essence to write the Draft Rules the Commission will now seek to adopt. Such a procedure does not allow for the open comment and effective participation by all affected parties (interestingly, the Draft Rules appear to have been substantively affected by the efforts of gaming vendors while the Commission has previously asserted that vendors lack standing under the IGRA). The Commission has a duty to look out for and to consider the interests of all affected parties and, in particular, all tribal governments. That has not happened here.

The Commission should identify all drafts and communication exchanged by the Commission with the TGWG, M-TAC, and T-TAC in connection with the Draft Rules. The Commission should identify all proposals either received by or considered by the Commission in connection with any rulemaking. The Tribe is gravely concerned that the record created by the Commission thus far in connection with its rulemaking as to the Draft Rules will not permit a proper review by the courts in connection with the Commission's rulemaking efforts. The Tribe would respectfully urge the Commission to correct the current situation before substantial additional time, money, and energy has been expended by tribal governments in responding to what on the surface appear to be clearly unauthorized regulations and standards.

**V. Conclusion.**

The Commission's current rulemaking and legislative efforts have created an environment of uncertainty making it difficult for the Tribe's agencies to determine what new games or activities should or can be implemented in the Tribe's gaming facilities. The Commission's current rulemaking and legislative efforts

have created an environment of uncertainty for tribal agencies as to the regulation of tribal gaming facilities. The Commission's rulemaking and legislative efforts have also created an environment of uncertainty between tribal governments and states as to the regulatory framework intended and provided by Congress in the IGRA. That uncertainty will not be remedied by moving forward with the Draft Rules or the Legislative Proposals. If the Commission seeks to reduce the uncertainty surrounding tribal gaming by virtue of the Commission's rulemaking and legislative efforts, the Commission will abandon its Draft Rules and Legislative Proposals.

The issues raised in the Draft Rules and Legislative Proposals, whether under the Commission's Consultation Policy or federal policies and laws regarding the government-to-government relationship with tribal governments, are precisely the types of issues requiring effective and meaningful consultation with tribal governments. Before the Commission publishes any proposed rules in the federal register, the Commission should comply with its consultation policies by distributing the current versions of the Draft Rules to all tribal governments and allowing for effective consultation, on a government-to-government basis, as promised by the Commission. The Commission should do the same with respect to its Legislative Proposals. Effective and meaningful consultation may well have avoided the issues and legal difficulties associated with the Commission's Draft Rules and Legislative Proposals.

The federal government should not unilaterally change its relationship with tribal governments as to tribal gaming. The comments above are offered out of respect to the relationship between the Tribe and the federal government. If the Tribe has misunderstood the actions of the Commission, any such misunderstanding could be avoided by clear communication and disclosure by the Commission. As always, the Tribe remains willing to meet and to discuss with the Commission viable regulatory alternatives on matters of mutual import but any such alternatives must comply with the law and protect the Tribe's interests.

Nothing in these comments or this letter constitutes or should be construed as a waiver of any rights of the Miccosukee Tribe of Indians of Florida under the law or otherwise. The Tribe reserves the right to take any and all positions, including positions that are different, or even contrary, to those stated above.

Very truly yours,

Stephen B. Otto

*Via Telecopier and Electronic Mail Forwarding

cc: Hon. Billy Cypress, Chairman, Miccosukee Tribe of Indians of Florida

**HOBBS, STRAUS, DEAN & WALKER, LLP**
ATTORNEYS AT LAW
2120 L STREET, NW • SUITE 700 • WASHINGTON, DC 20037
TEL: 202.822.8282 • FAX: 202.296.8834
WWW.HSDWLAW.COM

March 7, 2008

Via Hand Delivery, Electronic Mail and Fax

Philip Hogen, Chairman
Norm DesRosiers, Vice-Chairman
National Indian Gaming Commission
1441 L St., N.W., Suite 9100
Washington, DC 20005

Re: Comments on Electronic or Electromechanical Facsimile Definition (72 Fed. Reg. 60481 (October 24, 2007)); Comments on Class II Classification Standards (72 Fed. Reg. 60483 (October 24, 2007)); Comments on Technical Standards (72 Fed. Reg. 60508 (October 24, 2007)); and Comments on Class II Minimum Internal Control Standards (72 Fed. Reg. 60495 (October 24, 2007))

Dear Chairman Hogen and Vice-Chairman DesRosiers:

Below please find comments on behalf of the Seminole Tribe of Florida, the Metlakatla Indian Community, the Kickapoo Traditional Tribe of Texas and the Wichita and Affiliated Tribes of Oklahoma on the National Indian Gaming Commission's ("NIGC") proposed Class II regulations referenced above. Our tribal clients respectfully urge the Commission to withdraw the proposed Classification Standards and Facsimile Definition, which are contrary to the Indian Gaming Regulatory Act ("IGRA"), case law and prior decisions by the Commission, and take a fresh look at the classification issue after completing work on reasonable Class II Technical Standards and Minimum Internal Control Standards ("MICS"), which our clients continue to believe could benefit the Class II industry.

Significant effort and expense was made to draft the Technical Standards and MICS regulations submitted to the NIGC by the Technical Tribal Advisory Committee ("TTAC") and MICS Tribal Advisory Committee ("MTAC") (collectively referred to as ("Tribal Advisory Committees")). However, at present both the Technical Standards and MICS regulations published as proposed regulations by the NIGC contain a number of arbitrary and unreasonable requirements. Unless these deficiencies are corrected, these published regulations would cause significant harm to the viability of Class II gaming. While the NIGC published drafts are unacceptable, our tribal clients stand ready to work with the Commission, vendors and other tribes to reconcile these published regulations with the industry-supported versions submitted by the Tribal Advisory Committees.

806 S.W. BROADWAY • SUITE 900 • PORTLAND, OR 97205 • TEL 503.242.1745 • FAX 503.242.1072
117 PARK AVENUE • SECOND FLOOR • OKLAHOMA CITY, OK 73102 • TEL 405.602.9425 • FAX 405.602.9426
400 CAPITOL MALL • 11TH FLOOR • SACRAMENTO, CA 95814 • TEL 916.442.9444 • FAX 916.442.8344

Background

Seminole Tribe of Florida. The Seminole Tribe has been a leader in the development of Indian gaming. The Tribe was the first tribe to open a Class II bingo hall and has been conducting gaming to provide revenue for tribal programs for over 25 years. Until recently, the Tribe was limited to Class II gaming due to the failure of the State and the federal government to follow federal law by refusing to compact or issue procedures in lieu of a compact. However, late last year the Tribe and the State of Florida entered into a Class III Compact that permits the Tribe to offer slot machines and other forms of gaming. However, that Compact is the subject of two separate court challenges. Thus, Class II gaming remains very important to the Tribe, which currently operates numerous Class II technologic aid devices at its seven gaming facilities. As you know, Charlie Lombardo has been an active participant on behalf of the Tribe on the Commission's Class II Technical Tribal Advisory Committee.

Metlakatla Indian Community. The Metlakatla Indian Community is located on the Annette Islands Reserve in Southeast Alaska. The Community operates a small Class II gaming facility, which is an important source of both revenue and jobs for the Community. Class II gaming is vital to the Community since the Community has been unable to negotiate a Class III compact with the State. In past years the Community operated both a forest products plant and a fish cannery, but for economic reasons unrelated to the Community, both of these sources of income and employment have been shut down for some years and the Community has high unemployment except in the fishing season. Due to the small size of its gaming operation, the Community is particularly concerned that the NIGC increase the threshold for Tier A MICS compliance to at least two million dollars.

Kickapoo Traditional Tribe of Texas. The Kickapoo Traditional Tribe of Texas has a small (125 acre) reservation near Eagle Pass, Texas. The Tribe operates a Class II gaming facility on its reservation, which is the primary source of jobs for tribal members and revenue for tribal programs. Class II gaming is extremely important to the Tribe, as the State of Texas has refused to negotiate a Class III compact with the Tribe and has fought the Tribe's efforts to obtain Class III procedures, notwithstanding the fact that the State permits a wide range of gaming activities.

Wichita and Affiliated Tribes of Oklahoma. The Wichita and Affiliated Tribes of Oklahoma (Wichita, Waco, Keechi, Tawakonie) reside on the Wichita Indian Reservation in West-Central Oklahoma. The Tribes do not operate any gaming facility but hope to in the near future in order to bring much-needed governmental revenues to the Tribes to support services to their members. Due to the Tribes' meager existence, options for financing to develop a gaming facility are extremely limited. Class II vendors have a strong history of assisting with start up facilities and the clientele in Oklahoma demand the availability of Class II machines as part of any successful gaming facility. Thus, while the Tribes have entered into a compact with the State of Oklahoma, the Tribes' ability to realize some of the many benefits other tribes have obtained through gaming hinges upon a viable Class II market.

1. Comments on Proposed New Definition for "Electronic or Electromechanical Facsimile."

Our tribal clients strongly object to the NIGC's proposal to amend the definition of "Electronic or Electromechanical Facsimile" found at 25 C.F.R. 502.8.[1] According to the NIGC, this change is necessary to "make[] clear that all games including bingo, lotto and 'other games similar to bingo,' when played in an electronic medium, are facsimiles when they incorporate all of the fundamental characteristics of the game." 72 Fed. Reg. 60,483.[2] This proposed change fails to recognize that both the legislative history of IGRA and case law indicate that the relevant test for facsimile is not whether the game is played in an electronic format, but whether the electronic format changes the fundamental characteristics of the Class II game by permitting a player to play alone with or against the machine.

The IGRA provides that Class II gaming does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind," 25 U.S.C. 2703(7)(B)(ii), however, the term "facsimile" is not defined by the statute. The legislative history suggests that Congress did not intend the facsimile prohibition to restrict the use of electronics to play bingo games. Instead, the term facsimile was used as shorthand for games where, unlike true bingo games, the player plays only with or against the machine and not with or against other players. As explained in the Senate Report:

> The Committee specifically rejects any inference that tribes should restrict class II games to existing games [sic] sizes, levels of

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[1] The present rule, adopted in 2002, provides the following definition:

> Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game, except when, for bingo, lotto, and other games similar to bingo, the electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine.

The proposed rule would change the definition to the following:

> (a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all the fundamental characteristics of the game.
>
> (b) Bingo, lotto, and other games similar to bingo, pull-tabs, and instant bingo games that comply with part 546 [the proposed classification standards] of this chapter are not electronic or electromechanical facsimiles of any games of chance.

[2] As an initial matter, it is not clear from the proposal which characteristics are "fundamental" and what it means to "incorporate" a characteristic into an electronic format. If anything, this change to the definition of facsimile further confuses the distinction between Class II and Class III.

> participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

S. Rep. No. 100-446 at 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3079 (emphasis added).

In other words, the use of technology, even if it allows fundamental characteristics of bingo to be played in an electronic format, does not necessarily make a bingo game a "facsimile." Rather, a bingo game played using technologic aids (which are expressly permitted by 25 U.S.C. 2703(7)(A)(i)), only becomes a facsimile if the technology permits the player to play "with or against a machine rather than with or against other players."

The courts have agreed with this interpretation. In the MegaMania cases, the courts ruled that MegaMania is not an exact copy or duplicate of bingo and thus not a facsimile because the game of bingo is not wholly incorporated into the player station; rather, the game of bingo is independent from the player station, so that the players are competing against other players in the same bingo game and are not simply playing against the machine. See United States v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1100 (9th Cir. 2000); United States v. 162 MegaMania Gambling Devices, 231 F.3d 713, 724 (10th Cir. 2000).[3] As drafted, the NIGC's

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[3] The applicable test for distinguishing between aids and facsimiles was explained by the Tenth Circuit:

> Courts reviewing the legislative history of the Gaming Act have recognized an electronic, computer or technological aid must possess at least two characteristics: (1) the "aid" must operate to broaden the participation levels of participants in a common game, see Spokane Indian Tribe v. United States, 972 F.2d 1090, 1093 (9th Cir. 1992); and (2) **the "aid" is distinguishable from a**

proposed change to the definition of "facsimile" ignores this critical distinction and would unlawfully restrict the range of technologic aids available to tribes. There is no legal basis for the NIGC to alter the current definition, which was adopted in 2002 for the express purpose of bringing the NIGC's previous definition of "facsimile" into compliance with case law.[4]

2. Comments on Class II Classification Standards.

The NIGC's proposal includes a comprehensive regulatory scheme in a new Part 546 for classifying and certifying Class II "games played with electronic components." Proposed 546.2. The proposed rule contains detailed requirements for such games and a process for approval by a testing laboratory and the NIGC. Tribal gaming commissions have no meaningful role under this framework proposed by the NIGC, other than the ability to impose requirements in addition to those enumerated in the regulations. This is directly contrary to the IGRA, which specifies that tribes have the primary responsibility to "license and regulate ... class II gaming on Indian lands within such tribe's jurisdiction ... ." 25 U.S.C. 2710(b)(1).[5]

In addition, the substance of the proposed classification regulations would unlawfully restrict the range of Class II games available to tribes. The proposed rule would restrict tribes to "traditional" bingo and allow only minor variations for games similar to bingo.[6] It also would

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> **"facsimile" where a single participant plays with or against a machine rather than with or against other players.** Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 304 U.S. App. D.C. 335, 14 F.3d 633, 636-37 (D.C. Cir.), cert. denied, 512 U.S. 1221, 129 L.Ed.2d 836, 114 S.Ct. 2709 (1994) (Cabazon III). Courts have adopted a plain-meaning interpretation of the term "facsimile" and recognized a facsimile of a game is one that replicates the characteristics of the underlying game. See Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 542 (9th Cir. 1994) ("the first dictionary definition of 'facsimile' is 'an exact and detailed copy of something.'" (quoting Webster's Third New Int'l Dictionary 813 (1976))), cert. denied, 516 U.S. 912, 133 L.Ed.2d 203, 116 S.Ct. 297 (1995); Cabazon II, 827 F. Supp. at 32 (same); Cabazon III, 14 F.3d at 636 (stating "[a]s commonly understood, facsimiles are exact copies, or duplicates.").

162 MegaMania Gambling Devices, 231 F.3d at 724 (emphasis added).

[4] The NIGC cites Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1995) (involving electronic pull-tabs), for the proposition "that even if a player is playing against another player and not simply the machine that the game may nonetheless be a facsimile." 72 Fed. Reg. 60,482. However, the validity of this analysis (which concluded that an electronic pull-tab is a facsimile of a pull-tab) is doubtful in light of the Ninth Circuit's subsequent ruling in United States v. 103 Electronic Gambling Devices, 223 F.3d 1091, 1100 (9th Cir. 2000), where the court held that electronic bingo cards could be used in a Class II game and did not result in a facsimile.

[5] The NIGC also asserts jurisdiction to set requirements for testing labs, which it does not have under the IGRA.

[6] The Commission has decided to reject the view, expressed in the preamble to its 2002 regulations, that games similar to bingo are not required to meet all of the statutory requirements of bingo. As explained by the

restrict the types of technologic aids available to tribes for Class II games.[7] Ironically, the proposal would use technology to restrict Class II gaming by requiring that Class II aids comply with arbitrary restrictions designed to detrimentally slow game play, restrict prizes values and mandate levels of player participation and interaction with the aid device. This proposed language frustrates Congress's intent in adopting IGRA.

Congress intended to cast a wide net to allow tribes to offer an expansive range of game variations under the broad category of bingo by broadly defining bingo to mean any game that meets three basic requirements set out in the IGRA. 25 U.S.C. 2703(7)(A)(i). In fact, Congress made clear that tribes could offer not just "bingo," but numerous related games – "pull-tabs, lotto, punch boards, tip jars, instant bingo, ... ." Id. Moreover, rather than stop with the enumerated list of games, Congress then went on to specify that tribes also could offer any "other games similar to bingo." In short, Congress was not trying to limit tribes to a restrictive set of bingo-type games (such as only games with a 5x5 card and 75 numbers), but, consistent with the Supreme Court's ruling in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), to recognize that tribes were entitled to offer a very vast range of Class II games. As explained in the Senate Report, "Consistent with tribal rights that were recognized and affirmed in the Cabazon decision, the Committee intends ... that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development." S. Rep. No. 100-446 at 9. Further emphasizing the broad scope of Class II, Congress also explicitly stated that tribes could offer such games with "electronic, computer, or other technologic aids." 25 U.S.C. 2703(7)(A)(i).

The IGRA draws a bright line between Class II and Class III gaming, allowing tribes to play as Class II games a wide range of bingo and specified bingo-like games and permits electronics to be used in the play of such games, as long as the electronics do not allow a player to play alone with or against the device. In the case of bingo, the IGRA specifies the requirements for a game to qualify as Class II bingo. Thus, any game that meets the three IGRA classification requirements for bingo can be played with electronic aids as a Class II game, as long as the electronics are "readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players." S. Rep. No. 100-446 at 9. There is no basis, or more importantly authority, for the NIGC to impose additional classification requirements that are outside those set forth by Congress.

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Commission in 2002, a game that meets all of the requirements of bingo would be bingo – not a game similar to bingo. Only minor differences (the number of spaces on the card and the size of the ball draw) would be permitted for games similar to bingo, even though such games were previously recognized as "bingo." This dramatic change in position is, for the reasons expressed by the NIGC in 2002, illogical and contrary to the plain language of the IGRA.

[7] For example, the NIGC proposes to impose numerous arbitrary, harmful and unlawful limitations on the value of the game-winning prize, size of the bingo card, and the length of the buy-in period.

Of particular note, the NIGC claims that Congress did not intend for tribes to offer bingo aids that result in "one-touch" games through the use of auto-daub, notwithstanding the broad language for Class II in the IGRA and the legislative history. However, to support this claim the NIGC misquotes the Senate Report in the preamble to the proposed rule. According to the NIGC, "[i]n adopting IGRA, Congress observed that ... a Class III facsimile results if those electronic aids incorporate all of 'the fundamental characteristics.'" 72 Fed. Reg. 60,485. However, as shown above, the actual quote is that an aid cannot "change the fundamental characteristics of the bingo or lotto games" by allowing a single participant to play alone with or against the machine. In short, this key language used by the NIGC to support its argument against "one-touch" actually says nothing of the sort. To the contrary, the language suggests that "one-touch" is permissible as long as the aid device does not permit a single player to play with or against the machine.

The courts have agreed with an expansive definition of Class II. As explained by the Ninth Circuit:

> The Government's efforts to capture more completely the Platonic "essence" of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.
>
> There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?
>
> Further, IGRA includes within its definition of bingo "pull-tabs, ... punch boards, tip jars, [and] instant bingo ... [if played in the same location as the game commonly known as bingo]," 25 U.S.C. § 2703(7)(A)(i), none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children. ... Instant bingo, for example, is as the Fifth Circuit explained in *Julius M. Israel Lodge of B'nai B'rith No. 2113 v. Commissioner*, 98 F.3d 190 (5th Cir. 1996), a completely different creature from the classic straight-line game. Instead, instant bingo is a self-contained instant-win game that does not depend at all on balls drawn or numbers called by an external source. *See id.* at 192-93.
>
> Moreover, § 2703(7)(A)(i)'s definition of class II bingo includes "other games similar to bingo," 25 U.S.C. §

> 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.

103 Electronic Gambling Devices, 223 F.3d at 1096. See also 162 MegaMania Gambling Devices, 231 F.3d at 723 ("While the speed, appearance and stakes associated with MegaMania are different from traditional, manual bingo, MegaMania meets all of the statutory criteria of a Class II game, as previously discussed.").

Nevertheless, the NIGC has crafted a regulatory scheme that fails to honor Congress' authorization for tribes to be able offer an expansive range of electronically-aided Class II games into a narrow authorization for a very limited form of electronic bingo. The end result is the creation by the NIGC of a new game that likely has never been played in any bingo hall at any time. Moreover, no electronic bingo game previously approved by the courts or the NIGC would satisfy these requirements. This clearly is not what Congress intended when it enacted the broad Class II provisions of the IGRA.

Significantly, it also is not how the NIGC has previously interpreted the IGRA. In the preamble to its 1992 definition regulations, the NIGC stated:

> [One] commenter suggested that class II gaming be limited to games involving group participation where all players play at the same time against each other for a common prize. In the view of the Commission, Congress enumerated those games that are classified as class II gaming (with the exception of "games similar to bingo"). Adding to the statutory criteria would serve to confuse rather than clarify. Therefore, the Commission rejected this suggestion.
>
> [Another] commenter questioned whether the definition of bingo in the IGRA limits the presentation of bingo to its classic form. The Commission does not believe Congress intended to limit bingo to its classic form. If it had, it could have spelled out further requirements such as cards having the letters "B" "I" "N" "G" "O" across the top, with numbers 1-15 in the first column, etc. In defining class II to include games similar to bingo, Congress intended to include more than "bingo in its classic form" in that class.
>
> . . . Congress enumerated the games that fall within class II except for games similar to bingo. For games similar to bingo, the Commission added a definition that includes the three criteria for bingo and, in addition, requires that the game not be a house banking game as defined in the regulations. The Commission

> believes that Congress did not intend other criteria to be used in classifying games in class II.

57 Fed. Reg. at 12382, 12387 (1992).

In addition to the general objection to proposed Classification Standards, we submit on behalf of our tribal clients the following non-exclusive list of specific objections.

**Section 546.3 -- Definitions**

The proposed section contains a number of arbitrary, and limiting, definitions for bingo, lotto, pull-tabs, instant bingo and other games similar to bingo, to which our tribal clients object. These definitions are discussed below.

*Game.* Proposed section 546.3(a) unlawfully attempts to redefine the term "game" for bingo and other games similar to bingo, notwithstanding the fact that bingo is already defined by the IGRA. The three statutory requirements are the exclusive requirements for bingo. The NIGC's proposed definition of "game" would impose requirements beyond those found in the IGRA definition of bingo and therefore would be unlawful. For example, the proposed definition suggests that there can be only one game-winning pattern, which is contrary to the IGRA definition of bingo, which permits multiple game-winning patterns, as long as they are pre-designated.

*Lotto.* The proposed rule would define "lotto" to be a game "played in the same manner as the game of chance commonly known as bingo." Under this proposed definition, lotto would be defined out of existence as a separate Class II game. In interpreting the IGRA it is clear that Congress intended lotto to have a separate meaning since it is listed as a game separate from bingo.

*Progressive prize.* Proposed section 546.3(d) includes in the definition of progressive prize the requirement that "[a]ll contributions to the progressive prize must be awarded to the players." No justification is given for this limitation, which is contrary to common industry practice in both Class II and Class III jurisdictions, where the operator of the pool generally charges a fee against the pool as compensation for managing the pool.

*Sleep.* It appears that this definition has been added by the Commission to support its opposition to "auto-daub." The definition defines "sleep" to include both failing to cover and failing to claim a prize, however, the IGRA definition of bingo does not require a separate "claim" action by the play. To the contrary, the IGRA provides that the game is "won" by the first player to cover a game-winning pattern. The imposition of an additional claim requirement is contrary to the IGRA requirements for bingo. There also is no legal basis for requiring that a player be permitted to "sleep" a bingo.

*Pull Tabs.* This definition would mandate that pull-tabs be made of paper or other tangible material. In other words, it would preclude the possibility of electronic pull-tabs. This is contrary to recent case law in Ninth and Tenth Circuit holding that electronic bingo cards are permissible.

*Instant bingo.* According to the NIGC, the game is functionally the same as pull-tabs; however, Congress listed them separately and therefore clearly intends that they be treated as separate games.

**Section 546.4 -- Criteria for First Statutory Requirement**

*Card Standards.* While the rule would permit electronic cards, it states that "[a]t no time shall an electronic card measure less than two inches by two inches or four square inches if other than a square card is used." Proposed 546.4(b). These requirements are arbitrary, especially since no allowance is made for small display screens (i.e. hand-held bingo minders). In that same section, the Commission explains that the card must be "clearly visible." However, as long as the card is clearly visible, there is no apparent justification for requiring a card with the dimensions mandated in the proposed rule. Further, we note that many bingo minders (which allow players to play many cards at the same time) display individual cards that are smaller than two-by-two inches.

The rule also would require that bingo be played with a traditional five-by-five card. Proposed 546.4(c). This is a dramatic change in position for the Commission, which has consistently taken the position over the years that Congress did not intend to limit tribes to traditional bingo. It also is contrary to the MegaMania cases. According to the Commission, other card configurations could be permitted as games similar to bingo. While this might sound reasonable, tribes and the Commission have viewed games similar to bingo as permitting a much wider range of bingo-type games, including ones that do not meet all of the IGRA requirements for bingo. In effect, the Commission's proposal would limit games similar to bingo to games that have, until now, been considered to be bingo. This change would have a significant negative operational impact, since games similar to bingo can be played only in locations where bingo is played. 25 U.S.C. 2703(7)(A)(i).

*Display.* The rule also would require that Class II games prominently display a message that the game is bingo or a game similar to bingo. Proposed 546.4(d). It is unclear why this message is necessary, especially if the bingo game is clearly displayed on the video screen. We understand that this requirement originally was suggested by the Justice Department, but it is, in our view, an arbitrary and unnecessary requirement.

*Prize Limitations.* Further, the rule would impose significant limitations on prizes. The rule would prohibit "[r]andom or unpredictable prizes . . . ." Proposed 546.4(g). According to the proposal, "[a]ll prizes in the game, except for progressive prizes, must be fixed in amount or established by formula and disclosed to all participating players in the game." Id. As further explained:

> All prizes in a game, including progressive prizes, must be awarded based on the outcome of the game of bingo and may not be based on events outside the selection and covering of numbers or other designations used to determine the winner in the game and the action of the competing players to cover the pre-designated winning patterns. The prize structure must not rely on an additional element of chance other than the play of bingo.

Proposed 546.4(n). Later in the proposed rule, the Commission clarifies that "the order of, or quantity of, numbers or other designations ... may affect the prize awarded for completing any previously designated winning pattern in a game." Proposed 546(k). However, the limitations proposed by the NIGC are significant and without justification. Bonus wheels and similar devices are common in Indian and non-Indian bingo halls and there is no indication that Congress intended to restrict this aspect of "traditional" bingo. We see nothing in the IGRA, which simply requires that bingo be played "for prizes," that would preclude random or unpredictable prizes.

In addition, the proposal would require that the game-winning prize be awarded in every game and be no less than one cent. Proposed 546.4(h). We note that MegaMania, approved by the Ninth and Tenth Circuits, did not require that the game-winning prize be awarded in each game. Similarly, the one cent rule is completely arbitrary and should be eliminated.

**Section 546.5 --Criteria for Meeting Second Statutory Requirement**

In this section the NIGC continues its effort to limit bingo to its view of what is "traditional." Again, such requirements are contrary to the IGRA and should be removed.

*Pre-drawn Numbers*. The NIGC repeats its view (expressed in NIGC bulletins and advisory opinions) that games played with pre-covered or pre-drawn numbers (such as bonanza-style bingo) are not permitted to be played in an electronic format. The Commission's rationale, is that the term "when" used in the definition of bingo has a temporal meaning and requires that numbers be covered at the same time that they are drawn or determined. However, as in its previous guidance, the NIGC ignores the argument that when also has a conditional meaning (the player covers "IF" matching numbers are drawn or determined), even though the definition of "when" quoted by the NIGC in the preamble includes the conditional "IF" meaning. The NIGC is incorrect in its belief that games played with pre-drawn balls cannot be bingo or at least games similar to bingo, especially since such games are recognized as such under the laws of a number of states. Amazingly, the Commission previously acknowledged that bonanza-style can be played in "live session bingo play," 71 Fed. Reg. 30,245. There is no logical basis for the Commission's position that such games can be played in a "live" format, but not with electronic aids. Both forms are "live" bingo games.

*Auto-daub & Cover.* The rule also prohibits "auto-daub" and requires that players "must take overt action after numbers or designations are released by touching the screen or a designated button." Proposed 546.5(e). Further, the rule would prohibit a player from catching-up and covering previously missed balls later in the game, even though this is permitted in almost every traditional bingo game. Proposed 546.5(i). An exception is made for the game-winning prize, but not for bonus or progressive prizes. There is no legal basis for any of these limitations. In the case of auto-daub, the restriction is particularly unreasonable, since this feature is common in non-Indian bingo halls throughout North America. In the Preamble, the NIGC claims that "[i]mplicit" in the IGRA requirement that a bingo game is won by the first person to cover is a requirement that "a player must make some overt action to win the game." 72 Fed. Reg. 60,486. However, this "logic" ignores the fact that functions performed by the aid device ARE the player's actions. Simply put, when the device assists the player by covering matching spots on the bingo card, that action is the player's action.[8]

*Substitute Players.* The NIGC asserts that "[t]he gaming facility or its employees may not play as a substitute for a player." Proposed 546.5(m). There is no real explanation for this limitation, which would be contrary to an advisory opinion issued by the NIGC on November 14, 2000, where it opined that "proxy play" (where facility employees covered the cards for the players) was permitted for Class II games. Thus, this limitation should be removed.

**Section 546.6 -- Criteria for Meeting Third Statutory Requirement**

Proposed Section 546.6(a) sets forth a number of additional requirements, which are completely arbitrary and should be removed. We discuss these provisions below.

*Ball Release &Game Winning Pattern.* According to the rule, each game can have only one game-winning pattern, the winning pattern must have at least three spaces, and bonus patterns must have at least two spaces. Proposed 546.6(c)-(d). There is no legal basis for these limitations.

Since the NIGC now agrees that a bingo game can be played with a single ball release (72 Fed. Reg. 60,486), the language in Proposed 546.6(f) appears to have been included in error, since it is based on the requirement for at least two releases. We assume that this language will be removed in any final rule.

*Buy-in period.* The NIGC requires at least six players to begin play. Otherwise, the game must wait at least two seconds before beginning play with no fewer than two players. Proposed 546.6(a). Consistent with the Senate Report language quoted above and case law, we agree that there must be at least two players in each game. However, the requirement for six players and a two second delay period are completely arbitrary and should be eliminated.

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[8] Similarly, a person can access his/her bank account through the internet and instruct the bank to make a payment at the beginning of every month to his/her mortgage company. That person is still the one making payments to the mortgage company, even though no further action is required by the person. Like auto-daub, the computerized system helps the customer by taking action on his/her behalf.

*Ante-up rules.* The proposed rule would prohibit the "ante-up" style of game approved in the MegaMania cases. While NIGC concedes that ante-up games are permitted, it proposes game rules that are contrary to the game features approved in the MegaMania cases. Specifically, the game requires that at least two players must agree to ante-up. If not, the last player "will be declared the winner of the game-winning prize, and the game will end, provided that player obtains, covers (daubs), and claims the game-winning pattern." Proposed 546.6(n). There is nothing controversial about awarding the game-winning prize to the last player if he/she covers the pattern. However, the NIGC then proposes the absurd requirement that "[i]f all players leave the game before a game-winning pattern is obtained, covered (daubed), and claimed by a player, the game will be declared void and wagers returned to the players." Id. (emphasis added). Apparently, all players would get a full refund even if they had paid and played multiple rounds, but had dropped out before a player covered the game-winning pattern. On its face, this would appear to require refunds, even if the players had won interim prizes during earlier rounds of the ante-up game! Such a requirement would be at odds with the MegaMania cases and would be impractical.

*Sleep.* Proposed 546.6(l) provides that if a player sleeps the game-winning pattern "[t]he same value prize must be awarded to a subsequent game-winning player in the game." Thus, if there are two players in the game (one at a 5 cent buy-in level and one at a $5 buy in level) and the player at the higher level fails to cover the game-winning pattern, then the rule would require that the 5 cent player win the prize from the $5 level if he/she covers the game-winning pattern. We are not aware of any "traditional" bingo game that is played under such an unfair and arbitrary rule. The prize should be based on the prize table for the individual player's buy-in level.

**Section 546.7 -- Criteria for Non-Electronic or Electromechanical Facsimiles Pull-tabs or Instant Bingo**

This section reflects the NIGC's view that pull-tabs must be made of paper or other tangible material in order to avoid being an electronic or electromechanical facsimile. While the NIGC agrees that a technologic aid may "read and display the contents of the pull-tab as it is distributed to the player" the proposed rule would not permit the device to validate the pull-tab or otherwise accumulate credits. We understand that this change from a previous draft of the proposed rule was requested by the Justice Department, however, there is no rationale provided in the proposed rule for why such a feature would be not allowed for a Class II aid device. Also at the request of the Justice Department, the rule would require that the aid device display– "THIS IS THE GAME OF PULLTABS." Finally, the rule would limit the size of the print on the pull-tab to eight point font. Once again these requirements are arbitrary and contrary to law and should be removed.

Further, the rule would prohibit pull-tab systems where paper pull-tabs are electronically read at a central location and the results transmitted to individual player stations. Proposed 546.7(k). The NIGC provides no real justification for this limitation, except for a general

unwillingness to allow any feature that was not expressly permitted favorable in recent pull-tab cases. There is no legal basis for this limitation, which should be removed.

**Section 546.8 -- Approval Process for Games**

The entire approval process is fundamentally flawed, since it fails to respect the primary role of tribal regulators under the IGRA. For example, there is no ability under the proposed rule for a tribe or vendor to appeal a negative decision by the testing laboratory. Instead, the proposed rule appears to permit a tribe to challenge only a favorable certification by the testing laboratory. Proposed 546.8(e)(1). This is contrary to fundamental due process. The rule should permit a challenge to the "formal written report" issued by the lab at the conclusion of the process, rather than just to a decision by the lab to certify that a game complies with the applicable standards. Further, the proposed rule would require advance certification by an independent testing laboratory determined to meet standards set by the Commission before a game could be put in play. According to the proposed regulations, the Chairman of the NIGC or his designee would have 60 days to object to any certification issued by a testing laboratory. Proposed 546.8(e)(1)(ii). However, even after 60 days, the Chairman or his designee is permitted to object to a previously certified game "upon good cause shown." Proposed 546.9(e)(1)(iii). In other words, there never would be any certainty about a game classification decision. It likely would be impossible for a vendor to operate and raise capital in such an uncertain regulatory environment.

**Section 546.9 -- Compliance with Part 546 Standards**

As written, the proposed rule would impose a significant unfunded mandate on tribes to implement an NIGC-designed compliance program. The result is that tribal regulators would be transformed into little more than NIGC field agents, which is contrary to Congress' intent to promote strong tribal governments and to maintain tribal regulators as the primary regulators of gaming that takes place on tribal lands.

3. General Comments on Technical Standards and MICS.

The NIGC first published its proposed draft Class II Technical Standards on August 11, 2006. This first draft was an unwieldy compilation of Class III technical specifications lifted from a number of non-tribal gaming jurisdictions in the United States and abroad. Imposing such Class III technical specifications on Class II gaming systems would have inappropriately forced Class II system-based technologic aids to meet technical requirements appropriate only for Class III machine-based games. This approach would have caused significant legal and regulatory uncertainty and imposed unnecessary costs on the Class II industry and likely destroyed the industry.

At a hearing on September 19, 2006, the NIGC heard from a broad cross-section of tribal leaders, regulators, attorneys, manufacturers and other tribal gaming industry representatives who all testified that the draft standards would cause severe economic harm to Indian tribes.

Several major Class II gaming manufacturers testified that imposing such misguided regulations on the industry would likely cause them to abandon the Class II industry altogether. A subsequent economic impact analysis commissioned by the NIGC confirmed that the economic cost to tribes of the combined proposal would in fact be in the billions of dollars.

In a follow up meeting held shortly thereafter in December of 2006, the NIGC recognized that the standards might be improved with the assistance of the NIGC Tribal Advisory Committee (TAC) and technical experts from tribes and the Class II industry. The NIGC invited the TAC to assemble a working group of Class II gaming experts to work with the TAC to revise the proposed Technical Standards so that they better reflected the technological reality of Class II gaming systems. Our tribal clients have been active participants in this effort.

In the space of 50 days, the Tribal Advisory Committee and the newly formed tribal gaming work group committed enormous time and resources working with senior NIGC staff to produce an alternative set of Technical Standards. The Tribal Advisory Committee submitted its Alternative Technical Standards draft to the NIGC on January 25, 2007. On February 15, 2007, the NIGC withdrew the entire 2006 package of regulations, including the August 11, 2006, proposed Technical Standards.

In revising the Technical Standards, it became apparent that there was a need to revise the Minimum Internal Control Standards ("MICS") in a similar fashion. As a result, the NIGC tasked a newly reconstituted MICS committee to begin working with the Tribal Advisory Committee, the tribal gaming work group and NIGC staff to draft MICS for Class II which conformed with the new approach taken in the Technical Standards. Over the next several months, the MICS Committee, the Tribal Advisory Committee, and the Tribal Gaming Work Group spent many hundreds of hours and considerable resources revising the MICS alongside NIGC staff. As the MICS were revised, the Tribal Advisory Committees made additional conforming revisions to the revised Technical Standards to ensure that the two sets of standards work together as seamlessly as possible.

On September 12, 2007, the two Committees presented the revised Technical Standards and MICS to the NIGC. These drafts reflected the consensus view of the expert tribal representatives of the Tribal Advisory Committees, the industry leading expertise of the tribal leaders, regulators, attorneys, manufacturers and other tribal gaming industry representatives who make up the Tribal Gaming Work Group, and senior NIGC staff who participated in their development. The drafts were only reached after considered deliberation, debate and compromise.

There was a general consensus among all involved that the two new sets of standards were broad enough to encompass all types of Class II game play, while providing strong standards and controls that will ensure the integrity of Class II gaming, protect tribal operations and preserve tribal assets. Taken together, the Technical Standards and the MICS set standards and controls that reflect the essential characteristics of Class II gaming, and in so doing, highlight the line between Class II and Class III gaming. We believe that the success of this

effort was due in large part to the collaborative, cooperative and transparent process adopted by the NIGC.

Accomplishing this task in such a short time frame was not easy. Significant resources were expended by those involved in order to accommodate the NIGC's self-imposed fast track for revising these regulations in under a year. By way of comparison, it is our understanding that similar efforts conducted in other gaming jurisdictions such as Nevada have taken years to complete.

We were therefore significantly disappointed when we discovered that the published drafts of the Technical Standards and the MICS published on October 24, 2007, contained material departures from the Tribal Advisory Committees' drafts that create some of the same problems that plagued the initial drafts. Although we always recognized that the Tribal Advisory Committees' drafts were recommendations, NIGC staff participated in their development, and changes had already been made to accommodate NIGC's concerns. At every stage of the process, NIGC staff was asked whether they had issues with what had been proposed, and after often heated debate, changes were made to accommodate the NIGC's regulatory concerns. At the end of the process, it was understood that if the NIGC were to make changes, they would not be of the type that would materially impair the remainder of the documents.

Nevertheless, the NIGC made significant changes to the Technical Standards regulations without any advance notice or discussion with the industry. These changes included the following: (1) the Technical Standards have been revised by NIGC to require compliance with the Classification Standards in order to comply with the technical standards (which would threaten the legal viability of the Technical Standards); (2) the NIGC removed the permanent exemption for existing player interfaces (player station interfaces) from complying with the new technical specifications for hardware (this alone will cost the industry hundreds of millions of dollars); (3) the NIGC has added new minimum probability requirements for progressive and other prizes (once again, this is the NIGC trying to fit bingo into a slot machine box); (4) the NIGC would prevent tribes from using their own testing laboratories (this is offensive to Indian Country, as states and counties are under no such restrictions); (5) NIGC would require that the entertaining display be recalled in the event of a malfunction in addition to the bingo card (which would give inappropriate and independent legal significance to the entertaining display, confusing the players and eroding the integrity of the bingo game); and (6) some of the changes are really MICS issues that cannot be tested by a testing laboratory.

The NIGC also made several material changes to the Tribal Advisory Committees' MICS. First, the NIGC's cross-referencing of existing MICS would mandate that tribes provide information appropriate only in Class III operations (we went to great effort and expense to avoid just this problem when the effort began in 2006). Second, the draft contains significant internal inconsistencies that must be addressed before the rules can go forward. Third, the NIGC rejected a proposal to raise the minimum revenue requirement for complying with the MICS from $1 million to $3 million. Fourth, the NIGC removed a critical provision in the Tribal

Advisory Committees' draft which clarified that tribes only need to adopt MICS for the types of games and related equipment they are not otherwise required to use.

Although the NIGC had pursued an honest, open, cooperative and collaborative process in revising the Technical Standards and the MICS until it made its recent changes, it was clear to all that this process did not substitute for tribal consultation. This was stated by all parties throughout the process. While the Tribal Advisory Committees and the Tribal Gaming Work Group have been able to provide the NIGC with technical advices from the tribal perspective concerning the operation and regulation of Class II games, they do not and cannot speak for all tribal governments. We urge the NIGC to consult directly with all Tribal Governments and provide an opportunity for Tribal Governments to participate in a dialogue on the contents of the proposed regulations. The differences between the Tribal Advisory Committees' drafts and the drafts the NIGC proposed have the noted differences and are new to most tribal governments, which have not since then had the chance to weigh in on the proposal. These drafts will have significant impacts on tribal economies, and the NIGC has not yet held consultation on the drafts. This failure to consult with tribes concerning such important regulations is in direct violation of the NIGC's own consultation policy. It is our hope that reasonable technical standards and MICS can be finalized that will help to protect tribes and the general public at large.

4. Comments on Technical Standards.

As discussed above, we believe that for the most part, the Technical Standards draft is an enormous improvement over the previous draft the NIGC published as a proposed rule in August of 2006. Rather than attempt to adapt Class III technical standards appropriate for Class III machine boxes, the proposed Technical Standards properly reflect that Class II gaming is based on a system of integrated components. The vast majority of the proposed rule was developed as part of an open, cooperative and collaborative process with the Tribal Advisory Committee, the Tribal Gaming Work Group, and NIGC staff, and imposes state of the art technical standards appropriate for Class II gaming systems that achieve the NIGC's goals of ensuring the integrity of Class II gaming, protecting tribal operations and preserving tribal assets. As a result, we generally support the proposed rule.

As noted above, however, the NIGC has made several key changes to the Tribal Advisory Committees' draft Technical Standards which if left undisturbed will render the standards unworkable and impose significant and unnecessary costs on the Class II industry and the tribal economies that rely on it. Following are specific section by section comments on these aspects of the proposed rule.

**Section 547.4 -- How do I comply with this part?**

The NIGC has improperly added a new requirement that the testing laboratory test to new minimum probability standards of Proposed 547.5(c), which as discussed below, we do not believe are necessary or feasible. Accordingly, our tribal clients do not support this new requirement.

The NIGC has also improperly added a new requirement not in the Tribal Advisory Committees' draft that the testing laboratory must test to "applicable provisions of Commission regulations governing the classification of games... ." As discussed above, to the extent that this provision applies to the proposed Classification Standards under consideration by the NIGC, we oppose these regulations. To the extent this provisions refers to the existing Class II regulations, it is inappropriate for the NIGC to grant the authority to determine whether a game meets the legal definition of Class II or Class III to a testing laboratory. First, Tribal Gaming Regulatory Authorities are the primary regulators of Class II gaming under the IGRA, and it is inconsistent with the IGRA for the NIGC to transfer the authority to make that determination to a testing laboratory. Second, the testing laboratories are expert only in technical matters and do not have the requisite legal expertise to determine whether a game meets the definition of Class II or Class III under the IGRA. When a game is submitted to a lab, it can only determine whether a game is technically played in a manner consistent with technical standards. Laboratories simply do not have the capacity to take the next step and render any conclusion as to whether or not a game meets a legal standard. That determination must be left to the Tribal Gaming Regulatory Authorities in the first instance.

The NIGC also changed a requirement regarding the independence of testing laboratories that is patronizing and unwarranted. The Tribal Advisory Committees' draft standard would have required that testing laboratories be independent from tribe or tribal gaming regulatory authority. This requirement would ensure that there would be no way for a tribe to improperly influence the result of a test lab. The NIGC has taken this requirement a step further and mandated that the tribe cannot own or operate a testing lab. This would effectively preclude a tribe from using its own testing lab even if that lab were independent from the tribe. This is a patronizing requirement that appears to assume that tribal governments are incapable of ensuring the independence of a tribally owned enterprise. This is inappropriate and unwarranted, and fails to consider situations where tribes already have their own test labs up and running that produce quality results and employ tribal members.

The suitability determinations added by the NIGC also render it more difficult for tribal laboratories to certify games. The NIGC added provisions requiring tribes to conduct the same kind of background investigations applicable to management contracts for all testing laboratories that have not been determined to be suitable by any other gaming jurisdiction in the United States. This improperly gives non-tribal test laboratories a leg up on tribal testing laboratories, as non-tribal test laboratories already have suitability determinations from other jurisdictions that have nothing to do with tribal gaming.

One of the most significant changes the NIGC made in this section was to remove a permanent exemption for existing player interface hardware. The Tribal Advisory Committees' standards contained a provision permanently exempting existing hardware player station "boxes" from compliance with the rules, reasoning that the cost of replacing existing boxes would be prohibitively high, and that in any event, market forces would require their eventual replacement. This permanent exemption for existing boxes would not have any affect on game play, as the

Class II box is a dumb terminal that cannot play the game without being connected to the system. Accordingly, exempting existing hardware would not delay compliance with the most critical aspects of the new standards. We believe that failing to include this exemption will impose enormous costs that cannot be justified by the benefits of the new proposal regarding hardware. The player station box is the most expensive part of existing systems, yet the standards that apply to hardware provide the least protection to tribal assets. Accordingly, we believe that providing a permanent exemption is warranted.

**Section 547.5 -- What are the rules of interpretation and of general application of this part?**

As mentioned above, the NIGC added a new minimum probability requirement to the Tribal Advisory Committees' draft that would for the first time establish minimum probability odds for prizes. The new requirement would set minimum probability odds of 50,000,000-to-1 for all progressive prizes, and 25,000,000-to-1 for all other prizes.

These requirements are unnecessary, arbitrary, and place tribes at a competitive disadvantage with states. There is nothing in the IGRA that calls for setting minimum odds for winning Class II games, and the NIGC has failed to articulate a reason for including such a provision in these regulations. Even if such a requirement were warranted, the levels chosen by the NIGC are completely arbitrary. We note that state-run lotteries generally have odds of at least 250,000,000-to-1, which in some states compete directly with tribes through VLTs. There is no basis for the NIGC to impose a comparative disadvantage on tribes through lower probability odds.

**Section 547.7 -- What are the minimum technical hardware standards applicable to Class II gaming systems?**

The only material change made in this section by the NIGC is that it deleted language in the standards for financial instrument storage components to apply to components that are operated under the direct control of gaming employees or agents rather than to components that are designed to be operated in such a manner. The deletion of the "designed to be" language changes this provision from a technical standard that requires equipment designed for a certain purpose to meet certain requirements, to an operational control (i.e., a MICS) that requires equipment used in a certain manner to meet certain requirements. In order to fit more appropriately in the technical standards, the "designed to be language" should be reinserted.

**Section 547.8 -- What are the minimum technical software standards applicable to Class II gaming systems?**

The NIGC changed the requirements for bingo games to also cover "games similar to bingo." These Technical Standards were designed with bingo games in mind, and the MICS which complements these technical standards was specifically drafted only to cover bingo games. The new requirements make little sense as they were intended to cover bingo games. For example, Proposed 547.8(d)(4)(vi)(B) would require games similar to bingo to display "The

identifier of the bingo game played." It is difficult to see how this would be accomplished in the case of a game similar to bingo. This section should be revised to clarify that it only applies to games of bingo.

The last game recall provisions were altered by the NIGC to require not only that a gaming system be able to recall last game information, but also that it must be able to recall any alternative video display the system provides. This requirement will cause many more problems than it is designed to solve. The alternative display is not legally relevant to the outcome of a game of bingo, and in fact cannot have any relevance to the outcome of a game and still be Class II. Although the NIGC appears to believe that requiring the display of such information will actually help resolve patron disputes, the opposite is true. Often, a malfunction will occur in the alternative display itself, and even if such a malfunctioning display can be recalled, a faulty display will only further confuse the patron and/or unnecessarily motivate them to continue to pursue a challenge. Requiring those legally immaterial results to be displayed in a federal regulations will only grant them the appearance of relevance they lack, and make it all the more difficult for tribes to explain that it is the result of the bingo game that counts, and not the alternative display. Granting the imprimatur of relevance to the alternative display will only blur the line between Class II and Class III gaming. This requirement must be deleted from the proposed rule before it can be finalized.

We also oppose the new requirements for pull-tabs, which effectively impose classification requirements on pull-tabs. The new provisions would require that pull-tabs use tangible pull-tabs. There is no requirement that pull-tabs be tangible. Although certain courts have held that to be the case for pull-tabs, the rationale in those decisions has been overturned by more recent decisions allowing the use of electronic cards for bingo.

**Section 547.17 -- How does a gaming operation apply for a variance from these standards?**

The NIGC deleted a critical provision from the variance provisions in the Tribal Advisory Committees' draft standards. In order to avoid undue delay and ensure that the denial of a variance could be challenged in court, the Tribal Advisory Committees' draft provided that the Commission would have thirty days to consider the appeal of a denial or the IGRA's decision would be upheld. The NIGC has deleted this provision, and effectively granted itself an indefinite time period in which to consider an appeal. The Commission should not be able to review an appeal indefinitely and avoid finality of its action.

5. Comments on MICS.

As discussed above, the Tribal Advisory Committees' draft MICS for Class II gaming were developed through the work of the Tribal Advisory Committees, the Tribal Gaming Work Group and NIGC audit and legal staff. After revising the Technical Standards, it became apparent to all involved that the existing MICS for Class II gaming were inadequate, and inconsistent with the newly developed Technical Standards.

The draft Class II MICS developed by the NIGC's audit staff suffered from many of the same deficiencies as the initial draft of the Technical Standards. Cobbled together from a series of controls from Nevada, New Jersey and other North American jurisdictions, the Class II MICS reflected the same Class III bias as the initial draft of the Technical Standards. As a result, the MICS Advisory Committee decided to drastically revise the standards. Working with the NIGC's audit and legal staff, and the members of the Tribal Advisory Committee and Tribal Gaming Work Group, the MICS Committee was able to develop new MICS that more accurately reflects the Class II game.

We believe that the proposed MICS, for the most part, represents a significant improvement over the initial draft that was circulated by the NIGC. The proposed MICS properly focuses on internal controls appropriate for Class II system-based gaming, and for the most part no longer imposes controls appropriate only for Class III gaming.

As with the Technical Standards, however, the NIGC made several material changes to the Tribal Advisory Committees' draft MICS that had been approved by NIGC's audit staff before they were submitted to the Commission on September 12, 2007, by the MICS Committee. These changes make material changes to the Tribal Advisory Committees' MICS that in many ways recreate the same problems that were present in NIGC's initial draft. Following are our comments on these aspects of the proposed rule.

**Section 543.1 – What does this part cover?**

One of the difficulties in focusing only on MICS for bingo was how to implement the rules in the absence of revising the remainder of the MICS, which also imposes general controls for gaming operations that are not specific to bingo. It was suggested that the proposed MICS for bingo go forward, and simply cross-reference existing MICS in other areas until such time as those MICS could be revised and included in the new Class II MICS as well. We agree that importing the remainder of generally applicable controls from the existing MICS to the MICS for Class II is a good idea. However, simply cross referencing existing MICS does pose some difficulties. For example, the proposed Class II MICS also make Section 542.19(b)(4) applicable to Class II operations. This section requires a comparison of actual to theoretical hold percentages, which are appropriate only in the Class III environment. This issue had been discussed with both the Commission and NIGC staff, and it became clear that it would be impossible for tribes to calculate an accurate theoretical hold percentage using a Class II gaming system of the kind required by this control. There is no justification or need for such a requirement in the Class II arena, and it therefore should not be cross referenced in the new Class II MICS.

Moreover, the Tribal Advisory Committees' draft was developed with the specific understanding that it applied only to bingo games, and would not cover games similar to bingo. The controls and technologies involved with games similar to bingo may be very different from what is required for bingo, and such controls should be developed separately.

**Section 543.2 -- What are the definitions of this part?**

As discussed below, we believe it is appropriate to raise the minimum threshold for small operations from compliance with the MICS to at least $2 million, since the original $1 million figure has never been adjusted for inflation. Accordingly, the definition of Tier A should be revised.

**Section 543.3 -- How do I comply with this part?**

If this proposed rule becomes final tribes have six (6) months from the date of the publication of the final rule to establish Tribal Internal Control Standards (TICS) that provide a level of control that equals or exceeds those set forth in Part 543. Tribes must then require that existing gaming operations comply with the TICS within six (6) months after establishing the TICS. The proposed rule provides that tribes can extend this six (6) month deadline for compliance by an additional six (6) months if they submit to the NIGC, written justification for the extension "*no later than two weeks before the expiration of the nine month period.*" The "*nine month period*" is a holdover from the Tribal Advisory Committees' draft, which required compliance within nine months. We believe that nine months is a more realistic time from for tribes to digest and implement these new rules, and that the rule should be revised accordingly.

The proposed rule also requires that all gaming operations in existence within one year of the effective date of the rule must come into compliance within the time period set by the tribe in the previous section (effectively, no later than one year after the effective date of the rule). New gaming operations that commence within six months after the effective date of the rule must comply with §543 *prior to* commencement of gaming operations. This second requirement appears inconsistent with the first, in that if a gaming operation is begun six months after the date of the rule, it would have to comply with the rule immediately, even though the first requirement would arguably allow such operations to comply within the time period set by the tribe (no more than one year from the date of the rule, total), and even though the tribe may not have standards in place by then (as the rule allows tribes a total of one year to set standards and require compliance).

The proposed rule provides that a CPA will perform testing to ensure either that the tribal gaming operation is in compliance with either the TICS or the MICS. One of the requirements of this Part mandates that "an unannounced" observation of the drop and count take place. The proposed rule specifies that the CPA performing the testing shall make appropriate arrangements with the *tribal gaming operation* and tribal gaming regulatory authority (TGRA) to ensure prompt access. However, the proposed rule also provides that unannounced means that "no officers, directors, or *employees* are given advanced notice" of the observation. Making prior arrangements with the gaming operation itself would require "announcing" the "unannounced" observation. Many tribal gaming ordinances currently require that auditors, state agents, or other visitors to the tribal gaming operation give advance notice to either the operation or the TGRA to ensure that an agent of the TGRA is available to escort visiting parties to the non-public areas of a gaming operation. We believe the rule should be revised to reflect this.

**Sections 543.4-543.5 [Reserved]**

The NIGC deleted Section 543.4 from Tribal Advisory Committees' draft MICS submitted by the MICS Advisory Committee. This section provided that only applicable standards apply and was designed to ensure that the MICS do not mandate that tribes create and enforce controls for technologies they are not otherwise required to use. For example, Section 543.7(f) sets controls for the use of voucher systems, but was not intended that tribes must use voucher systems. However, it states that "the voucher system shall be utilized to verify the authenticity of each voucher or coupon redeemed." Without the catch-all provision in Section 543.4 stating that only applicable standards apply, this voucher section could be interpreted by a future Commission as requiring the use of voucher systems, a technology forcing result clearly at odds with the legal requirements of the IGRA. There are many other similar provisions throughout the MICS which were only agreed to with the understanding that this catch-all provision would not force tribes to use particular technologic aids when playing Class II bingo. Forcing tribes to do so is contrary to the IGRA which does not require the use of any aids to the game of bingo, and contrary to the spirit of compromise and fairness that lead to the adoption of standards that do not require the use of any one manufacturer's technology to play Class II. This section is critical to the successful operation of the MICS and must be reinserted.

**Section 543.6 -- Does this part apply to small and charitable gaming operations?**

The NIGC deleted the requirement in the Tribal Advisory Committees' draft MICS that would have raised the exemption threshold for small and charitable gaming operations from $1 million to $3 million. The proposed rule maintains the existing one million dollar threshold, whereby a tribal gaming operation will not be subject to the MICS if its gross gaming revenue does not exceed $1 million annually. The NIGC says publically that it is concerned about the viability of small tribal gaming facilities. However, failing to adjust the $1 million threshold for inflation after nearly a decade is at odds with this statement and seems to reflect a lack of trust in the ability of tribes to regulate even very small gaming facilities.

The $3 million threshold was suggested by the NIGC Director of Audits, who recommended it be raised to reflect inflation and the growth of the industry. As we understand it, the NIGC calculated that raising the exemption to $3 million would have exempted too many Tribal gaming operations to be politically palatable. This is a critical issue for many tribes, however, and we urge the NIGC to consider raising the limit to at least $2 million.

Many tribes make just less than the current $1 million threshold, but with inflation could soon reach that figure. Doing so would require the adoption of extraordinarily expensive new controls, such as the use of digital surveillance technologies whose cost is ordinarily only justified in much larger gaming operations. When a small gaming operation is forced to adopt these controls, the associated costs can represent a significant percentage of that operation's income. This may lead to tribes voluntarily seeking to lower their profits simply to avoid meeting that threshold if doing so would adversely impact their bottom line. This creates a

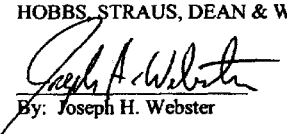
perverse incentive that must be addressed in the proposed rule. We believe that raising the threshold to at least $2 million would serve both small operations and the NIGC.

Conclusion

Congress provided a bright line test to distinguish electronically-aided Class II games from Class III games. In contrast, the classification regulations proposed by the NIGC would muddy this clear line by imposing numerous onerous and unlawful restrictions on both the underlying games and the types of electronic aids used to play those games. The games that would be permitted under the proposed regulations would be unreasonably slow, hard to play and generally unappealing to players. In the end, Class II gaming would be limited to a very narrow range of games that would have very little commercial viability. On behalf of our tribal clients, we respectfully urge the Commission to withdraw the proposed regulations and take a fresh look at the classification issue after completing work on reasonable Class II Technical Standards and MICS regulations.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP



By: Joseph H. Webster

cc: Penny Coleman, Acting General Counsel
National Indian Gaming Commission

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March 7, 2008

Phillip N. Hogen, Chairman
Norman H. DesRosiers, Commissioner
National Indian Gaming Commission
1441 L Street NW
Washington, D.C. 20005

Re: Proposed Definitions and Game Classification Standards

Dear Chairman Hogen and Commissioner DesRosiers,

I, Stephanie A. Bryan, Poarch Band of Creek Indians Vice-Chair, have some heartfelt concerns in relation to the regulations posted in the Federal Register on October 24, 2007. Gaming is the economic engine in Indian Country today, and I understand totally and support that it should be highly regulated. Since being involved with the regulatory aspect of the industry, I have understood from day one that the current goal of the NIGC was to draw a bright line between class II and class III gaming.

As a tribal leader, I express a sincere appreciation that you allowed the tribal gaming working group (TGWG) to develop technical standards and minimum internal control standards that would assist in this process of differentiating between class II and class III gaming. At some point, however, it almost seems useless – their time, dedication and dollars spent became totally meaningless once you published the game classification standards. I stood before you in Washington, DC on September 11th, 2007 and begged that you all move forward

with the technical standards and possibly the minimum internal control standards, and if that did not draw some distinction between the two, then you should consider moving forward with the game classification standards. An alternative could have been for you to allow the TGWG to also work on the game classification standards in order to develop something that would help satisfy your needs, yet not be as economically devastating.

I have witnessed and seen the changes in lives throughout Indian country due to this economic engine. The programs and benefits that the tribes have been able to implement for tribal members are phenomenal. I was reared in my own Tribal community and tears come to my eyes when I look back at our community and see where we were and how we have grown today. The challenges that the tribes have faced throughout this century speak for themselves. But as a leader today, I am also very appreciative – and so are all of my fellow tribal members – of the benefits we have been able to obtain due to this economic engine called gaming. We are able to educate our own people and have them return to the community and work for the Tribe. Educate our elders on catastrophic diseases that are so prevalent in Indian country, such as heart disease and diabetes, along with providing them with adequate health care.

The infrastructure that Tribes have developed because of the gaming industry is also deeply appreciated by our neighboring communities. The economic development provides not only for Tribal members, but also for many others. While the State of Alabama continues to allow one man to benefit significantly from his gaming revenues, we are trying simply to provide necessities for our Tribal members and neighbors in these rural and often poverty-stricken communities.

You all are aware of the opposition that we at Poarch Creek face within our state. We are at a competitive disadvantage due to our state's gaming issues. IGRA states as long as a state is acting in good faith to negotiate a compact they are adhering to IGRA's policy. How do you consider the State of Alabama and Governor Bob Riley to be acting in good faith when he will not even meet with

the Tribe but will allow one man to operate a gaming facility under no regulations?

Once again, I am begging you as a leader of my Tribe to please consider moving forward only with the technical standards and possibly the minimum internal control standards. If that does not clean up the industry and create the desired "bright line," then consider the game classification standards.

You too are leaders and I ask that you not make a decision that would negatively impact Indian Country in such a way that we as leaders cannot provide benefits to our tribal members. If you move forward with the game classification standards it would cripple the Tribe's ability to compete within our state. I beg once again please think about the negative effect this will have on Tribes before you continue with the finalization of these regulations.

Best Regards,

Stephanie A. Bryan

Stephanie A. Bryan, Vice-Chair
Poarch Band of Creek Indians

**POARCH BAND OF CREEK INDIANS**
Seeking Prosperity and Self Determination
5811 Jack Springs Road
Atmore, AL 36502
251-368-9136
251-368-4502 Fax
www.poarchcreekindians-nsn.gov

March 7, 2008

Philip N. Hogen, Chairman
Norman H. DesRosiers, Commissioner
National Indian Gaming Commission
1441 L Street, NW
Washington, DC 20005

Re: Proposed Definitions and Game Classification Standards

Dear Chairman Hogen and Commissioner DesRosiers,

We appreciate the opportunity to comment on the National Indian Gaming Commission's ("NIGC") proposed regulations regarding the classification of games under the Indian Gaming Regulatory Act ("IGRA") as published in the Federal Register on October 24, 2007 ("Proposed Rules"). For the reasons stated below, the Poarch Band of Creek Indians ("Tribe") objects to the Proposed Rules and strongly urges that they be withdrawn in their entirety.

First and foremost, the Tribe objects to the NIGC's current action as it serves only to further restrict the scope of class II gaming. The Proposed Rules contain a host of requirements never before needed for a game to fall within the category of class II gaming. Because these requirements are new, existing games do not satisfy them, and thus, no game currently classified as class II by the courts, or even the NIGC itself, will survive this rulemaking. The Tribe strenuously objects to the fact that if these Proposed Rules are finalized, all existing games *will automatically lose their class II status* and thus require a Tribal-State Compact for their continued operation – an occurrence verified by the NIGC's own economic impact study. No court ruling or congressional enactment justifies such a dramatic change of course.

The Tribe is also deeply concerned with the economic impact of the Proposed Rules. While we discuss later some of the more specific impacts that these Proposed Rules will have on our Tribe, the NIGC's own economic impact study shows that the impact of finalizing these regulations will be a loss of approximately $575.9 *million* to $1.8 *billion* of gaming revenue *each year*. Non-gaming revenue, such as food and beverage, lodging, retail and entertainment will suffer an additional loss of approximately $2.8 billion per year. The NIGC's economic impact study also shows that if the NIGC finalizes its Proposed Rules, Indian country will lose approximately 1,629 to 5,044 jobs per year. This includes jobs not only at tribal gaming facilities, but also at tribal offices, which will ultimately suffer from decreased gaming revenues. Given that tribal offices tend to employ a large percentage of tribal members, the study states that tribal members are expected to be impacted greatly. Finally, the NIGC's economic impact study also

states that the need to redevelop class II games will cost approximately $347.9 million over five-years in increased capital, deployment and compliance costs. The study estimates that the majority, if not all, of these costs will be borne by tribes. Again, no court ruling or congressional enactment justifies such a devastating impact.

The Proposed Rules are particularly problematic for our Tribe because of the state's continued unwillingness to negotiate for the very same games that are currently being played elsewhere within the state. We resent the fact that we will be forced to replace all games within our gaming operations with slower and less profitable games, while our competitors continue to flourish. In enacting IGRA, Congress placed only three requirements on a game of bingo, and the federal courts have held that these three requirements "constitute the sole *legal* requirements for a game to count as class II bingo."[1] Congress intended that tribes have "maximum flexibility" to utilize class II gaming for the purpose of economic development. Given that technology is never intended to limit the commercial success of a product or an industry, Congress clearly expected that Indian gaming would grow and evolve with advancing technology. By further restricting the types of games that the Tribe may operate, our ability to compete is impacted even further. These Proposed Rules make our ongoing struggle to maintain equal footing with our competitors an impossibility.

Because of the unique situation in which we find ourselves, our Tribe will clearly be among those most impacted if these Proposed Rules are finalized. We, therefore, begin our discussion here.

## THE PROPOSAL'S IMPACT ON THE TRIBE

The Poarch Band of Creek Indians descends from a segment of the original Creek Nation consisting of tribal members that were not removed from their tribal lands. The Tribe was federally recognized in 1984, its members having lived together for over 150 years near Atmore, Alabama. Upon federal recognition, the Tribe began to reverse the cumulative effects of a century of social segregation, discrimination, and poverty.

The Tribe has conducted gaming in the State of Alabama for over twenty years, beginning with the Creek Bingo Palace, which opened in Atmore, Alabama, in April 1985. Since then, the Tribe has opened two additional gaming operations: one in Wetumpka, Alabama, which opened in November 2001, and one in Tallapoosa, Alabama, which opened in September 2002.

Gaming is critical to the Tribe's viability because it fuels so many other tribal endeavors. As permitted under IGRA, the Tribe allocates discretionary monies to satisfy other needs, including the betterment of our members and community through the provision of education, health care, and housing, land acquisition and improvement, and fire and police protection. Economic ventures such as gaming provide a strong economic base for the Tribe and facilitate additional economic development, job creation, and an overall improved quality of life for this

[1] *U.S. v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096, 1097 (9th Cir. 2000).

rural southern region. Tribal gaming revenues are now a vital source of support for the tribal community and its roughly 2,500 members. Its economic benefits reach well beyond the Tribe and its members to surrounding communities in at least five Alabama counties. For example, most of the Tribe's nearly 800 gaming-related jobs are held by non-Indians.

For the past seventeen years, a series of challenges have threatened the Tribe's ability to conduct gaming on an equal footing with our competitors. In 1990, the State of Mississippi legalized dockside casino gaming. Casinos in the gulf regions of Biloxi and Gulfport in particular have had a devastating impact upon the Creek Bingo Palace. A large percentage of our customers come to us from Mobile, Alabama, which is situated almost equidistant between Atmore, Alabama, and Biloxi, Mississippi. When faced with an hour drive in either direction, the majority of our customers naturally chose the full-scale casinos of Biloxi over our bingo hall. The result was devastating for the Tribe, as traditional bingo transformed from a profitable venture to one that barely broke even. Our ability to fund social and economic programs was considerably reduced.

Three years later, the State of Mississippi approved a class III gaming compact with the Mississippi Band of Choctaw Indians. The Mississippi Choctaws now operate two full-scale casinos that are located only 300 miles from our northern gaming facilities. The Choctaw casinos serve as direct competition and in fact have stated that the majority of their customers come to them from Alabama – a reason, perhaps, for their well-publicized opposition to the expansion of gaming in our state.

Developments within the State of Alabama, however, have proven even more harmful. As you are well aware, the Tribe has been attempting to negotiate a Tribal-State Compact with the state since 1990. Though the state permits a broad range of activities that, if offered on Indian lands would fall within the category of class III gaming, it has chosen to ignore the Tribe's requests to negotiate. Most troubling is the fact that in recent years, the scope of gaming within the state has grown exponentially, making it increasingly difficult for the Tribe to compete or even keep pace. The Tribe now finds itself at a severe competitive disadvantage.

In November 2003, voters in two Alabama counties approved constitutional amendments authorizing the operation of bingo games by nonprofit organizations for charitable and educational purposes. Macon County, which is a mere 30 miles from the Tribe's Wetumpka facility, is home to the Victoryland Dog Track, which, interestingly, is the only qualifying "charitable" entity within the county. The track now operates approximately 3,500 electronic bingo machines – machines whose operation is forbidden to the Tribe.

While the responsibility of determining whether a gaming activity is lawful in Indian country falls to the NIGC, in the State of Alabama, this responsibility falls to those within the state. Because the laws under which the state and the NIGC review the legality of certain activities differ, the outcome of their analyses is also bound to differ. That is indeed the case here and, as a result, while the bingo games authorized for use elsewhere within the state are being operated lawfully under state law, they contain features that, in the eyes of the NIGC, transform

the game into one that is class III gaming. The most obvious of these features is auto-daub, which will be discussed at length later in this letter.

Because the state continues to refuse to negotiate with the Tribe, we remain limited to the operation of class II games. As a result, during the very time at which non-Indian operators within the state have increased their use of games that are forbidden to the Tribe, the scope of class II gaming in Indian country appears to be shrinking. The game is being slowed to the point where it will no longer be economically viable – defeating the original intent of Congress and returning the tribes to the days of grey-market vendors. The NIGC should avoid placing tribes at a competitive disadvantage. Tribes should be allowed to operate not only those games permitted by IGRA, but also those games permitted elsewhere within the state.

The proposal's long-term impact on the Tribe and on the non-tribal residents of Alabama would be devastating. Not only would the proposal eliminate critical revenue streams for social, medical and educational programs for the Tribe, but the loss of hundreds of jobs in predominately lower-income areas of rural Alabama would have deep, long-lasting impacts throughout the state. Many would be forced to leave home due to an inability to maintain meaningful local employment, further impacting family and social structures. The Tribe's business partners and vendors in surrounding rural communities would also be seriously impacted. Depriving the Tribe of its primary source of income and sustenance runs counter to Congress' stated policy in the enactment of IGRA of promoting tribal self-determination.

## LACK OF SUPPORT FOR THE NIGC'S CURRENT DIRECTION

Given the devastating impact these Proposed Rules will have on both the Tribe and Indian country in general, we are particularly alarmed at the fact that the NIGC fails to provide any support for their enactment. While it is stated within the preamble that if the NIGC does not provide a "bright line" between class II and class III gaming, Congress will do so (much to the detriment of tribes), no support is provided for this claim. Similarly, the NIGC's assertion that today's games have crossed some unknown line because Congress could not possibly have anticipated current technology is also without merit. While perhaps it can be said that Congress could not have envisioned the *exact* games that are in use today, it is disingenuous to say that Congress could not have envisioned the advances in technology that have occurred over the last twenty years. Indeed, it is clear that at least the precursors to each component of the technology used by today's electronic bingo games existed before 1988, and in many cases, long before.

In the 1970's, the video game revolution began in earnest. The home version of Pong, often said to be the first video game, was released in 1975.[2] Video games such as Space Invaders, Tron, PacMan, and many others have been licensed in the United States since 1978, 1980, and 1981 respectively, and were in wide use during the 1980's. This video technology naturally spread to the gaming industry. Video poker games were first introduced in the mid-1970's and

[2] *See* http://en.wikipedia.org/wiki/First_video_game.

became more popular in casinos throughout the 1980's.[3] This was also the time during which the first personal computers were being developed. The microprocessors that developed as a part of modern computer technology were naturally incorporated into the gaming industry. This transfusion of technology into the gaming industry allowed gaming machines to provide a broader array of games, permitted two-way communication between the microprocessor and the gaming machine's internal components, and led to the development of the credit meter, which lessened the operation's dependence on coin-handling personnel and permitted faster game play.[4] In 1986, the Nintendo Entertainment System was released nationally in the United States, enabling people to play even faster, graphic video games in their own homes.

The technology necessary to link electronic components was also widespread before the enactment of IGRA. Automated Teller Machines, or "ATMs," provide perhaps the clearest example. While the first electronic ATM was introduced in 1967, wide usage of the machines did not occur until 1973 – still fifteen years before the enactment of IGRA.[5] These early machines were very similar to today's ATMs in that they were linked electronically and permitted a person to withdraw cash from an account, which was immediately updated.[6] These machines also used PIN numbers stored on a card, a technology created in 1965.[7]

The technology that permitted the linking of electronic components used in ATMs was incorporated into the gaming industry by at least the mid-1980's as evidenced by a 1985 court case that dealt with a networked system. Here, the court was faced with evaluating the nature of certain video lottery equipment under applicable state law.[8] Of relevance to our discussion is the fact that the game at issue consisted of individual game terminals, an agent terminal, and a central site system. The agent terminal was linked on-site to one or more individual lottery terminals, which permitted certain game functions, such as the printing of winning game tickets. The agent terminal was also linked to a presumably off-site central server that dialed up each agent terminal at various locations to obtain a summary of that day's play. While the dial-up technology may be an early version of today's more modern methods of communicating, the case shows that game networks existed before IGRA was enacted.

Also, the California State Lottery began authorizing lotto, an on-line game played through dispersed access points linked to a centralized computer, in 1986. And given the forms of technology and their advancement during the years preceding the enactment of IGRA, any suggestion that Congress could not have envisioned the advances in technology that have occurred over the last twenty years is difficult to support. For the NIGC to move forward with regulations that will have such a destructive impact on Indian gaming, its justification in doing so and the support therefore should be solid.

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[3] http://en.wikipedia.org/wiki/Video_poker.
[4] *Introduction to Slots and Video Gaming*, available on www.igt.com.
[5] See http://en.wikipedia.org/wiki/Automated_teller_machine.
[6] *Id.*
[7] *Id.*, citing "Pins and needles," http://www.guardian.co.uk/g2/story/0,,1394149,00.html.
[8] *Video Consultants of Nebraska, Inc., v. Douglas*, 219 Neb. 868; 367 N.W.2d 697 (1985).

## SPECIFIC OBJECTIONS TO THE PROPOSED RULES

1. Allowance Must be Made for Tribes in States with More Lenient Gaming Laws

The Tribe believes strongly that consideration should be given to those isolated tribes who find themselves in a situation such as ours, with a Governor who refuses to follow the directives of IGRA and negotiate a Tribal-State Compact, yet permits the scope of gaming to flourish within the state. Without such consideration, we could face economic ruin upon finalization of the Proposed Rules. To avoid this negative impact, tribes such as ours should be permitted the opportunity to comply with either the standards set forth within the Proposed Rules or the scope of games permitted within the state. Consequently, the Tribe recommends that §546.8(a) of the Proposed Rules be revised as follows:

**Sec. 546.8 What is the process for approval, introduction, and verification of electronic, computer, or other technologic aids under the classification standards established by this part?**

(a) Except as provided in subsection (1), ~~A~~an Indian tribe or a supplier, manufacturer, or game developer sponsored by a tribe (hereafter, the "requesting party") wishing to have games and associated "electronic, computer, or other technologic aids" certified as meeting the classification standards established by this part must submit the games and equipment to a testing laboratory recognized by the tribal gaming regulatory authority under this part. The requesting party must support the submission with materials and software sufficient to establish that the game and equipment meets classification standards, any other applicable regulations of the Commission, and provide any other information requested by the testing laboratory.

(1) An Indian tribe or a supplier, manufacturer, or game developer sponsored by a tribe (hereafter, the "requesting party") wishing to have games and associated "electronic, computer, or other technologic aids" certified for operation in a tribal facility that is located in a state that permits the operation of games that are broader than those permitted as class II gaming under this part, must submit these games and equipment to a testing laboratory recognized by the tribal gaming regulatory authority under this part. The requesting party may elect to support the submission with materials and software sufficient to establish that these games and equipment meet the scope of gaming permitted in the state rather than the classification standards under this part. A requesting party wishing to meet state requirements will submit additional supporting materials and documentation to the testing laboratory as may be necessary to meet the state requirements. Such requests shall follow the same procedural requirements as outlined in this part.

To further clarify the intent behind this provision, the Tribe also recommends the following changes:

**Sec. 546.1 What is the purpose of this part?**

This part clarifies the terms Congress used to define Class II gaming under the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq. ("IGRA" or "Act"). Specifically, this part explains the criteria for determining whether a game of bingo or lotto, another game similar to bingo, or a game of pull-tabs or instant bingo, meets the statutory requirements when these games are played primarily through an electronic, computer or other technologic aid. This part also establishes a process for establishing Class II certification of electronic, computer, or other technologic aids and the games they facilitate. This part further addresses those unique situations where these games and associated "electronic, computer, or other technologic aids" are intended to be certified for operation in a tribal facility that is located in a state that permits the operation of games that are broader than those permitted as class II gaming under this part. These standards for classification are intended to ensure that Class II gaming using electronic, computer, or other technologic aids can be distinguished from Class III electronic or electromechanical facsimiles. If the technologic aid meets the requirements of this part, then the fundamental characteristics of the game have not been incorporated and the aid is not an electronic or electromechanical facsimile.

**Sec. 546.4 What are the criteria for meeting the first statutory requirement that the game of bingo, lotto, or other games similar to bingo be played for prizes, including monetary prizes, with cards bearing numbers or other designations?**

...

(p) Where these games and associated "electronic, computer, or other technologic aids" are intended to be certified for operation in a tribal facility that is located in a state that permits the operation of games that are broader than those permitted as class II gaming under this part, the requesting party may elect to support the submission with materials and software sufficient to establish that these games and equipment meet the scope of gaming permitted in the state rather than the classification standards under this part as provided for in §546.8(a).

**Sec. 546.5 What are the criteria for meeting the second statutory requirement that bingo, lotto, or other games similar to bingo be one in which the holder of the card covers such numbers or other designations when objects similarly numbered or designated are drawn or electronically determined?**

(n) Where these games and associated "electronic, computer, or other technologic aids" are intended to be certified for operation in a tribal facility that is located in a state that permits the operation of games that are broader than those permitted as class II gaming under this part, the requesting party may elect to support the submission with materials and software sufficient to establish that these games and equipment meet the scope of gaming permitted in the state rather than the classification standards under this part as provided for in §546.8(a).

**Sec. 546.6 What are the criteria for meeting the third statutory requirement that bingo, lotto, or other games similar to bingo be won by the first person covering a previously designated arrangement of numbers or designations on such cards?**

...

(o) Where these games and associated "electronic, computer, or other technologic aids" are intended to be certified for operation in a tribal facility that is located in a state that permits the operation of games that are broader than those permitted as class II gaming under this part, the requesting party may elect to support the submission with materials and software sufficient to establish that these games and equipment meet the scope of gaming permitted in the state rather than the classification standards under this part as provided for in §546.8(a).

**Sec. 546.7 What are the criteria for meeting the statutory requirement that pull-tabs or instant bingo not be an electronic or electromechanical facsimile?**

...

(m) Where these games and associated "electronic, computer, or other technologic aids" are intended to be certified for operation in a tribal facility that is located in a state that permits the operation of games that are broader than those permitted as class II gaming under this part, the requesting party may elect to support the submission with materials and software sufficient to establish that these games and equipment meet the scope of gaming permitted in the state rather than the classification standards under this part as provided for in §546.8(a).

2. The NIGC Should Acknowledge Pending Requests for Secretarial Procedures

If the NIGC elects not to implement the option presented above, the Tribe requests that the NIGC incorporate language that would permit us to continue to operate existing games until such

time as our request for secretarial procedures is finalized. To this end, we recommend the following language:

> **Sec. 546.8 What is the process for approval, introduction, and verification of electronic, computer, or other technologic aids under the classification standards established by this part?**
>
> (g) *Secretarial Procedures.* Notwithstanding any other requirements, tribes that have a request pending before the Secretary of the Department of the Interior for secretarial procedures as provided for in 25 CFR Part 291, and that satisfy the requirements of 25 CFR §291.3, may elect to continue operating existing games pending the final outcome of that request. The tribal gaming regulatory authority shall submit a list of such games to the Commission on or before [Insert 120 days from the effective date].

3. The Grandfather Clause as Drafted is Not Sufficient to Protect the Tribe from Enforcement Action

While the NIGC had originally agreed to specifically address those tribes with pending requests for secretarial procedures as recommended above, we understand that this intention changed in light of what the NIGC views as an expanded grandfather clause. It is our belief, however, that the grandfather clause, as drafted, is not sufficient to protect the Tribe from enforcement action by either the Department of Justice or even a newly constituted NIGC.

We see two specific problems with the grandfather clause contained within §546.10(b). First, while the intent appears to be to permit the continued operation of existing class II games for a period of five years, other sections are incompatible with this intent. To illustrate, tribal gaming regulatory authorities are required to submit a list to the Commission of all technologic aids under §546.10(d). Section 546.9(c) adds that this list must be accompanied by a certification by the tribal gaming regulatory authority that such technologic aids satisfy the requirements of the new game classification standards. Because it is highly unlikely that any games meeting "the classification standards established by this part" will be in existence at the time certification is required, such certification is impossible. In order for the grandfather clause to work as intended, §546.10(b) should state simply that all games in operation before 120 days of the effective date may remain in operation for a period of five years, so long as the tribal gaming regulatory authority submits a list of the same to the NIGC. No certification should be required.

Second, even if the issue identified above is corrected, another larger issue exists. Section 546.10(e) of the Proposed Rules states: "Nothing in this section is intended to authorize the continued operation of uncompacted Class III machines that allow a player to play against the machine." While conversations with key NIGC officials leads us to believe that this provision was directed at one or two specific instances where true slot machines are be operated without a compact, we are concerned that this provision also includes many if not all of the games currently

being operated by the Tribe. For example, NIGC game classification opinions have argued that several common game features permit a player to play against the machine rather than other players. Regardless of whether the NIGC maintains this position within the Proposed Rules, these prior arguments provide the Department of Justice, or even a newly constituted NIGC, with the ammunition that it needs to find that the games being operated during the grandfather clause are in fact not suitable for inclusion within that clause. Accordingly, §546.10(e) must be deleted from the Proposed Rules.

Finally, even the NIGC's own economic impact study shows that the grandfather clause will not have the effect presumably desired by the NIGC. The study states that "while the five-year grandfathering provision will reduce the chance of temporary gaming facility closures, it will have little if any effect on any of the other negative economic impacts of the proposed regulations. It will only serve to delay some of them." The study then explains that these "other negative impacts" include closure, decreased revenue and increased costs.

4. The NIGC Should Not Prohibit Game Features Permitted to Others Within the State

Auto-daub is a permitted feature within a game of bingo in the State of Alabama. Victoryland Dog Track, which is located in Shorter, Alabama, currently operates approximately 3,500 electronic bingo machines that lawful employ auto-daub. Still, the NIGC has prevented our Tribe from using this same feature. Because the use of auto-daub is permissible within our state, the Tribe should be able to utilize games that incorporate this feature, and must be able to do so in order to remain competitive.

As the NIGC is well aware, IGRA establishes only three requirements for a game to qualify as the class II game commonly known as bingo. First, it must be a game played for prizes with cards bearing numbers or other designations.[9] Second, the holder of the card must cover numbers or other designations when objects, similarly numbered or designated, are drawn or electronically determined.[10] And third, the game must be won by the first person who covers a designated pattern on such a card.[11]

In considering the game of MegaMania, a predecessor to today's electronic bingo games, the Ninth Circuit Court of Appeals addressed the criteria that must be satisfied for a game to meet IGRA's requirements of a class II game of bingo. In relevant part, the court stated:

> "The Government maintains that because IGRA uses the phrase 'the game of chance commonly known as bingo' before spelling out the three criteria, *other* features that have traditionally characterized bingo games are also pertinent in determining whether or not a game is a class II bingo game. The Government contends, specifically, that (i) traditional bingo games lack the ante-up feature MegaMania possesses, (ii) in a traditional

[9] 25 U.S.C. §2703(7)(A)(i)(I).
[10] 25 U.S.C. §2703(7)(A)(i)(II).
[11] 25 U.S.C. §2703(7)(A)(i)(III).

> bingo game, unlike CornerMania, earnings depend on those of other players, and (iii) MegaMania's 'manic pace' and potentially high stakes are markedly different than the placid tranquility and token rewards and losses associated with a traditional bingo game, *see* Appellant's Opening Brief ("AOB") at 23 (citing Alice Andrews, *Hooked on Bingo* 11 (1988) ("There is a calm and peacefulness in playing Bingo. There is a get-away-from-it-all feeling, kind of like bamboo fishing.")).
>
> "The Government's efforts to capture more completely the Platonic 'essence' of traditional bingo are not helpful. Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or home towns might discover, IGRA's three explicit criteria, we hold, constitute the sole *legal* requirements for a game to count as class II bingo.
>
> "There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?"[12]

Despite this clear direction, the NIGC has attempted to add requirements to the statutory definition of bingo in IGRA. For example, it has argued that "[m]erely hitting a start button and having numbers covered would not comply with the degree of participation that the statutory language – 'the first person to cover' – implies."[13] The NIGC adds that the player must respond to the numbers as they are called. IGRA, however, contains no such explicit requirement, and the addition of "implicit criteria" runs counter to the holding of the Ninth Circuit Court of Appeals quoted above.[14] The NIGC's new requirement of "participation" is a requirement of the game not contained within IGRA. Such a requirement can not be grafted on to the statute.

Indeed, in determining whether a game satisfies the statutory elements of bingo, the courts have evaluated what it means for a player to "cover" the numbers on a bingo card under various factual circumstances when electronic covering (known as "daubing" after the use of ink daubing devices used in some games) is used. Traditionally, players of paper bingo would separately locate each number drawn and then place a marker on, or otherwise physically mark, each matching number on their card(s). Players of electronic bingo games, however, typically mark their card(s)

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[12] *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000). Other attempts by the government to add requirements to other key definitions have also been rebuked. *See Seneca-Cayuga*, 327 F.3d 1042. "Moreover, adopting the government's strict proposed definition of 'aid' would run counter to the Committee's Report exhortation that 'tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility.'"

[13] *Reel Time Bingo Game Classification Opinion*, National Indian Gaming Commission, September 23, 2003 ("*Reel Time Bingo*") at 7.

[14] *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000).

by either pressing a button on the console or by touching the display itself, either way covering all matching numbers at once.

In dismissing the argument that MegaMania fails to satisfy the definition of bingo because of its electronic daub feature, the court stated that "[t]here is nothing in IGRA. . .that requires a player to independently locate each called number on each of the player's cards and manually 'cover' each number independently and separately."[15] To the contrary, the court emphasized that IGRA "merely require[s] that a player cover the numbers without specifying how they must be covered."[16] Thus, the manner in which players cover numbers on their card(s) is irrelevant.

When Congress enacted IGRA, it anticipated advancing technology and intended for Indian gaming to evolve and grow as technology developed. This intent is best illustrated by often-quoted language from the Senate Report accompanying IGRA, which states:

> The [Senate Indian Affairs] Committee specifically rejects any inference that tribes should restrict class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.[17]

Incorporating the benefits of electronics in playing the game is merely the natural progression of changing technology, which now enables players to daub through means of an electronic player station. The courts have held that the manner in which a player covers numbers on their card(s) is irrelevant. The statutory requirements of bingo are satisfied so long as numbers *are* covered when similarly numbered objects are drawn or electronically determined – a statutory requirement that continues to be satisfied even with the addition of auto-daub.[18]

Nothing in IGRA or judicial interpretations of IGRA prevents a game of bingo from employing a feature that assists a player in daubing. To the contrary, IGRA expressly authorizes the use of technologic aids in the play of a class II game and federal courts have repeatedly recognized that the manner in which a player covers numbers is irrelevant. Furthermore, even with auto-daub the daubing function is performed during the game's natural progression, only *after* each release of balls, and thus, IGRA's sequencing requirement continues to be satisfied.

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[15] *U.S. v. 103 Electronic Gambling Devices*, 1998 WL 827586, at 6 (N.D. Cal), *affirmed* 223 F. 3d 1091 (9th Cir. 2000). In keeping with this ruling, the NIGC added in a recent game classification opinion that "[c]onsistent with the view that the game may be played in electronic format on a video screen and that 'bingo paper' is not required, the act of electronically daubing. . . is a logical substitute for marking a bingo paper card. . .." *See Sierra Design Group "Mystery Bingo" Game Classification Opinion*, National Indian Gaming Commission, September 26, 2003 ("*Sierra Design*") at 10.

[16] *Id.*

[17] S. Rep. No. 446, 100th Cong., 2d Sess. 9 (1988).

[18] When covering numbers through the use of auto-daub, players are in essence utilizing a type of assistance similar to that provided by reader/dauber devices commonly known as "bingo minders." Notably, these devices pre-date IGRA and are still used widely in both tribal and non-tribal bingo facilities.

Auto-daub cannot play independent of the player, and it has no impact on the outcome of the game. Adding auto-daub to a class II game of bingo does not cause the game to fall outside of IGRA's three explicit requirements for a game to qualify as the class II game commonly known as bingo. The statutory requirements of bingo are satisfied so long as numbers *are* covered when similarly numbered objects are drawn or electronically determined.

Moreover, because the use of auto-daub is authorized within the state, the Tribe believes that it too has a clear right to operate class II games that employ this feature within its gaming facilities. Accordingly, the Tribe objects to the NIGC's prohibition of this type of a technologic aid and respectfully requests that changes be made to the Proposed Rules accordingly.

5. The NIGC Should Not Modify its Definition of Electronic or Electromechanical Facsimile

Since the enactment of IGRA, federal courts have addressed and clarified the distinctions between class II technological aids and class III facsimiles; clarifications that are properly reflected in the NIGC's 2002 definition regulations. Given the clarity brought by these definitions, the Tribe was disappointed to see that the NIGC is now proposing to amend them. With regard to the facsimile definition in particular, the proposed amendment not only abandons this clarity, but moves the industry back in time.

The preamble to the 2002 rulemaking explains that Congress intended that bingo, lotto, and games similar to bingo may be played in an electronic format, "even a *wholly* electronic format, provided that multiple players are playing with or against each other. ... A manual component to the game is not necessary."[19] "What IGRA does not allow," it continues, "is a wholly electronic version of the game that does not broaden participation, but instead permits a player to play alone with or against a machine rather than with or against other players."[20]

We disagree with the NIGC's current claim that as defined, facsimiles are seemingly permitted as a class II game. Such an assertion distorts the plain meaning of the definition, as well as the intent behind its enactment. The definition is clear on its face that so long as the electronic format allows "multiple players to play with or against each other rather than with or against a machine," such games are *not* facsimiles.[21] In other words, so long as the electronic format – even a *wholly* electronic format – does not permit a player to play alone against a machine, the game *is* bingo and *not* a facsimile of bingo. The fundamental characteristics of the game are preserved, unaltered by the game's electronic format.[22]

The proposed definition, however, does away with this distinction and provides that *any* wholly-electronic game – even bingo – is a facsimile, and therefore, class III. The only way in which class II games can retain their status is to include a manual element, such as a mechanical ball draw or a tangible card – a potentially devastating reversal of the status quo. To begin with

[19] 67 Fed. Reg. 41,166, 41,171 (June 17, 2002).
[20] *Id.*
[21] 25 CFR §502.8.
[22] *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000).

the assumption that *all* wholly electronic games are facsimiles, and thus class III, is an extremely damaging way in which to proceed and marks a drastic change from existing regulations that begin with the assumption that games are class II unless transformed into class III gaming. The carve-out contained within subsection (b) does little to rectify this impact given the arbitrary restraints contained elsewhere within the regulation. We would add further that the NIGC is without power to both determine that a game is a class III facsimile, and yet treat it as though it were a class II technologic aid. If a game is a facsimile, the NIGC must treat it as such.

The Tribe therefore opposes any change to the definition of "electronic or electromechanical facsimile." Alternatively, the Tribe proposes the following language to perhaps more clearly express the interplay between class II technologic aids and class III facsimiles:

> "§502.8 Electronic or electromechanical facsimile.
>
> "(a) An electronic or electromechanical facsimile of a game of bingo, lotto, and other games similar to bingo means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game and that fails to allow players to play with or against each other rather than with or against a machine.
>
> "(b) An electronic or electromechanical facsimile of a game other than bingo, lotto, and other games similar to bingo means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating all of the characteristics of the game."

The Tribe respectfully requests that the electromechanical facsimile definition remain unchanged, or at the very least, that the revision more appropriately reflect the intent of Congress and the courts.

6. <u>The NIGC Should Not Modify its Definition of Games Similar to Bingo</u>

We also object to the NIGC's efforts to redefine "games similar to bingo" in a way that encompasses many games that are currently "bingo." While it is true that games similar to bingo remain class II, these games may only be played in locations where "bingo" is played. By improperly shifting games of bingo into the category of games similar to bingo, the NIGC is doing further harm to the viability of class II gaming.

By way of history, this term was first defined by the NIGC in 1992 as "any game that meets the requirements for bingo under §502.3(a) of this part and that is not a house banking game

under §502.11 of this part."[23] Thus, as originally defined, for a game to be a game similar to bingo, it had to satisfy *all* the requirements of bingo, *plus* not be house banked as defined by the NIGC. In other words, it had to be *more* than bingo.

During the 2002 rulemaking, the NIGC reexamined this definition. The following discussion within the preamble to the Final Rule is particularly instructive:

> "The Commission now believes that its 1992 definition of 'game similar to bingo' is flawed. It defies logic to conclude that the Congress intended to require that these other 'similar' games satisfy the same statutory requirements of bingo. If this were Congress' intent, there would have been no need for the phrase 'and other games similar to bingo.' These games would not in effect be 'similar' to bingo; they *would* be bingo."[24]
>
> "The definition announced today corrects this flaw by accurately stating that 'other games similar to bingo' constitute a 'variant' on the game and do not necessarily meet each of the elements specified in the statutory definition of bingo. The Commission believes that this modification more accurately reflects Congress' intent with regard to games similar to bingo."[25]

Within the preamble to the 2002 rulemaking, the NIGC also discussed their intent behind the phrase "variant on the game of bingo."

> "It is particularly noteworthy that the statutory listing of specific games followed by the phrase, 'and other games similar to bingo,' can be read in two ways. First, it can be interpreted to mean merely that the specified games are similar to bingo. The Commission finds this interpretation unlikely. Alternatively, this language can also be interpreted to leave class II open to other games that are bingo-like, but that do not fit the precise statutory definition of bingo. This second reading, that the class was left open to a group of non-specific, bingo-like games, or 'variants' on the game of bingo, is consistent with legislative history and the holdings of the Courts of Appeals for the Ninth and Tenth Circuits in their analysis of the game Megamania cited above."[26]

Thus, the revised definition permits class II gaming to evolve with changing technology, and furthers Congress' intent that tribes be permitted "maximum flexibility" in utilizing advancements in class II gaming. Congress intended games similar to bingo to encompass a

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[23] 57 Fed. Reg. 12,387 (April 9, 1992).
[24] 67 Fed. Reg. 41,166, 41,171 (June 17, 2002) *internal cites omitted.*
[25] *Id.*
[26] *Id.*

broader range of games than those satisfying the three specific requirements of bingo; an intention that was properly captured by the NIGC in 2002. While the Tribe is not opposed to removing the house-banked reference, the NIGC should avoid any other changes to this definition.

To illustrate the manner in which the Proposed Rules would shift existing bingo games into the category of games similar to bingo, one need only look to the NIGC's opinion issued for Wild Ball Bingo.[27] On March 27, 2001, the NIGC issued a game classification opinion for Wild Ball Bingo, wherein the game was found to be a class II game of bingo. In finding the game to be bingo rather than a game similar to bingo, the NIGC made the following observations regarding the game's four-number bingo card.

> **"Non-traditional design**
> "Although the traditional bingo game may use a card with a grid containing more than four numbers, a minimum array is not specified in the IGRA definition. As the United States Court of Appeals for the Ninth Circuit noted in a recent decision on a similar game:
>
> > "Whatever a nostalgic inquiry into the vital characteristics of the game as it was played in our childhoods or hometowns might discover, IGRA's three explicit criteria, we hold, constitute the sole legal requirements for a game to count as Class II bingo....
> >
> > "Moreover, § 2703(7)(A)(i)'s definition of Class II bingo includes "other games similar to bingo," § 2703(7)(A)(i), explicitly precluding any reliance on the exact attributes of the children's pastime.
>
> "In light of this case and our own review of the statute and application of our regulations, the fact that the card contains only four numbers rather than a more extensive grid of numbers does not place the game outside the "bingo" definition found in IGRA."[28]

This finding would be overturned by §546.4(c) of the Proposed Rules. Consequently, based on this provision alone, Wild Ball Bingo would be reclassified as a game similar to bingo.[29] The intent that games similar to bingo encompass a broader range of games than those satisfying the three specific requirements of bingo most assuredly was meant to encompass distinctions broader than the number of squares on a bingo card, or the number of balls contained within the ball draw. These are truly distinctions without materiality and rather than broadening the permissible scope of games, serve only to limit bingo and games similar to bingo beyond what

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[27] *Wild Ball Bingo (Electronic Version) Game Classification Opinion*, National Indian Gaming Commission, March 27, 2001 ("Wild Ball Bingo")(citations omitted) at 4.
[28] *Wild Ball Bingo* at 4.
[29] Importantly, because Wild Ball Bingo also fails to satisfy a host of other new requirements found within the proposed rule, it would loose its class II status as a whole.

was intended. The Tribe requests that these immaterial distinctions between bingo and games similar to bingo be removed from the proposal. These two categories of games should be viewed as described in the preamble to the 2002 rulemaking.

7. The NIGC Should Not Reclassify All Existing Class II Games

Another primary objection that the Tribe has to the Proposed Rules is that they will reclassify *all* games that the federal courts, tribal gaming commissions, and the NIGC itself have previously determined to be class II. None of the bingo or pull-tab games currently classified by the NIGC as class II will survive this rulemaking. Consequently, *all existing class II games will become class III, and thus require a Tribal-State Compact for their continued operation.* We find this outcome outrageous given that no court ruling or congressional enactment justifies such a drastic transformation of the legal landscape.

One need only compare the current proposal with one of the NIGC's latest game classification opinions to see how the Proposed Rules will reclassify all existing class II games. In 2005, the NIGC found the Nova gaming system to be a class II game under IGRA.[30] This game, however, will become a class III game if the Proposed Rules are finalized. One way in which the Proposed Rules overturn the NIGC's earlier opinion deals with a player's failure to mark a number on their bingo card.

In its review of the Nova gaming system, the NIGC found acceptable a game structure wherein patterns rather than numbers are slept.[31] The fact that one type of a pattern rather than another was involved, or whether the player was the first to obtain such pattern, was wholly irrelevant to the NIGC's analysis. The Proposed Rules, however, reverse this position stating now that *numbers* rather than *patterns* must be slept in a class II game.[32] Even more, the proposal states that slept numbers comprising any pattern other than the game-winning pattern are forfeited, and can never be "caught-up." While numbers comprising the game-winning pattern may be "caught-up," this can only be done where that player is the first to obtain the game-winning pattern. Because the Nova system does not satisfy these newly created requirements, it would fail to maintain its current class II status.

It is also not clear within the Proposed Rules as to when a player may exit a game. Specifically, it is unclear whether players can exit the game after they have completed their final action, or whether they must wait until *all* players have done so. In the Nova Gaming game classification opinion, it was clear that while "[t]he last potential winner MUST daub and has an infinite period of time" in which to daub, players that slept the game winning pattern before this

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[30] *See Nova Gaming Bingo System*, National Indian Gaming Commission, April 4, 2005 ("*Nova Gaming*").
[31] *Nova Gaming* at 11.
[32] *Proposed Rule, National Indian Gaming Commission, "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,'"* 72 Fed. Reg. 60483 (October 24, 2007)("Proposed Rule") at §546.5(i).

time were "released from the game" and then able to join another.[33] The Proposed Rules, however, address this feature at two separate places. First, section 546.5(j) states that "[i]f a player sleeps the game-winning pattern, the game must continue until a player subsequently obtains and covers (daubs) and claims the game-winning pattern." Next, section 546.5(l) states that "[a]fter all available numbers or designations that could lead to a game-winning prize have been randomly drawn or electronically determined and released (i.e. no more objects could be drawn that would assist in the formation of a game-winning prize), the game may allow an unlimited length of time to complete the last required cover (daub) and claim of the prize, or it may be declared void and wagers returned to players and prizes canceled." Because the two sections, when read together, are unclear as to this critical game feature, we respectfully request that the Proposed Rules be clarified to model the standard expressed by the NIGC just last year.

Furthermore, no mention has ever been made of restricting the bingo card such that each space contains "a unique number or other designation which may not appear twice on the same card."[34] Another feature not required last year was that the game "prominently display" that it is a game of bingo, as would be required by section 546.4(d) of the Proposed Rules. Without such a display, a game can no longer satisfy the requirements of a class II game. Because the NIGC has never before placed such a requirement on a class II game, no existing class II game satisfies this requirement. If these Proposed Rules are finalized, *all* existing class II games will be instantly transformed into class III games.

The significance of this last provision, however, must be emphasized. This requirement alone fulfills the NIGC's stated intent in enacting this regulation; that being to adequately distinguish a class II game from one that is class III. Requiring such a prominent display in and of itself achieves the desired result of distinguishing the two and alleviates any confusion among players as to whether the game is class II or class III. In the interest of simplicity and efficient rulemaking, the Tribe suggests that this one requirement be maintained, and *that all others be omitted from the proposal*. Doing so enables the NIGC to achieve its stated intent, while at the same time avoiding the placement of arbitrary limitations on the game of bingo such as those regarding prize amounts, game patterns, unnecessary game delays, and card sizes. This one change achieves the desired result with the least amount of impact.

While it may be simple to modify existing class II games to satisfy *some* of the new requirements found within the Proposed Rules, in other instances, modification will require a complete retooling of the game. All of our Tribe's existing class II games will either have to be replaced or modified – options that will result in significant cost. If the NIGC insists on moving forward with this rulemaking, all of the requirements discussed herein must be deleted from the regulation, particularly given that the NIGC has provided no analysis or reasoned support for its action. No where has the NIGC argued that these new features will bring class II games to where they are more in-line with IGRA. To require such an overhaul of the existing statutory scheme without the support of the courts or the legislature is simply unconscionable.

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[33] "The last potential winner MUST daub and has an infinite period of time to daub. Any previous potential winner that sleeps the game winning pattern is released from the game and may join another game." *Nova Gaming* at 13.
[34] *Proposed Rule* at §546.4(c).

8. The NIGC Should Avoid Restricting Pull-Tab Games

The Tribe has previously objected to a number of restrictions placed upon pull-tab games by earlier proposals. In particular, we objected to sections 546.7(g) and (i) because, when read together, they prohibited the accumulation of credits and the dispensing of vouchers or receipts representing winnings. Instead, players would be forced to redeem each individual winning pull-tab at an alternate location. Such a requirement runs counter to existing guidance and case law.

We note that in drafting the Proposed Rules, the NIGC deleted section 546.7(i), which prohibited the game itself from paying out winnings to the player, but not 546.7(g), which requires that winning pull-tabs be redeemed at a designated location. Because subsection (i) was deleted, but not (g), it still appears as though winnings cannot be accumulated and that individual winning pull-tabs must be redeemed at a certain location away from the game.

The NIGC has expressly permitted our Tribe to operate Diamond Game's Lucky Tab II Millennium dispensers ("Millennium"), a court sanctioned class II game. Notably, Lucky Tab II allows players to build and play credits obtained from winning pull-tabs. The Proposed Rules, however, would ban the Millennium dispenser despite its current classification, and despite the fact that it utilizes pre-printed, paper pull-tabs that are read and dispensed to the player on each play. A feature that tracks winning amounts and dispenses such amounts in a single form clearly falls within the category of "aiding" the game of pull-tabs by providing a "cashier" function to the game. Furthermore, these requirements are also inconsistent with the provision pertaining to bingo games, which *are* permitted to build, play, and dispense credits.

Finally, it should be noted that security and MICS compliance is stronger where pull-tab dispensers permit winning tabs to be credited at the machine rather than requiring that each individual ticket be exchanged for cash. The latter requires significant handling of both cash and paper pull-tabs, not to mention the fact that excessive cash must also be maintained on the gaming floor at all times. It also leads to increased patron complaints when individual pull-tabs are misplaced. Accounting for pull-tab dispensers that allow credits can all be done via normal drop procedures and accounting reports that fully, accurately, and securely comply with the MICS. For each of these reasons, the Tribe respectfully requests that section 546.7(g) also be removed from the Proposed Rules.

9. Commission Objection Can Be Raised At Any Time

Section 546.8(e)(1)(iii) of the game classification standards provides that the NIGC can challenge a testing laboratory's determination that a game is class II *at any time* "upon good cause shown." No direction, however, is provided as to the meaning of the standard "upon good cause shown." Because as written no laboratory certification could ever be relied upon as final, this provision will destabilize the class II market. At some point, we simply must be able to rely upon a determination that a game is class II. The NIGC, however, has justified its actions – despite the enormous economic harm – by claiming that they are in fact steadying the class II market. Given

that this is not the case, the portion of this section that permits the NIGC to challenge a determination after the initial 60-day timeframe should be removed from the regulation.

10. The Deadline for Compliance is Unworkable

Given that upon finalization of the Proposed Rules, *all* class II games will be reclassified as class III, *all* games within our operations will either have to be replaced or reconfigured. Based upon discussions with vendors and manufacturers, we understand that it is likely to take at least a year for games that are compliant with the game classification standards to be developed. (This, of course, assumes that manufacturers chose to overlook the poor economic performance of these new games and more forward with their development.) Consequently, we believe that six months is an unrealistic deadline for the industry to come into compliance with a complete rewrite of existing guidance.

The Tribe believes this requirement to be wholly unfair as it is unlikely that compliant games will be developed within six months of the final rule's effective date. As a result, tribes will be forced to await full implementation of the regulation before games may be added to their operation. Given the start-up nature of this ambitious certification and approval program, it is likely to take upwards of 12 to 18 months for a game to receive NIGC approval. We find it wholly unacceptable that any tribe would be prohibited from adding any new class II games for this length of time. Consequently, the Tribe requests that the six month requirement contained within both §§546.10(e)(1) and (2) be extended to a more realistic 24 months. Further, §546.10(e)(3) should be deleted entirely from the regulation to prevent unnecessary financial harm to tribes during the transition period.

11. The Rules Should be Republished as Proposed Rules

Should the NIGC decide to move forward with this rulemaking, the Tribe encourages the Commission to publish both the Proposed Rules and the technical standards and minimum internal control standards as proposed rules before consideration is given to their finalization. Any minor delay associated with doing so will permit both the industry and the NIGC to ensure that the least restrictive means are being utilized to accomplish the NIGC's stated goals in drafting these regulations.

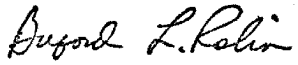
Also worth noting is that within the preamble to the technical standards it is stated that the purpose behind their enactment is to protect the integrity of class II gaming – the very same reason for which the NIGC states these game classification regulations are needed. We feel strongly that enactment of both regulations is unnecessary. Because of the detrimental impact the Proposed Rules will have on Indian gaming, its enactment should be abandoned.

And finally, as the above examples illustrate, though couched as an agency rulemaking, the NIGC's current efforts would in effect be an amendment of IGRA. It is without doubt that the Proposed Rules place restrictions on the game of bingo not envisioned by Congress. If IGRA is to

be amended at all, the proposal should be presented and debated as such. To do otherwise may be seen as an underhanded attempt to circumvent proper procedure, especially when considering that it is doubtful that the game described within the Proposed Rules can actually be played in a live setting. As a result, it appears as though the NIGC is not clarifying the game of bingo, but instead creating an entirely new game.

For all these reasons, we urge the NIGC to withdraw these Proposed Rules. The courts have provided the appropriate legal contours for the classification of games under IGRA, and it is this framework that should be followed. Should the NIGC continue to feel obligated to move forward with this rulemaking effort, we respectfully request that the changes discussed above be incorporated into the Proposed Rules in an effort to lessen its devastating economic impacts. On behalf of the Poarch Band of Creek Indians, I thank you for the opportunity to provide these comments.

Sincerely,



Buford L. Rolin, Chairman
Poarch Band of Creek Indians

Attachments

cc: Members of the Senate Committee on Indian Affairs
Members of the House Resources Committee
National Indian Gaming Association

**THE SENECA NATION OF INDIANS**

P.O. Box 231
Salamanca, New York 14779
Phone (716) 945-1790
Fax (716) 945-1565

1490 Rt. 438
Irving, New York 14081
Phone (716) 532-4900
Fax (716) 532-6272

March 6, 2008

National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington DC 20005
Attn: Penny J. Coleman, Acting General Counsel
Attn: Michael Gross, Associate General Counsel

Re: Comments on Electronic or Electromechanical Facsimile Definition (Part 502)
Comments on Minimum Internal Control Standards for Class II (Parts 542 & 543)
Comments on Class II Classification Standards (Parts 502 & 546)
Comments on Technical Standards (Part 547)

Dear Ms. Coleman and Mr. Gross:

On October 24, 2007, the National Indian Gaming Commission ("NIGC") published four proposed rules in the Federal Register: (1) *Definition for Electronic or Electromechanical Facsimile* ("Definitions"), 72 Fed. Reg. 60482, (2) *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 Technologic Aids"* ("Classification Standards"), 72 Fed. Reg. 60483, (3) *Minimum Internal Control Standards for Class II Gaming* ("Class II MICS"), 72 Fed. Reg. 60495, and (4) *Technical Standards for Electronic, Computer or Other Technological Aids Used in the Play of Class II Games* ("Technical Standards"), 72 Fed. Reg. 60508. The proposed rules are intended to clarify terms relative to Class II Gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA").

This letter provides the comments of the Seneca Nation of Indians ("Nation") on all four of the proposed regulations. For the reasons set forth below, the Nation requests that the NIGC abort its current regulatory effort.

I. Background: Class II and Class III Gaming Under IGRA

The IGRA categorizes Indian gaming into three classes. As pertinent here, Class II gaming includes bingo, as well as "pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo" if played in the same location as the bingo activities. 25 U.S.C. § 2703(7). IGRA authorizes tribes to utilize "electronic, computer, or other technologic aids . . . in connection" with Class II gaming activities. Class III gaming is defined as all gaming that is neither Class I or II, including the "electronic and electromechanical facsimiles" that are expressly excluded from the definition of Class II gaming. 25 U.S.C. § 2703(8).

Each class of gaming is subject to different regulatory regimes. Class II gaming is subject to joint regulation by the Indian nation and by the NIGC. Class III gaming on Indian lands is lawful if conducted pursuant to an approved tribal gaming ordinance, is located within a state that permits such gaming, and is authorized by a Tribal-State gaming compact negotiated between the Indian nation and the state in which its Indian lands are located. 25 U.S.C. § 2710(d). These distinctions in the regulatory framework lend significance to the classification of games under IGRA. Games that are Class II remain so, even if "computer, electronic or technologic aids are used in connection" with those games. If, however, the device constitutes an "electronic or electromechanical facsimile" of a game of chance, then it is a Class III gaming, which may not be conducted without a Tribal-State gaming compact.

II. Promulgation of the Proposed Regulations is Unwarranted and Unjustified

As an initial matter, the Seneca Nation is not convinced that the proposed regulations are warranted or justified. As recently as 2002, the NIGC revised the relevant definitional regulations concerning three key terms in the IGRA. 67 Fed. Reg. 41166 (June 17, 2002). As stated in the 2002 preamble, the driving force behind that regulatory effort was the fact that "federal courts, including no less than three United States circuit courts of appeal, have been virtually unanimous in concluding that the Commission's definitions are not useful in distinguishing between technologic aids and facsimiles." 67 Fed. Reg. at 41168. Thus, because of the lack of federal court deference, among other reasons, the NIGC felt duty-bound to amend the regulations to "codif[y] existing Federal court decisions and assure that the Commission will follow such decisions." 67 Fed. Reg. at 41172.

In the preamble to the Classification Standards, the NIGC states that new regulations are necessary to provide greater clarity as between Class II and Class III gaming devices, but offers no support for its position. Although the 2002 regulatory effort was necessitated by federal court disregard for the prior NIGC regulations, here, no less than two federal courts have relied on the 2002 regulations in declaring the lawfulness of certain devices as Class II. And, unlike the situation prompting the 2002 amendments, no federal court has called the existing regulations into question. Even more, while the U.S. Department of Justice ("DOJ") has expressed its views with respect to the NIGC regulatory proposals, there is no indication that DOJ prompted the promulgation of the regulations in the first instance.

In addition to the foregoing, a review of the NIGC consultation transcripts and comments received by the NIGC on its 2006 proposal reveals unanimous tribal opposition to the proposed rules. This vehement opposition was reiterated at the NIGC public hearing held on September 19, 2006, and at the Oklahoma Field Hearing in February of 2008. At the hearings, tribal leaders questioned why the NIGC intends to move forward with regulations that will destroy an entire class of gaming, and in so doing, further upset the critical balance struck in IGRA. The Nation echoes these sentiments.

Moreover, the NIGC's proposals will have a substantial, negative impact on Indian nations that conduct class II gaming. The NIGC's commissioned economic impact study (Alan Meister, Ph.D., *The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations* (Feb. 1, 2008)) does the following:

- Acknowledges a "significant negative impact on Indian tribes"
- Anticipates a decrease in the variety and quality of class II devices, as innovation becomes stale and a certification process laborious and costly
- Acknowledges the likelihood of class II facility closures
- Predicts an increase in operational costs for capital deployment, compliance, regulatory, training, and financing costs of approximately $350 million, most all borne by tribes
- Job losses of between 1600 and 5000 jobs
- Decrease in gaming revenues in the range of $575 million to $1.8 billion (and potentially as high as $2.8 billion) and in non-gaming revenues in the range of $62 million to $192 million (and potentially as high as $300 million)

With impacts of this magnitude, it can hardly be said that the NIGC's rulemaking endeavor will provide clarity and stability to Indian gaming. Rather, it appears that the result will be absolute chaos.

Based on the foregoing and the lack of any congressional directive prompting the current regulatory initiative, the current effort is wholly unwarranted and unjustified.

III. The Classification Standards Impose Unlawful and Arbitrary Limitations on Class II Gaming

The determination of what constitutes a Class II versus Class III gaming device should not be made in a vacuum. Congress' purpose in enacting IGRA should be considered when the NIGC interprets it. Chief among those purposes is to promote "tribal economic development [and] self-sufficiency." 25 U.S.C. § 2702(1). That interest would plainly be served by allowing tribes the greatest flexibility to offer games through dispensers or use technology in connection with bingo and pull-tabs that does not alter its character as a game. Indeed, the Senate Report accompanying IGRA notes that:

> the Committee intends [in its definition of class II gaming] that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II

> games to existing game sizes, levels of participation, or current technology.

S. Rep. 100-446, 100th Cong., 2d Sess. (1988) at 9.

In light of these considerations and as set forth below, the proposed regulations place unreasonable and unwarranted restrictions on the use of technologic aids in connection with bingo- and pull-tab-based Class II gaming devices.

IGRA defines Class II gaming to include "the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith)" if: (1) it is played for monetary or other prizes with cards containing numbers or other designations; (2) the card holder covers the numbers or designations, following a drawing or electronic determination; and (3) "the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards." 25 U.S.C. § 2703(7)(A)(i). IGRA simply requires that the game of bingo, lotto, or other games similar to bingo be "played for prizes, including monetary prizes, with cards bearing numbers or other designations." 25 U.S.C. § 2703(7)(A)(i)(I). However, proposed section 546.4 would add details regarding the minimum size for a card being displayed, precise grid size, frequency of which a given designation may appear on a card, a statement that must be "prominently displayed" on any technological aid, how prizes must be communicated and awarded, and how a display should visually depict the "covering" of the number. Section 546.7 also requires technologic aids to pull-tabs to "prominently" display a statement and dictate that the pull-tab results must in an eight point or larger font. None of these additional details are mandated, or even implicit, in the IGRA.

With respect to bingo, the Classification Standards are designed to slow down the speed of play by imposing video display and notification requirements—all of which has the effect of restricting class II games by size, participation and technology. For example, proposed section 546.5 of the Classification Standards describes a lawful "cover". To "cover," a player in a game must take overt action after the numbers or designations are released by touching (daubing) the screen or a designated button on the player station at least one time in each round after a set of numbers or other designations is released. This part of the Classification Standards requires the game to be won by the "first person" who covers a bingo pattern. 25 U.S.C. § 2703(7)(A)(i)(III). To satisfy this requirement, electronic bingo must be played by multiple players through a linked system. The Classification Standards require this system to have a minimum of two players for each game and must allow at least six players to enter the game. The Classification Standards also require specific minimum time requirements tied to different aspects of the play of the game. The practical effect creates a game that lasts longer than IGRA itself requires.

The statutory text negates any additional requirement suggested in the Classification Standards. In fact, courts have found that the explicit criteria in the IGRA constitutes the sole requirements for a game to qualify as bingo. *U.S. v. 162 Megamania Gambling Devises,* 231

F.3d 713 (10th Cir. 2000); *see also, United States v. 103 Electronic Gambling Devices,* 223 F.3d 1091 (9th Cir. 2000). Indeed, as the Ninth Circuit observed in *United States v. 103 Electronic Gambling Devices*:

> There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria. The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?

223 F.3d at 1096.

In citing to *United States v. 103 Electronic Gambling Devices*, the Tenth Circuit similarly found that the game under review, Megamania, meets the three criteria found in IGRA's definition and rejected the government's arguments that certain variations in the game made it a Class III game. 231 F.3d at 719-20. The courts have underscored that IGRA rests on the proposition that Congress did not intend to "limit bingo to its classic form." 223 F.3d at 1096-97. Put differently, Congress fully anticipated that gaming devices, and thus the play of bingo and games similar to bingo, would evolve with technology.

There is certainly no basis for the NIGC to impose additional classification requirements that go beyond those set forth by Congress. There is no issue of lack of clarity here, as the NIGC suggests.

With respect to pull-tabs, the Nation appreciates that the NIGC has moved substantially from its prior position concerning pull-tab dispensers and readers. However, the Nation remains concerned that the NIGC continues to insist on requirements for pull-tabs and technologic aids that have no basis whatsoever in IGRA. When a player of pull-tabs receives a tangible medium evidencing the play, that is sufficient for IGRA purposes. The game is in the pull-tab rolls. It can hardly be said that a pull-tab dispenser, with or without a built-in reader, is a facsimile of a slot machine. Any restrictions on such dispensers and readers are better left to tribal gaming commissions to impose.

The limitations and arbitrary restrictions contained in the Classification Standards both with respect to bingo and pull-tab games are not mandated by federal case law, and do not account for advancements in technology which were contemplated by IGRA and established by court precedent. Several Indian nations throughout the United States, including the Seneca Nation of Indians, have made substantial financial investments based on an understanding that the federal courts had resolved several open issues in the realm of Class II gaming. The current effort to add these new requirements after-the-fact will serve no purpose other than to create further uncertainty in those areas where the courts have established some certainty, and to attempt to hamstring future technological advances in gaming.

IV. The Process for the Certification of Games Usurps the Primacy of Tribes With Respect to Gaming Classification

For purposes of establishing uniform minimum classification standards for Class II "electronic, computer, or other technologic aids," section 546.8 proposes a rigorous certification process that must be established and adhered to prior to the authorization of Class II "aids" in a tribal gaming operation. Under the proposal, a qualified and independent testing laboratory must certify that the technologic aid meets the Classification Standards before a tribal gaming enterprise can use the technologic aid. The testing laboratory is to provide a report that it has tested and evaluated the game or "aid" and that the game or "aid" meets the Classification Standards. Finally, the rule provides that the tribal gaming regulatory authority is free to adopt additional classification standards so long as they do not undermine the NIGC's minimum standards.

Under the proposal, the Chairman of the NIGC is required to review the certification and accompanying report and may object to a report. An objection must be made within sixty days of receipt of the certification and report. In absence of a "good cause" objection thereafter, parties may lawfully operate the technologic aid. If the Chairman does object, he/she has thirty days to attempt to resolve the dispute with the aid of a mediator or third party, if necessary. At the conclusion of the mediation, the Chairman will review the mediator's report and make a determination. If the requesting party is still unsatisfied with the Chairman's decision, the party can appeal to the full NIGC Commission. The NIGC will make its decision based on the written record developed by the Chairman and written submissions by the testing laboratory, the requesting party, and the sponsoring tribe. The NIGC can request additional information and a hearing, but a hearing is not required. Any further relief would be available under the Administrative Procedures Act, 5 U.S.C. § 702 et seq.

Interestingly, in issuing this updated regulation, the NIGC appears to no longer recognize "that Indian tribes are the primary regulators for Indian gaming," 71 Fed. Reg. at 30252, as such language is absent from this version proposed rule and preamble. Significantly, where a testing laboratory certifies a game as meeting the applicable Class II standards, the NIGC Chairman is authorized to object to such certification within 60 days of receipt of the certification and report, and anytime thereafter for "good cause" shown. The fact that the Chairman is authorized to second-guess a positive testing laboratory determination at any point in time means that an Indian nation – which would be forced by this regulation to invest millions of dollars in revamping its gaming machine inventory – will enjoy no security or certainty with respect to the lawful operation of games on a going forward basis even where it has obtained a positive gaming testing lab determination. To be borne in mind throughout this process is the indication from the NIGC's economic analyst that the costs for this new regulatory regime will fall upon Indian nations.

Despite vehement objections from Indian country several years ago regarding the NIGC's failure "to recognize that the Commission *shares* responsibility for the regulation of Class II gaming with tribal governments," 67 Fed. Reg. at 46136 (emphasis added), the proposed rule largely diminishes the role of tribal gaming regulatory authorities in the game classification process. Recall that Congress, along with state interests, also sought to consider "the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land," S. Rep. 100-446 at 5, and pursued that interest by reserving Class II games to exclusive tribal jurisdiction with oversight by the NIGC. The proposed rules, even in this modified form, continue to undercut the regulatory regime IGRA established.

V. Technical Standards for "Electronic, Computer, or Other Technologic Aids" are Beyond the Scope of IGRA

The "Technical Standards" proposed by the NIGC "would add a new part to the Commission's regulations establishing technical standards for Class II games – bingo, lotto, other games similar to bingo, pull tabs, or 'instant bingo' – that are played primarily through 'electronic, computer, or other technologic aids.'" 72 Fed. Reg. 60508 (Oct. 24, 2007). The Commission states that the purpose of this proposed rule is to assist tribal gaming regulatory authorities and operators in ensuring the integrity and security of Class II games and gaming revenues. No federal standards currently exist. The Commission notes that the proposed rule is meant to work in conjunction with the Classification Standards and the MICS.

As in the Classification Standards, these Technical Standards and the related MICS provisions usurp the tribal gaming authorities' role in the game review and classification process. Further, the IGRA does not permit the NIGC authority over the classification process in the level of detail expressed in the Technical Standards. These Technical Standards and MICS provisions should be offered to Indian tribes and their regulatory authorities as elective guidance (in the form of an NIGC Bulletin), not as a rigid federal rule.

VI. The Proposed Rules Will Have a Detrimental Impact on the Nation's Budget

The Nation has entered into a Compact with New York State that provides the Nation with the right to establish and operate three Class III gaming facilities in Western New York. The Nation currently operates the *Seneca Niagara Casino* on the Nation's Niagara Territory, the *Seneca Buffalo Creek Casino (temporary)* located on the Nation's Buffalo Creek Territory, and the *Seneca Allegany Casino* located on the Nation's Allegany Territory.

While the vast majority of the gaming activities currently undertaken by the Nation are of the Class III variety, Class II gaming has long been and remains, a critical source of revenue to the Nation. The Nation operates Class II gaming facilities on the Nation's Allegany, Niagara and Cattaraugus Territories. The revenue generated from Class II gaming greatly enhances the Nation's efforts to fund education, healthcare, and social service programs for its members. As indicated above, the proposed rules will significantly slow down the speed of play, making the games significantly less attractive to customers. Moreover, the proposed

rule establishes a regulatory bureaucracy that is wholly unnecessary to the integrity and security of Class II gaming, and will only serve to significantly increase the regulatory costs borne by Indian nations seeking to engage in Class II gaming other than traditional bingo. The effect of the proposed rules will greatly diminish the profitability of Class II gaming, and may adversely impact critical Nation programs and economic development opportunity.

VII. Conclusion

The proposed regulations are unwarranted and unjustified. In addition, the proposed regulations place unreasonable and unwarranted restrictions on the use of technologic aids in connection with Class II gaming. As described above, the proposed regulations usurp the primacy of tribal gaming regulatory authorities in connection with the classification of games. Finally, the proposals will render Class II gaming less relevant to the gaming market and could potentially have adverse impacts on the Nation's budget projections.

For these reasons, the Nation urges the NIGC to cease proceeding with these rules and permit current law, as established by the IGRA and case law interpreting it, to remain the law of the land.

* * *

Thank you for your consideration of these comments. If you should have any questions regarding this matter, do not hesitate to contact Deputy Counsel Christopher Karns at (716) 945-1790.

Sincerely,

Kevin W. Seneca, Treasurer
SNI Representative to NIGA

cc: Executives
Councillors
DOJ
NIGA via fax 202-546-1755

THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION
P.O. BOX 278
Pablo, Montana 59855
(406) 275-2700
FAX (406) 275-2806
www.cskt.org

**A Confederation of the Salish, Upper Pend d'Oreilles and Kootenai Tribes**

TRIBAL COUNCIL MEMBERS:
James Steele Jr. – Chairman
E.T. "Bud" Moran – Vice Chair
Steve Lozar – Secretary
Jim Malatare – Treasurer
Joe Durglo
Carole Lankford
Michel Kenmille
Reuben A. Mathias
Charles L. Morigeau
Terry L. Pitts

May 1, 2008

Committee on Indian Affairs
United State Senate
838 Hart Office Building
Washington, DC 20510

Re: **Comments on the National Indian Gaming Commission Oversight Hearing held on April 17, 2008.**

Dear Chairman Dorgan and Members of the Committee:

The Confederated Salish and Kootenai Tribes (Tribes) submit this letter as our official comments of the National Indian Gaming Commission (NIGC) Oversight Hearing held on April 17, 2008.

The Indian Gaming Regulatory Act (IGRA) of 1988, created the framework by which gaming is conducted on "Indian Lands" throughout the nation. It established Indian Tribes as the frontline regulators for gaming that occurs within the Tribes' territory. The IGRA clearly recognizes the sovereign right of Tribes to govern themselves and their territory, with the exception that Class III gaming would be governed by the terms of a Compact negotiated between the Indian Nations and the state in which they reside.

Therefore, our sovereignty has been the key to our Tribes' survival over a proud history of protecting our people and land that survived a history of assimilation and termination. Our Tribes continue to protect our sovereign status, as that has been the very basis by which we provide for the health and welfare of our people and our homeland. It is our belief that tribal sovereignty is rooted in IGRA and should be acknowledged and followed by the NIGC when carrying out their jobs as regulators.

The Tribes acknowledge that the NIGC has its place in assisting with the regulation of Indian Gaming, but just how far is spelled out in the IGRA and has been well established by case law. Thus, the NIGC should refrain from creating overreaching and unnecessary

regulations that have no significant reasons. The NIGC should spend more time on using its resources to protect Indian Gaming instead of eliminating Indian Gaming by drafting unnecessary regulations such as the proposed Class II regulations.

Additionally, we call upon the NIGC to comply with its responsibilities under Executive Order 13175 and consult with Tribes. The NIGC has clearly failed to properly consult with Tribes and has moved forward with unnecessary regulations that would have a long-term and devastating impact on Indian Gaming. And we are not talking about the type of consultation NIGC identifies as consultation, by having meetings across the nation where Tribes have been invited to participate, but when we arrive to voice our concerns they are only heard with a deaf ear. We no longer want to participate in a guessing game when we walk into a NIGC consultation and wonder whether our Tribal voice counts or if it is just another opportunity for the NIGC to say they have consulted with us on a government-to-government basis. The NIGC moving forward with its proposed Class II regulations is a prime example of where NIGC has not properly consulted and listened to Tribal concerns.

The NIGC has failed to properly consult or listen to the concerns being voiced by Tribes across the nation about the particular impact these Class II regulations would have on lost tribal revenue, lost tribal employment and decreased leverage power in Class III compact negotiations, etc. All the foregoing factors will definitely have a tremendous and immediate impact to our Tribes. As the NIGC is aware, our Tribes currently do not have a compact with the State of Montana. The compact that expired on November 30, 2006, was one of the worst in the United States—the state was receiving more then 60% of the gaming revenues off our own Reservation. And so with elimination of Class III gaming on the Reservation we are left with the only viable Class II option. This viable option is being sought to be taken away from us by the NIGC, the agency, the Tribes believed IGRA created to be here for Indian Gaming Tribes. They are depriving Tribes of a source of income which runs counter to the IGRA's and the United States' policy of promoting tribal self-determination.

We understand that NIGC has the responsibility to protect the integrity of Indian gaming however we also have the same responsibilities and goals to protect the integrity of Indian gaming. And so we have created the necessary governmental institutions in the tribal gaming commissions and have hired and trained staff in the areas of compliance, surveillance, security and law enforcement, etc., in order to protect Indian gaming on our Reservation.

So, we would encourage the Senate Committee to create a bill that would mandate an accountable government-to-government consultation process for the NIGC. Additionally, the NIGC should begin to provide training and technical assistance to tribal governments and tribal gaming regulators as Congress mandated in 2006, and assist Tribes with regulatory duties rather then continually creating unnecessary regulations that go against the spirit and language of IGRA and the Tribes' hard fought federal court victories.

Thank you for allowing us to comment on this important oversight hearing on Indian Gaming and we hope the Committee will continue to hear and allow us to voice our concerns. Additionally, we would like to thank Senator Tester and Senator Baucus for submitting a request to extend the deadline for comments on the Class II regulations, which unfortunately was once again heard with a deaf ear by the NIGC. If you have any questions or need additional information regarding these comments, please feel free to contact us at (406)675-2700.

Sincerely,

Chairman James Steele Jr.

May 8, 2008

VIA FACSIMILE and U.S. MAIL

The Honorable Byron Dorgan, Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C., 20510

The Honorable Jon Tester
United States Senate
204 Russell Senate Office Building
Washington, D.C., 20510

Dear Senators Dorgan, Tester and Members of the Committee:

At the April 17, 2008, Senate Committee on Indian Affairs oversight hearing on the National Indian Gaming Commission (NIGC), you asked several questions of me that I promised to answer. My answers are set forth in detail in the appendices to this letter. In addition, I have addressed several other matters in order to set the record straight in light of some of allegations made at the hearing. I ask that this letter and appendices be included in the hearing's formal record.

In Appendix I, I have attached a copy of NIGC's statement of receipts and disbursement budget for Fiscal Years 2006, 2007, and 2008, along with the proposed budget for Fiscal Year 2009. There you will see that we are reducing the percentage of fees that tribes submit while reducing the amount of carryover that the agency accumulated during years when NIGC funding was uncertain. We will continue to work toward the most efficient use of tribes' money while sustaining the agency's mission of supporting tribal economic development, and protecting tribes from corrupting influences and providing technical assistance.

At the hearing I was also asked to provide a timeline regarding the promulgation of the Facility Licensing regulations. Appendix II outlines the chronology of events that culminated in those regulations. You will see that these regulations were introduced and consulted on for almost two years before they became final, contrary to the picture presented at the hearing.

NATIONAL HEADQUARTERS 1441 L St. NW, Suite 9100, Washington, DC 20005 Tel: 202.632.7003 Fax: 202.632.7066 WWW.NIGC.GOV

REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

Likewise, I hope that you will review the enclosed outline of the consultation process NIGC embarked upon while developing the Class II regulations, which even now we have not finalized. We believe we have set a standard for consultation that is unprecedented in its good faith outreach to tribes in the development of regulations. Appendix III details this consultation process, which included numerous formal and informal consultations on the regulations, beginning back in 2004 and concluding only in March 2008.

From the attached Appendix IV, you will see our training record, which in 2007 included 145 formal trainings provided to tribal organizations throughout the country. Those trainings addressed, among other topics, the roles of tribal gaming commission, slot machine technology, public safety, and general compliance with IGRA.

I have also addressed, in Appendices V and VI respectively, the agency's active engagement with Advisory Committees and its judicious promulgation of new regulations.

In conclusion, thank you for allowing me to testify at the April 17, 2008 hearing. I appreciate this opportunity to add to that hearing's record.

Sincerely,

Philip N. Hogen
Chairman

**Appendix I**

**Budget**

The attached chart shows that in Fiscal Year 2007, NIGC budgeted for $18 million in receipts and $20 million in disbursements. In fact, the agency took in $17 million and spent $16 million. The agency spent less than budgeted because we decided not to open several additional regional offices that had been budgeted. Instead, we are reassessing where these offices would be most helpful to Indian Country. Also, in part on account of delaying the staffing of the additional field offices, we did not hire at the accelerated rate that had been anticipated.

You will also see that in Fiscal Year 2007, the agency had a total ending balance of $12 million. This carryover from previous years resulted from our concern about funding, which had been precarious for many years and had required yearly appropriation measures in Congress to raise the limit on fees received beyond IGRA's original statutory limit of $8 million. We were acutely aware that the majority of NIGC's budget was made up from fees paid by only a few of the large casinos; were something catastrophic to happen to any one of those casinos, NIGC could not have continued to operate.

Finally, for the first half of Fiscal Year 2008, NIGC took in receipts of close to $9 million and dispersed almost $8 million. In order to reduce the amount of the carryover of funds, the agency reduced the fee rate for 2008 from 0.059% to 0.057%, thus decreasing receipts. To this end we have also created a budget for Fiscal Year 2009 in which our receipts are less than disbursements by $2.5 million.

The NIGC intends to continue budgeting for substantially less than we collect in receipts in order to reduce the agency's carryover amount to approximately $5 million in three to four years. Were we simply to refund the money to individual tribes, we calculate that each gaming operation would receive approximately $21,407. This amount varies, however, according to each gaming operation; gaming operations making less than $1.5 million in assessable gross revenues, for example, pay no fees whatsoever. As a result, the average refund to each North Dakota gaming operation that pays fees would be $7, 532; the average refund to each Montana gaming operation that pay fees would be $286. We believe that reducing the carryover over several years, rather than a refund in proportion of the carryover, exercises judicious stewardship of tribes' money while maintaining operations at the agency.

# National Indian Gaming Commission
# Statement of Receipts and Disbursement
# Budget vs. Actual
# October 1, 2005 through April 30, 2008

| Description | 2006 | | | 2007 | | | 2008 | | | | 2009 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 10/01/05~9/30/06 | | | 10/01/06~9/30/07 | | 10/07 ~ 9/08 | 10/01/07 ~ 4/30/08 | | | 10/8 ~ 9/09 |
| | Budget | Actual | Variance | Budget | Actual | Variance | Budget | Budget | Actual | Variance | Budget |
| Total Beginning Fund Balance | | 11,700,635 | | | 11,061,638 | | | | 12,201,577 | | |
| Less Advance Deposits | | 2,035,000 | | | 1,817,723 | | | | 1,893,920 | | |
| Disposable Beginning Fund Balance | | 9,665,635 | | | 9,243,915 | | | | 10,307,657 | | |
| Receipts: | | | | | | | | | | | |
| NIGC Fees | 11,809,975 | 10,993,338 | (816,637) | 14,585,000 | 13,422,820 | (1,162,180) | 15,490,998 | 7,745,499 | 7,448,871 | (296,628) | 19,788,237 |
| Fingerprint Processing Fees | 1,600,000 | 1,854,160 | 254,160 | 2,200,000 | 2,225,336 | 25,336 | 2,310,000 | 1,155,000 | 1,190,497 | 35,497 | 1,155,000 |
| Background Investigation Deposits | 1,000,000 | 1,085,594 | 85,594 | 1,500,000 | 1,671,114 | 171,114 | 1,600,000 | 800,000 | 540,724 | (259,276) | 1,000,000 |
| Total Receipts | 14,409,975 | 13,933,092 | (476,883) | 18,285,000 | 17,319,270 | (965,730) | 19,400,998 | 9,700,499 | 9,180,092 | (520,407) | 21,943,237 |
| Disbursements: | | | | | | | | | | | |
| Salaries and Benefits | 9,601,277 | 8,840,686 | (760,591) | 11,600,000 | 10,329,987 | (1,270,013) | 13,520,806 | 6,760,403 | 5,601,416 | (1,158,987) | 14,989,813 |
| Domestic Travel | 740,297 | 867,838 | 127,541 | 1,574,001 | 1,250,989 | (323,012) | 1,721,970 | 860,985 | 625,153 | (235,832) | 1,986,850 |
| Rent, Communications & Utilities | 1,040,000 | 1,099,449 | 59,449 | 1,186,000 | 1,232,238 | 46,238 | 1,248,252 | 624,126 | 605,410 | (18,716) | 1,609,309 |
| Printing and Reproduction | 63,454 | 50,774 | (12,680) | 70,000 | 102,697 | 32,697 | 77,000 | 38,500 | 40,344 | 1,844 | 84,092 |
| Supplies, Material & Equipment | 338,995 | 249,524 | (89,471) | 352,000 | 262,365 | (89,635) | 392,000 | 196,000 | 87,310 | (108,690) | 433,808 |
| Other Services | 2,125,952 | 3,246,541 | 1,120,589 | 5,253,000 | 3,077,252 | (2,175,748) | 5,185,970 | 2,592,985 | 814,889 | (1,778,096) | 5,339,365 |
| Total Disbursements | 13,909,975 | 14,354,812 | 444,837 | 20,035,001 | 16,255,528 | (3,779,473) | 22,145,998 | 11,072,999 | 7,774,522 | (3,298,477) | 24,443,237 |
| Excess of Receipts over Disbursements | 500,000 | (421,720) | (921,720) | (1,750,001) | 1,063,742 | 2,813,743 | (2,745,000) | (1,372,500) | 1,405,570 | 2,778,070 | (2,500,000) |
| Disposable Ending Fund Balances | | 9,243,915 | | | 10,307,657 | | | | 11,713,227 | | |
| Add: Advance Deposits | | 1,817,723 | | | 1,893,920 | | | | 2,142,139 | | |
| Total Ending Fund Balances | | 11,061,638 | | | 12,201,577 | | | | 13,855,366 | | |
| Fee Rate | | 0.053% | | | 0.059% | | | | 0.057% | | 0.066% |
| FTE | | 95 | | | 106 | | | | 123 | | 129 |

**Appendix II**

**Facility License Standards**

NIGC developed the Facility License Standards for four purposes: 1) to identify the lands on which new gaming facilities are located and to assure that the NIGC is notified when a tribe intends to open a new facility; 2) pursuant to IGRA's mandate, to ensure that all tribal gaming facilities are licensed; 3) to ensure that the construction and maintenance of gaming facilities are conducted in a manner which adequately protects the environment, public health and safety; and 4) in response to a report issued by the Department of the Interior's Office of Inspector General ("OIG") recommending that NIGC issue regulations on the status of Indian lands.

The chronology of the regulation's development is as follows:

2005

The Commission began addressing the topic of potential Facility License Standards during tribal consultations held in November 2005. At that consultation the Commission met with 23 tribes and solicited their views regarding the potential regulations, along with other areas of interest to the tribes.

2006

In 2006, the NIGC developed its first draft of the Facility License Standards. On May 15, 2006, NIGC shared the draft with tribes by mailing the draft along with a letter to tribal leaders with gaming facilities explaining the purpose and content of the draft regulations. The letter provided for a 45-day comment period. The draft regulations were also posted on the NIGC website for public access.

During 2006 the Commission invited 309 tribes to meet during seven consultations held throughout the country to discuss current topics, including the draft Facility License Standards. NIGC met with 53 tribal representatives throughout 2006 and received 56 written comments on the draft regulations.

2007

In response to oral and written comments received from tribal leaders, on March 26, 2007, NIGC sent its second draft of the Facility License Standards to tribal leaders and provided for a 45-day comment period, which was later extended to 60 days.

During 2007 the Commission conducted consultations throughout the country to discuss the draft regulations, along with other topics of interest to tribal representatives. In addition, the Commission received 78 written comments on the proposed draft of the regulation.

On October 18, 2007, the Commission published the proposed rule in the Federal Register, after five months of review and consideration of tribal and public comments on the second draft regulation. The period for comment on the proposed rule was 45-days and closed on December 3, 2007.

The Commission received 83 written comments on the published proposed rule. After reviewing the comments, the Commission decided December 31, 2007, to publish the regulation in final.

2008

The final rule was published on February 1, 2008, with an effective date of March 3, 2008. The publication of the final rule was the culmination of a two-year period of consultation with many government-to-government meetings with tribes, review of over 217 written comments, and substantial revisions to the rule based on those comments.

We have outlined those major revisions below.

Revisions Based on Comments Received

As a result of the comments received from the tribal community and public, the NIGC made substantial revisions to the regulation from the first draft to the final rule. Some of those revisions are highlighted here:

1. Indian Lands Information

- In proposed drafts of the rule, the Commission required lands information on all existing as well as new gaming facilities. In the final rule, only new facilities need submit information on Indian lands.

- Proposed drafts required: 1) certification from the Tribe that gaming was occurring on Indian lands; 2) a legal opinion regarding the status of the land from a licensed attorney; 3) road or plat map; 4) documentation related to jurisdiction/governmental authority over the site; 5) the name and address of the property; 6) the legal description of the property; and 7) any other relevant trust documentation showing the status of the property.

  The final rule was substantially curtailed. Based on comments from tribes stating that the requirement was overly burdensome and that the information already existed at the Bureau of Indian Affairs (BIA), the NIGC reduced the lands information requirement to: 1) name and address of the facility; 2) the legal description of the property; and 3) the BIA tract number. Only if the information is not already held at the BIA is the tribe required to provide the trust documentation to NIGC.

2. Issuance/Renewal of Facility License

- The first draft of the Facility License Standards required annual renewal of a facility license for each gaming operation. The second draft required tribes to submit the license with their gaming ordinances. Tribes commented that the annual renewal process would be too frequent and that tying renewal to the ordinance process would require each gaming tribe to resubmit already approved ordinances.

  In response, NIGC reduced the issuance/renewal requirement to "at least once every three years" and removed the requirement that ordinances be revised. This change allowed the NIGC to continue to gather the information required for regulatory purposes, while reducing the paperwork requirements for tribes to comply with the rule.

3. Environment, Public Health and Safety Requirements

- Drafts of the rule required tribes to resubmit the required EPHS documentation with each renewal of the facility license, including copies of all applicable laws, codes, and standards. The final draft removed this obligation and requires only that tribes certify that there have been no changes in the prior submission and the tribe remains in compliance with its tribally-identified laws.

- In the final rule the Commission added a section that allows for tribal self-reporting in the event the tribe discovers an area of non-compliance during the certification period. If a tribe discovers they are not in compliance, they can provide that information to the Commission, along with a plan on how to come into compliance within six months. If the plan will take longer than six months, approval by the Chairman of the NIGC is needed.

  This provision was not included in any of the early draft or the proposed rule, but was added to the final rule as a result of comments reviewed and considered following publication of the proposed rule.

In short, the Commission went to great lengths to solicit and consider input on this regulation during the two-year period between its development and its implementation. In addition, once the rule was promulgated, the Commission provided information to Tribal Gaming Commissions via a letter to Tribal Gaming Commissioners on how to comply with the rule and continues to offer training on the regulation.

A chart detailing the specific changes made to the final rule based on comments received regarding prior drafts is attached.

# FACILITY LICENSE STANDARDS – REVISIONS FROM DRAFT TO FINAL

| SIGNIFICANT PROVISIONS OF REGULATION | PROPOSED REGULATIONS (MAY 2006) | FIRST ALTERNATIVE REGULATIONS (MARCH 2007) | FINAL REGULATIONS (FEBRUARY 2008) |
|---|---|---|---|
| **Notice of opening new facility** | 120 days prior to opening new facility, including:<br>1) Certification from Tribe's governing body that gaming is, or will be, located on lands eligible for gaming under IGRA<br>2) Legal opinion from licensed attorney that lands are eligible for gaming under IGRA | 60 day notice if facility located on land acquired into trust prior to Oct. 17, 1988 (enactment of IGRA)<br><br>120 day notice if not acquired in trust prior to enactment of IGRA | Notification letter 120 days prior to opening new facility |
| **Indian Lands Requirements** | Required for existing and new gaming facilities | Required for existing and new gaming facilities | Required for new gaming facilities only |
| **Lands Submissions shall contain:** | 1) name and address of property;<br>2) legal description<br>3) road or plat map<br>4) copy of trust or other deeds<br>5) documentation related to jurisdiction/governmental authority over site | 1) Certification that gaming facility will be on lands eligible for gaming under IGRA, accompanied by:<br>(i) name and address of property<br>(ii) legal description<br>(iii) 8x10 road or plat map<br>(iv) copy of trust or other deeds<br>(v) copies of applicable court settlement agreements, Congressional Acts, Executive Orders, or Secretarial Proclamations;<br>(vi) if within reservation boundaries, documentation of such boundaries<br><br>2) If facility located on trust or restricted fee land outside Tribe's reservation and acquired after | 1) name and address of property;<br>2) legal description<br>3) BIA tract number *(with NIGC obtaining lands information from BIA)*<br><br><u>Only if no BIA tract number</u>:<br>4) copy of trust or other deeds<br>5) documentation of property ownership |

# FACILITY LICENSE STANDARDS – REVISIONS FROM DRAFT TO FINAL

| | | | |
|---|---|---|---|
| | | enactment of IGRA:<br>(i) documented explanation of tribe's jurisdiction over and exercise of governmental authority over the land;<br>(ii) documentation of ownership of the site<br>(iii) documentation of any tribal leasehold interest. | |
| **LANDS SUBMISSIONS MAY CONTAIN:** | 1) documentation of property ownership<br>2) copies of applicable court settlement agreements, Congressional Acts, Executive Orders, or Secretarial Proclamations;<br>3) historical or other records;<br>4) documents indicating tribal leasehold interest in property;<br>5) documents evidencing operation is individually owned, if appropriate. | 1) copy of an Indian lands opinion from NIGC or DOI finding gaming lawful on parcel;<br>2) copy of final order from a federal court finding gaming lawful on parcel;<br>3) copy of tribal-state compact approved by Secretary of Interior with legal description of parcel;<br>4) copy of management contract approved by NIGC with legal description of parcel;<br>5) copy of tribal gaming ordinance approved by NIGC with legal description of parcel. | N/A |
| **NOTICE NOT REQUIRED IF:** | N/A | N/A | Charitable events not lasting longer than one week |
| **ISSUANCE/RENEWAL OF FACILITY LICENSE** | At least annually | Submitted with gaming ordinance (requiring amendments to all previously approved ordinances within two years of regulations) | At least once every three years after initial submission |

**Appendix III**

**Class II Regulations Package**

During the oversight hearing, the Committee expressed concern that the NIGC had not conducted sufficient consultation with tribal governments on a package of proposed regulations related to the operation of Class II gaming facilities. Below I outline the consultation process that NIGC has engaged in while developing the regulations.

Goal of Class II Regulations

The Commission determined that it was in the best long term interest of Indian gaming to issue classification standards clarifying the distinction between "electronic, computer, and other technologic aids" used in the play of Class II games and other technologic devices that are "electronic or electromechanical facsimiles of a game of chance" or slot machines.

As the Commission worked through a process to develop these classification standards, it became apparent that the revised definitions issued by a divided Commission in June 2002, did not provide the clarity that had been a goal in that rulemaking. Accordingly, the Commission proposed further revisions to the definition of "electronic or electromechanical facsimile" in a separate rulemaking.

Additionally, the Commission has proposed technical standards as well as minimum internal control standards for Class II gaming.

Development of Proposed Regulations

In January 2004, the Commission requested all gaming tribes across the country nominate tribal representatives to serve on an advisory committee. From the tribal nominations received, the Commission selected seven tribal representatives on March 31, 2004, to serve on the committee.

Between May of 2004 and April of 2006, the advisory committee held six meetings. During these meetings, all of which were open to the public, the committee discussed the various characteristics of Class II and Class III games of chance, their play, and related gaming technology and methods. In addition, the Committee also discussed, reviewed, critiqued and commented on four different, successive preliminary working drafts of the proposed Class II classification standards, which were prepared by the Commission representatives on the committee.

The seven tribal committee representatives provided early tribal input and valuable insight, advice, and assistance to the Commission in developing each of the respective working drafts, as well as the current proposed regulations. Although there were many instances of accord, there were also many times during the development of the proposed

regulations that the tribal committee representatives strongly disagreed with decisions made by the Commission.

On May 25, 2006, the NIGC published two proposed rules in the Federal Register. The goal of these proposed rules was to clearly distinguish technologically aided Class II games from Class III "electronic or electromechanical facsimiles of any game of chance" or "slot machines of any kind."

The first notice, 71 FR 30232, May 25, 2006, detailed a proposed change to the definition for "electronic or electromechanical facsimile" that is contained in 25 CFR 502.8. The second notice, 71 FR 30238, May 25, 2006, likewise further revised the definitions for "electronic or electromechanical facsimile" and "other games similar to bingo."

On August 11, 2006, the NIGC published proposed Class II technical standards. The goal of the technical standards was to ensure the security and integrity of Class II games played with technologic aids and to ensure the auditabilty of the gaming revenue that those games earn.

After publishing these proposed rules, the Commission embarked on an extensive consultation schedule, meeting with over 69 tribes in individual meetings. Additionally, the Commission held a day-long hearing and heard testimony from tribes, manufacturers, test labs, and state regulators.

As a result of the public hearing and at the request of many tribes the NIGC commissioned an economic impact study. On November 6, 2006, the Commission released an economic impact study of the proposed regulations.

The comment period lasted until December 16, 2006. The comment period for the Class II Technical Standards ended on January 31, 2007.

Public comments made it clear to the Commission that the first set of proposed technical standards fell short of its goal of technological flexibility. In particular, commenters stated that the first set of proposed technical standards would mandate particular implementations of technology and that some of those were not practical or feasible. Commenters suggested that rather than prescribe particular implementations of technology, the standards should describe the regulatory outcomes that the Commission desires and leave it to the manufacturers to develop ways of meeting those regulatory requirements.

At a December 5, 2006, advisory committee meeting in Washington, D.C., the tribal representatives to the advisory committee strongly seconded this sentiment. The details of the solution, however, were not immediately apparent. Before providing further advice to the Commission, the tribal representatives wished to consult further with other tribal representative and regulators, and with industry representatives. They therefore suggested that they assemble a working group made up of representatives from the Class II gaming industry – tribal operators, tribal regulators, and manufacturers alike – to assist it.

Accepting the fundamental premise that the technical standards ought to be descriptive rather than prescriptive, the Commission agreed to allow the tribal representatives to work independently of the Commission to redraft the technical standards.

In February of 2007, Commission announced its intention to withdraw the proposed Classification regulations and stated that if it went forward with regulations to better distinguish between technologic aids to bingo and Class III casino games and with technical standards for those technologic aids, such regulations would likely vary from those the Commission published in May and August of 2006. This withdrawal was published in the Federal Register on February 15, 2007. 72 FR 7360.

The tribal representatives to the advisory committee formed a working group, which met at various times, in person and telephonically, from the end of 2006 through the middle of 2007 to draft this new set of technical standards. The Commission did not participate in the establishment of this working group. On some occasions, the tribal representatives invited the participation of Commission staff members to answer questions and to provide explanation about the Commission's regulatory goals. Commission staff participated in this capacity during in-person meetings on December 11-12, 2006, in Las Vegas, Nevada, and June 5, 2007, in Dallas, Texas.

The full advisory committee, including the Commission, met to discuss drafts of proposed technical standards on February 22, 2007, in Albuquerque, New Mexico, April 26, 2007, in Seattle, Washington, and May 22, 2007, in Bloomington, Minnesota. All of these meetings were open to the interested public.

On February 22, 2007, the Commission held a meeting of its Classification Standards Advisory Committee. At this meeting the tribal representatives on the committee presented to the Commission a draft of descriptive technical standards for Class II gaming. As the technical standards were being developed the Commission realized that many of the provisions considered for inclusion were not technical standards but rather internal controls. After reviewing the final technical standards draft, the Commission decided, that for the technical standards to be effective, it would have to make changes to its existing minimum internal control standards (MICS). The updating of MICS will be done in phases with the first phase limited to those areas that had a direct impact on the technical standards, specifically, bingo and other games similar to bingo.

To complete this task, the Commission requested that its standing MICS Advisory Committee embark on an aggressive schedule to complete revisions to MICS to be published concurrently with the publishing of technical standards. In pursuit of this goal, the advisory committee was working on the Classification and technical standards, along with the tribal working group, urgently requested that it be allowed to work with the MICS Tribal Advisory Committee to assist in drafting MICS revisions to ensure that any changes were consistent with the draft technical standards. The Commission allowed the request. During a MICS Advisory Committee meeting held on June 25, 2007, in Dallas, Texas, tribal representatives on the MICS Committee urged the Commission to adopt a format for the new MICS regulations different than the one originally proposed by the

Commission. This alternative format focused on functions within a gaming facility rather than game type. Following this meeting the Commission decided to go forward with the suggested alternative format.

The tribal representatives of the MICS Committee worked collaboratively with the previously formed working group to solicit information from tribal regulators, operators, and manufacturers. Tribal representatives requested that they be allowed time to consult with this group before providing advice to the Commission. The Commission agreed and between June and September 2007, this group met several times in person and conducted numerous conference calls. The Commission did not participate in the establishment of this working group. However, staff of the Commission was invited to attend all of the meetings and participate in some of the conference calls. The Commission felt it was important to make staff available to this working group to answer questions about the goals of the Commission in drafting regulation revisions. Commission staff participated in this capacity during in-person meetings on July 15, 2007, in Seattle, Washington, on July 24, 2007, in Arlington, Virginia, and on August 13 and 27, 2007 in Las Vegas, Nevada.

The full committee, including the Commission, met to discuss the draft MICS and technical standards on September 12, 2007, in Arlington, Virginia. During this meeting the Commission raised questions about the draft regulations and received responses from the tribal representatives. The Commission also allowed members of the audience to make comments on the draft MICS as well as the process for developing them.

The proposed class II regulations—comprised of classification standards, definition, technical standards, and MICS—were published in the Federal Register on October 25, 2007.

On February 1, 2008, the Commission released a second updated economic impact study related to the Class II regulations package.

The comment period for these regulations was originally set for December 10, 2007, but at the request of tribes the Commission extended this deadline to March 9, 2008.

Revisions to Classification Standards Based on Comments Received

The new proposed regulations differ in some significant ways from the original proposal. When these regulations were first proposed there was considerable criticism that the proposed rules would result in great economic hardship to tribes and manufacturers. The economic impact study commissioned by the NIGC supported this proposition. The Commission withdrew the proposed regulations and after careful examination decided to make several changes. These changes, described below, have the added benefit of reducing the economic impact of compliance with the regulations.

1. Player Interaction/Speed of Game

One of the defining characteristics of the game of bingo is that the winner is the first person to cover a previously designated arrangement of numbers or patterns. Implicit in this requirement is the notion that a player must make some overt action to win the game. It is for this reason that the Commission has required that players cover/daub after the numbers or objects have been released. Originally, the Commission felt it was necessary to have at least two releases of numbers or objects to ensure that there was truly a competition among the players to be the first to cover. Further, the Commission felt that the release of numbers should be over a period of two seconds to ensure that players where fully engaged in the game. The Commission has given this great thought and has tentatively concluded that this goal may be achieved by requiring only that players press a button to start the game and then press at least one more time to cover and claim their prize. Therefore, the new proposed regulations eliminate a required daub as well as the required time period for the release of numbers or objects.

2. Patterns

As stated above, essential to the play of bingo is that individuals are competing against each other to be the first to obtain a previously designated arrangement of numbers or designations. The original proposal placed a restriction on making different patterns available for different players, reasoning that players must be competing for the same winning pattern. The Commission extended this reasoning to include not only the game winning prize but also patterns for any bonus prizes offered. After receiving comments, upon further consideration the Commission decided it could be less restrictive by allowing bonus patterns to differ and still achieve the goal that players play against each other for the game winning pattern. Therefore the use of different patterns for bonus prizes is now permitted under the proposed regulations.

3. Appearance

One of the primary goals of these classification standards is to enable tribes and regulators to distinguish Class II and Class III. The original proposal required that each machine display the message "This is a Game of Bingo" or "This is a Game of Pull-Tabs" in two inch letters. The Commission still believes that it is important to identify the game clearly but felt that a less intrusive method for doing so could accomplish this goal. The current proposed rule requires only that this message be prominently displayed giving manufacturers and tribal regulators more flexibility.

4. Lab Certification

For these regulations to be effective there must be a method for determining compliance with them before technologic aids are placed on the gaming floors. The easiest way to accomplish this goal is to have certified testing laboratories test the devices and certify that they comply with the criteria established by these standards. In the Commission's original proposal it was the responsibility of the NIGC to determine which labs were suitable to conduct this testing. However, after comment and consideration the

Commission has determined that tribal gaming regulatory authorities are better suited to this task and in many instances are already certifying labs as being suitable to conduct testing. These regulations place the responsibility for approving gaming laboratories on the tribal gaming regulatory authority with a certain minimum criteria for determining suitability.

5. Grandfather Provision

Absent from the original proposal were any provisions allowing for the continued use of games that were currently in operation. During consultations great concern was expressed that the immediate compliance with the proposed regulations would cause economic devastation to some tribes as well as to some manufacturers. The present proposal includes a grandfather provision that allows for the continued use of currently existing Class II games for a period of five years. Within a period of 120 days after this rule is final each tribal gaming regulatory authority will submit a list to the Commission of the Class II game interfaces currently in use. These are the only game interfaces that will qualify under the grandfather provision. This requirement effectively freezes the number of grandfathered interfaces in use. This provision also allows for software changes that ensure the proper functioning, security, or integrity of the game. It also allows for changes to the software that do not detract from compliance with this part such as changes to pay tables or to game themes. The inclusion of a grandfather provision greatly mitigates the economic impact of these regulations. However, the proposed regulations make clear that this grandfather provision will not provide a safe harbor to those machines which could be considered Class III under any standards.

Revisions to Technical Standards based on Comments Received

The comments made clear that the first technical standards proposal was unworkable because it specified in detail how equipment must be built rather than the regulatory goal that equipment must meet. The Commission agreed, withdrew the first proposal and adopted the large majority of the re-written standards proposed by the advisory committee. The current proposal attempts to describe the regulatory goal to be met, leaving it to the manufacturer to determine how it will be implemented. The former proposal dictated game engineering. The new proposal also attempts to accommodate the many different combinations of equipment (or the lack thereof) and was built from the ground up.

Central to the proposed rule, therefore, is the new definition "Class II gaming system," which refers to any given collection of components used in the play of a II game: "All components, whether or not technologic aids in electronic, computer, mechanical or other technologic form, that function together to aid the play of one or more Class II games, including accounting functions mandated by these regulations." The notion of the "gaming system" thus encompasses bingo played in all implementations.

It is the "gaming system" that must meet the technical standards of the proposed part 547. Like the gaming system itself, the new standards are conceived generally so that they

may be met by a gaming system, regardless of the particular components that may comprise it. For example, the proposed rule does not refer to "bill validators," an electronic device into which a patron may insert a bill in order to place credits on a gaming machine. Instead, proposed part 547 describes "financial instrument acceptors" and the standards they must meet. "Financial instrument acceptor" is broad enough in meaning to encompass not only "bill validator" but also a cash drawer staffed by an employee of the gaming operation. Proposed part 547 provides minimum standards for the security of the "acceptors" and of the money or vouchers (generally, "financial instruments") they accept.

Proposed Class II MICS

The proposed rule is largely adopted from the final draft MICS, delivered to the Commission by the tribal representatives of the Advisory Committee on September 4, 2007. There are places, of course, where the Commission felt it could not accept the MICS Committee's recommendations. As such, the Commission has proposed rules more stringent than the tribal representatives to the Advisory Committee would have preferred.

Current Status

The Commission is currently considering whether to finalize any or all of the proposed regulations. The Commission has commissioned a benefit/cost report which is expected in June.

**Appendix IV**

**Technical Assistance and Training**

At the hearing, two witnesses charged that NIGC is not providing training as required by the 2006 Congressional directive. These statements very much misrepresent the work NIGC is doing.

Providing training and technical assistance is of the utmost importance to the NIGC because well-trained tribal gaming officials will better protect the integrity of gaming assets. In light of this, training and technical assistance is continually being provided to tribal regulatory agencies, tribal officials and other interested stakeholders. In 2007, for example, NIGC's six Regional Offices provided formal training and technical assistance for approximately 145 tribes and/or their respective casino staff or tribal regulatory agencies. In addition, informal training was provided by regional field investigators who logged 715 site visits in 2007 and by other NIGC staff during Indian Gaming Working Group Conferences, regional Indian Gaming Working Group conferences and numerous other Indian gaming conferences throughout the nation.

Indian gaming varies from one geographic region to another and so, too, do the needs for training. A wide range of training categories are available and in some cases are carried out in cooperation with other industry experts.

Tribal background and licensing procedures are a crucial component in assuring that trustworthy personnel are employed at gaming operations. NIGC conducted 34 formal trainings for individual tribes on this process in 2007.

NIGC, in conjunction with International Gaming Technology (IGT), a slot machine manufacturer, presented 35 trainings on how to protect the integrity of slot machines.

Also among the trainings were 14 offered on Environmental Public Health and Safety (EPHS) alone. EPHS trainings covering a wide range of subjects and are designed to ensure Indian gaming facilities have tribal ordinances/laws or regulations to protect the environment, public health and safety. The EPHS program has several aspects, including but not limited to, EPHS inspections of Indian gaming facilities, EPHS training for employees/managers, and other assistance to tribes or facilities as requested. The goal of the program is to help tribes operate Indian gaming facilities that are safe for the public, employees and the environment.

NIGC also offered 14 trainings on the role and duties of tribal gaming commissions. These trainings were presented to individual gaming commissions in order to strengthen their understanding of their role in protecting the integrity of their tribes' gaming operations.

The Indian Gaming Working Group (IGWG) consists of several federal agencies with interest in the Indian gaming industry and was created to coordinate roles, pool resources

and develop effective strategies to investigate and prosecute Indian-related crimes. The NIGC participated in three IGWG conferences in 2007. Attendees at these conferences include tribal governmental officials, tribal gaming regulators, and tribal police enforcement, as well as federal agency officials involved in Indian gaming.

These numbers do not reflect the totality of training offered by the NIGC's Division of Enforcement, but give a sense of the number and range of trainings presented during 2007. In addition, NIGC's Division of Audits provided 23 trainings on the value of minimum internal control standards, compliance with NIGC's MICS, and the internal audit function.

**Appendix V**

**Advisory Committees**

At the hearing, a witness claimed that NIGC convenes and dissolves advisory committees arbitrarily and at whim. This is a mischaracterization of the NIGC's efforts to work with advisory committees on highly technical regulations.

In March 2004, the Commission convened the Class II Technical Game Classification Standards Tribal Advisory Committee (Classification Advisory Committee). The Committee included seven (7) members nominated by their tribal governments to help define what constitutes a class II game. This Committee continued its work until March 26, 2008, after the close of the comment period on the regulations on which they were advising.

Also in March 2004, the Commission sought new members to re-convene its Standing Federal-Tribal MICS [Minimum Internal Control Standards] Advisory Committee, which was to help formulate amendments to the NIGC's MICS. A MICS committee had existed earlier, the first having convened in 1998 and 1999. In 2004, nine (9) tribal committee members were selected.

In early 2006, the Commission asked members if they wished to be reappointed to the MICS Advisory Committee. In May 2006, the Commission published draft classification regulations. In December 2006 the Classification Advisory Committee told the Commission that the existing technical standards did not work; with NIGC's approval, that group subsequently formed its own working group and then reported back to the Commission with a draft of what it considered would be the most useful technical standards.

In summer 2007, several new members were added to the pre-existing MICS Advisory Committee in order to draft a separate set of Class II MICS that would be consistent with the new draft technical regulations. In October 2007 the Commission published its second draft classification and technical standards, this time adding MICS to the package of regulations. The comment period on the draft ended March 9, 2008. Subsequently, on March 26, 2008, the Commission sent letters to MICS Committee members and Classification Advisory Committee members, thanking them for their service. As to members of the MICS Advisory Committee, the Commission said that, in light of criticisms that the existing Committee was not sufficiently diverse, that the Commission would begin recruiting members for a new MICS Tribal Advisory Committee.

In short, advisory committees were formed for the purpose to formulating specific regulations. When those draft regulations were issued, the committees were disbanded.

**Appendix VI**

**Regulatory Activity**

At the hearing, it was alleged that NIGC is constantly writing new rules. Since I became Chairman in December 2002, we have adopted exactly one new set of regulations. Our new facility licensing regulations became effective on March 3, 2008. In addition, we have updated existing regulations five times; we updated our minimum internal control standards in three incremental steps, and revised our FOIA and fee regulations to comply with statutory changes. Beyond these, we have proposed in the *Federal Register* only the current package of Class II gaming rules, and we have done that twice. As I testified and have said on numerous other occasions, those rules are not final, and the Commission has not yet decided if or when they will be final.

By contrast, in this same time frame, the Nevada Gaming Commission has amended its technical standards alone six times and made approximately 50 changes, large and small, to its other gaming regulations.

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