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November 22, 2004

Hon. Philip Hogen, Chairman
National Indian Gaming Commission
1441 L Street, N.W.
Washington, D.C. 20005

Re: Class II Technical Standards Proposal

Dear Chairman Hogen, Vice Chairman Westrin, and Commissioner Choney:

On behalf of NIGA's 184 Member Tribes, I write to submit the following comments regarding the third draft of the National Indian Gaming Commission's (NIGC) "Classification Standards for Electronic, Computer or Other Technological Aids Used in Connection with Class II Gaming" ("Classification Standards") and the first draft of the "Class II Technical Standards Version 1.0" ("Technical Standards").

First and foremost, the current rulemaking lacks meaningful consultation. Notwithstanding the fact that the NIGC has assembled a tribal advisory committee to participate in the process, it is becoming increasingly clear that very little if any of the committee's input has been incorporated into the NIGC's proposals. President Bush directed all executive departments and agencies to work with Indian tribes in a way that "fully respects the rights of self-government and self-determination due tribal governments."[1] Unfortunately, this has not yet been done.

NIGA finds it disturbing that the NIGC's legal staff is conducting these meetings with an advisory committee composed of non-lawyers who are not permitted the involvement of their own legal advisors – even after specific requests by tribal representatives that this imbalance be corrected. The advisory committee meetings held thus far have focused heavily on *legal* rather than *technical* standards, and the absence of tribal legal advice places the interests of all tribes in jeopardy. Given the technical (but not legal) expertise of the individuals serving on the committee, it seems that their input would have been better suited to the development of technical standards, as opposed to debating the law with the NIGC's lawyers. These meetings should not permit the NIGC to claim consultation with tribal interests with respect to *any* legal issue, since advice of counsel is fundamental to the decisions one must make in a legal context, which this forum has become. To correct this situation, clarify the NIGC's current direction, and bring its actions into conformance

[1] Executive Memorandum Subject: Government-to-Government Relationship with Tribal Governments, September 23, 2004.

with its own consultation policy, NIGA calls upon the NIGC to engage in respectful and truly meaningful government-to-government consultation concerning both the Classification and Technical Standards through a series of regional and national tribal consultation meetings.[2]

Equally troubling is the fact that these rulemaking efforts appear determined to impose greater restrictions on class II gaming than exist under current law or the NIGC's present regulations, particularly with regard to the use of electronic, video and computer equipment. While initially described as an effort to establish technical standards to regulate the integrity of class II games when played with "technological aids," the rule's current draft goes much further, effectively rewriting the *legal* standards for establishing that a game and its equipment fall within class II gaming. Tribal leaders, regulators, and others in Indian gaming are concerned that the Classification and Technical Standards have the potential of jeopardizing the viability of tribal governmental enterprises vital to Indian country and tribal self-sufficiency.

This effort also appears designed to overturn ten years of case law, the outcome of which has been overwhelmingly favorable to the interests of tribal governments. The current draft undermines Congress' intent in enacting the Indian Gaming Regulatory Act (IGRA) in ways critically important to Indian country. Among these is the concern that the present draft undermines the status of tribal governments as the primary regulators of Indian gaming.

Tribal leaders are also concerned with the NIGC's willingness to follow the Justice Department's conservative lead with regard to the scope of acceptable class II games. In a recent letter to the Chairman of the Senate Indian Affairs Committee, the Justice Department made clear its position that Congress should require tribes to compact with states for essentially all electronic gaming, including class II gaming, because such "high speed" games are becoming "more lucrative" for tribes and, "from a player's perspective," are not distinguishable from class III games.[3] In an apparent acceptance of this policy view, many provisions within the NIGC's Classification and Technical Standards arbitrarily slow the play of class II games and make them less commercially viable. Each of these concerns has led to substantial unease throughout the class II industry generally, and particularly for those tribes located in states unwilling to negotiate compacts for class III gaming.

Perhaps most perplexing is that the latest drafts of the Classification and Technical Standards fail to resolve the basic problems associated with the NIGC's existing game classification process. For one, the current drafts fail to provide a procedure for appeal outside the enforcement context, a framework that some have argued presumes the correctness of the NIGC's interpretation of IGRA and avoids judicial oversight. Such a scheme violates fundamental principles of fairness and due

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[2] *See* NIGC Government-to-Government Tribal Consultation Policy, March 26, 2004, at §III(B), "[w]hen the NIGC determines that its formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards may substantially effect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA**,** 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, implementation, and related issues and effects."

[3] Letter from William E. Moschell, Assistant Attorney General, to The Honorable Ben Nighthorse Campbell, United States Senator (June 15, 2004).

process of law. As the primary regulators of class II gaming, tribes should be afforded the opportunity to challenge such an opinion on a government-to-government basis, without having to first subject itself to enforcement action.

Not only do the current drafts fail to address this problem, it compounds it by shifting the classification process from tribal regulators and the NIGC, to private sector gaming laboratories. Nothing in IGRA suggests that testing laboratories should be placed in the position of interpreting IGRA. Instead, their role should be limited to ensuring the integrity of equipment and operating systems. Many argue that the process set forth in the current draft not only deprives tribal regulators of their legitimate regulatory authority over class II gaming, but relinquishes a critical federal responsibility to the private sector and interferes with the right of tribes to full due process of law.

I. COMMENTS SPECIFIC TO THE THIRD DRAFT OF THE CLASSIFICATION STANDARDS

In enacting the Indian Gaming Regulatory Act (IGRA), Congress established a comprehensive regulatory scheme for gaming activities on Indian lands.[4] While Congress clearly intended to permit the use of electronic equipment, or "technologic aids," in the play of class II games, disagreement lingers as to the proper interpretation of the term under IGRA. What is clear is that Congress intended "that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development."[5] Legislative history shows that Congress was alert to the fact that technology would continue to advance, and expressed the intent that class II gaming likewise evolve and grow through technological advancement. As noted in the Senate report: "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."[6]

Since the enactment of IGRA, federal courts have addressed and clarified the distinctions between class II technologic aids and class III electromechanical facsimiles; clarifications that are reflected in the NIGC's definition regulation promulgated in 2002.[7] Notably, the 2002 rulemaking was the result of extensive consultation with tribes and other impacted parties, such as states and the Department of Justice, and brought clarity to electronically aided class II gaming. Tribes, manufacturers, and others in the industry, have made substantial investments in reliance upon these earlier actions, investments that are now threatened by the uncertainty surrounding the current rulemaking.

NIGA believes strongly that the NIGC should honor both the spirit and language of IGRA, the hard-fought victories of Indian country in the federal courts, and the NIGC's own regulatory framework, most prominently, the 2002 definition regulations. In an effort to redirect the NIGC's focus from

[4] 25 U.S.C. §§2701-2721 (2001).
[5] S. Rep. No. 100-446, at 9 (1988).
[6] *Id*.
[7] 67 Fed. Reg. 41,166 (June 17, 2002).

changing the existing legal environment to the more appropriate goal of developing true technical standards, we discuss below the current regulatory structure as created by IGRA and the NIGC, and then discuss the many ways in which the current drafts of the Classification and Technical Standards conflict with this framework.

Existing Regulatory Framework

IGRA divides gaming into three "classes" and specifies varying prerequisites to the play of each. Class I gaming, which includes traditional forms of Indian gaming, is regulated exclusively by tribes, and is not subject to the provisions of IGRA.[8] Class II gaming is defined in relevant part to include:

> (A)(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –
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> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
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> (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
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> (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[.][9]
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> (B) The term "class II gaming" does not include –
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> (i) any banking card games, including baccarat, chemin de fer, or blackjack, or
>
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.[10]

IGRA specifies that "all forms of gaming that are not class I gaming or class II gaming" fall within the category of class III gaming.[11] The NIGC expands upon this definition by adding that class III gaming includes, but is not limited to:

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[8] 25 U.S.C. §§2703(6), 2710(a)(1) (2001).
[9] *Id*. §2703(7)(A). Regulations of the National Indian Gaming Commission provide a similar definition of Class II gaming at 25 C.F.R. §502.3 (2004).
[10] 25 U.S.C. §2703(7)(B) (2001).
[11] *Id*. §2703(8).

(a) Any house banking game, including but not limited to –
  (1) Card games such as baccarat, chemin de fer, blackjack (21), and pai gow (if played as house banking games);
  (2) Casino games such as roulette, craps, and keno;

(b) Any slot machines as defined in 15 U.S.C. 1171(a)(1) and electronic or electromechanical facsimiles of any game of chance;

(c) Any sports betting and pari-mutuel wagering including but not limited to wagering on horse racing, dog racing or jai alai; or

(d) Lotteries.[12]

As noted earlier, IGRA permits utilization of "electronic, computer, or other technologic aids" in the play of class II games,[13] however, "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" fall within the category of class III gaming.[14] While the similarity of this language has led to disagreement as to the proper interpretation of IGRA in distinguishing between the two, legislative history reveals how Congress both anticipated this disagreement and provided direction in its resolution.

In enacting IGRA, Congress clearly intended "that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development."[15] Legislative history shows that Congress understood that technology would continue to advance, and expressed the intent that class II gaming likewise evolve and grow through technological advancement. Speaking directly to the use of electronic equipment in the play of class II games, Congress explained:

> 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.[16]

The NIGC first defined technologic aids and electromechanical facsimiles in 1992.[17] As the courts began to address these issues, however, it became increasingly clear that these original definitions

[12] 25 C.F.R. §502.4 (2004).
[13] *Id*. §2703(7)(A)(i).
[14] *Id*. §2703(7)(B)(ii).
[15] S. Rep. No. 100-446, at 9 (1988).
[16] *Id*.
[17] 57 Fed. Reg. 12,382 (April 9, 1992). In 1992, electronic, computer or other technologic aid was defined as "a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used: (a) Is not a game of chance but merely assists a player or the playing of a game; (b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and (c) Is operated according to applicable Federal communications law." Electronic or electromechanical facsimile was as "any gambling device as defined in 15 U.S.C.

were not working as intended. Even worse, three United States Circuit Courts of Appeal ignored the definitions, with one unmistakably criticizing the NIGC for its lack of guidance in this area.[18] As a result, the NIGC revised these definitions in June of 2002 by codifying the distinctions brought to light by the courts and ten years of experience with the definitions.[19]

As a result of the 2002 rulemaking, the NIGC now defines a technologic aid as:

> "(a) Electronic, computer or other technologic aid means any machine or device that:
> (1) Assists a player or the playing of a game;
> (2) Is not an electronic or electromechanical facsimile; and
> (3) Is operated in accordance with applicable Federal communications law.
>
> (b) Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:
> (1) Broaden the participation levels in a common game;
> (2) Facilitate communication between and among gaming sites; or
> (3) Allow a player to play a game with or against other players rather than with or against a machine.
>
> (c) Examples of electronic, computer or other technologic aids include pull tab dispensers and/or readers, telephones, cables, televisions, screens, satellites, bingo blowers, electronic player stations, or electronic cards for participants in bingo games."[20]

In addition to the elements of the definition contained within subsection (a), it is important to note that the NIGC chose also to include, at subsection (b), a list of analytical factors to be considered in determining whether particular equipment is a technologic aid. As such, equipment or an electronic format exhibiting any one of these characteristics "should be viewed as strong indication that the machine or device is a technologic aid."[21]

To provide additional assistance in interpreting subsection (a), the NIGC also included, within subsection (c), a list of specific examples of technologic aids. Therefore, in an analysis of whether electronic equipment satisfies the definition of a technologic aid, one must look to the definition contained with subsection (a), while ever mindful of the key indicators and specific examples included within subsections (b) and (c).

1171(a)(2) or (3)." A game similar to bingo was defined 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."
[18] 67 Fed. Reg. 41,166, 41,168 (June 17, 2002).
[19] 67 Fed. Reg. 41,166 (June 17, 2002).
[20] 25 C.F.R. § 502.7 (2004).
[21] 67 Fed. Reg. 41,166, 41,170 (June 17, 2002).

The 2002 regulations go on to define an electronic or electromechanical facsimile as:

> "[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."[22]

The 2002 regulations also modified the definition of other games similar to bingo, which now reads:

> "Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes."[23]

Under this regulatory scheme, an analysis of any electronically-aided game intended for play in a class II market is essentially two-fold. First, it must be determined whether the underlying game satisfies the definition of class II gaming. Second, it must be determined whether the electronic equipment utilized to play the game satisfies the definition of a technologic aid. The response to both questions must be in the affirmative for the game to be played on Indian lands without a Tribal-State Compact.

A primary concern of our member tribes is that while initially described as an effort to establish technical standards for electronic aids to the play of class II games, the current draft goes much further, also addressing *legal* standards for game classification. Instead of addressing integrity issues common to technical standards, this current rulemaking calls into question ten years of case law won largely by the tribes, as well as the NIGC's own pronouncements, and would effectively redefine "bingo" and other class II games. As a result, the latest draft would reclassify a number of games that the federal courts, tribal gaming commissions, and the NIGC itself have previously determined to be class II and require their removal from tribal operations.

In enacting IGRA, Congress placed only three requirements on the game of bingo. Federal courts have held that these three requirements "constitute the sole *legal* requirements for a game to count as class II bingo."[24] The NIGC's attempt to impose additional requirements upon the statutory elements of bingo would limit – and in some cases, prohibit – many years of technical advancement in the game and serves only to micromanage both the business judgment and regulatory responsibilities of tribes. Many of these additional requirements intrude upon the sovereign right of

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[22] *Id*. §502.8.
[23] *Id*. §502.9. It is worth noting that the 1992 definition also provided that a game similar to bingo could not be house banked. The 1992 definition provided that "[g]ame similar to bingo means 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."
[24] *United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1096-97 (9th Cir. 2000).

tribes to operate these games in accordance with law, while tailoring them to the demands of their own community and business environments. Detailed below is an illustration of the many ways in which the current draft conflicts with the current legal environment described above.

- *Prize Limitations*

IGRA specifies only that a game of bingo must be played for prizes. As such, NIGA opposes the NIGC's current attempts to place restrictions upon either the amount or types of prizes available in a class II game. For example, the current draft states that "[a]ll prizes in a game 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 player 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."[25] IGRA, however, contains no such limitation. Furthermore, this type of requirement conflicts with prizes available in traditional bingo games, such as "good neighbor" prizes where those players sitting near the winner also wins a prize.

The latest draft also asserts that "[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. Random or unpredictable prizes are not permitted."[26] Additionally, the draft provides that the game-winning prize must be "no less that 20% of the amount wagered and at least one cent."[27] The draft further provides that "[b]onus prizes must be awarded in the same manner of play as described for winning the game-winning prize."[28] Nothing within IGRA or judicial precedent justifies limiting either the amount or manner in which a prize is awarded. Rather, these are marketing decisions, "beyond the scope of the Act," to be determined by the tribe.[29] As such, these provisions should be removed from the regulation.

- *Bingo Card Specifications*

NIGA opposes the NIGC's current attempts to regulate all facets of an electronic bingo card, including its size, number of squares, and the range of numbers that may appear on the card. Requiring that a bingo card contain a particular number of squares, and that each square measure a precise amount, has no legal support and serves only to limit the flexibility that Congress so clearly intended. It also reverses existing NIGC guidance. NIGA encourages the NIGC to maintain its existing standard that an electronic bingo card must be "readily visible."

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[25] *Classification Standards* at §3(d)(i)(a).
[26] *Classification Standards for Electronic, Computer or Other Technologic Aids Used in Connection with Class II Gaming, Third Draft*, National Indian Gaming Commission, September 17, 2004 ("*Classification Standards*") at §3(d)(i)(d).
[27] *Id*. §3(d)(ii)(c).
[28] *Id*. §3(d)(iii)(b).
[29] *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 723 (10th Cir. 2000).

In game classification opinions issued only last year, the NIGC asserted that "the mere existence of an electronic card on a screen" is not sufficient to establish an electronic game of bingo as a class II game.[30] In the view of the NIGC, to conform to the statutory requirements of bingo, the card must be "readily visible," which was then described as an electronic bingo card that is prominently sized and displayed, that contains a readable font, and that makes use of contrasting colors.[31]

By these opinions, the NIGC's Office of General Counsel found an electronic bingo card measuring two inches square and utilizing a font size of 22 points, sufficient to satisfy the statutory requirements of bingo.[32] The NIGC also found an electronic bingo card measuring 2⅛ inches square with "an easy-to-read 16-point font" acceptable.[33]

In yet another game classification opinion, the NIGC also recognized that while IGRA requires that a bingo game be played "with cards bearing numbers or other designations," there is no requirement that a bingo card contain exactly five rows and five columns. The NIGC thereby determined that a bingo card containing "only four numbers rather than a more extensive grid of numbers does not place the game outside the 'bingo' definition found in IGRA."[34] Their analysis raised the statutory requirement of covering an "arrangement of numbers or designations" to win the game, deducing that "a card that contained fewer than three numbers or designations or in which the purpose of the game was to cover only one number or designation" cannot satisfy the IGRA definition of bingo.[35] To qualify as an "arrangement" a pattern must consist of at least two numbers or designations. No other requirements were established, and the four-number card was deemed acceptable.[36]

The current draft, however, abandons this reasoning and imposes a series of far more detailed requirements upon both the visibility and design of the bingo card itself. For instance, the current draft states that "[t]he interior size of the card will be a minimum of 5 centimeters by 5 centimeters and contain a minimum grid of 25 spaces, arranged in horizontal rows and vertical columns."[37] It continues that "[e]ach space in a grid must be at least 1 centimeter by 1 centimeter."[38] The current draft also requires that "[d]ifferent numbers or designations must be shown in each of the 25 individual spaces on the bingo card in a font or symbol size that fills as least ¾ of the space."[39] Again, none of these limitations are supported by IGRA or case law, and therefore serve only as restrictions upon the game of bingo not intended by Congress.

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[30] *Reel Time Bingo Game Classification Opinion*, National Indian Gaming Commission, September 23, 2003 ("*Reel Time Bingo*") at 6.
[31] *Id*. at 6; *Sierra Design Group "Mystery Bingo" Game Classification Opinion*, National Indian Gaming Commission, September 26, 2003 ("*Mystery Bingo*") at 15.
[32] *See Mystery Bingo*.
[33] *See Reel Time Bingo*.
[34] *Wild Ball Bingo (electronic version) game classification opinion*, National Indian Gaming Commission, March 27, 2001 ("*Wild Ball Bingo*") at 5.
[35] *Id*. at 8.
[36] *See Id*.
[37] *Classification Standards* at §3(b)(ii).
[38] *Id*.
[39] *Id*. §3(b)(iii).

- *Numbers or Other Designations*

IGRA requires that the holder of a card cover "numbers or other designations." Reasoning that a "pattern" cannot consist of only one space, the NIGC has interpreted this to require the covering of at least two objects before a player can win.[40] Notwithstanding this earlier pronouncement, the NIGC is now seeking to impose an additional, arbitrary requirement upon the game. The current draft adds that "[t]he pre-designated game-winning pattern must consist of at least 3 spaces."[41] While potentially insignificant in application, the increase from two to three spaces is without support.

- *Timing of Card Selection*

Despite lacking support from either IGRA or case law, the latest draft also asserts that a player must not be able to obtain a new card once game play begins or join a game in progress. The draft regulation states that "[p]layers must obtain the card or cards to be played in each game before any numbers or designations are drawn or electronically determined for that game. … Players cannot change the card once play of a particular bingo game has commenced."[42] The draft further contends that "[p]layers cannot enter the game and purchase a bingo card after the game commences."[43] Troubling is the fact that Bonanza Bingo, a game that pre-dates IGRA and that has been played widely both inside and outside of Indian country, has each of these features at its core.

In Bonanza Bingo, a limited number of balls are drawn and displayed on a dedicated screen before most, if not all, players purchase their card(s). As players enter the gaming facility, they purchase a package of bingo cards, which typically includes at least one Bonanza Bingo card. Players may cover the pre-drawn balls matched by this card at any time during the session. They also have the option of purchasing an unlimited number of additional Bonanza Bingo cards in the hope of increasing their winning opportunities. Because the cards utilized with Bonanza Bingo are sealed in a manner that hides its numbers, the player cannot determine whether a particular card improves their chances of winning until after it is purchased and its numbers revealed. Sometime during the session, players are notified that the playing of Bonanza Bingo will resume. Just as in other bingo games, numbers will then be drawn until the game-winning pattern is successfully achieved.

It was not Congress' intent in enacting IGRA to curtail bingo, or to place tribal operations at a disadvantage to those bingo halls operated outside Indian country. To the contrary, Congress intended gaming "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[44] Congress also intended tribal governmental bingo to evolve and grow along with advancing technology. The fact that limitations imposed by the Classification Standards

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[40] *See Evergreen Bingo game classification opinion*, National Indian Gaming Commission, November 2, 1999, finding Evergreen Bingo to be a Class III game in part because a player is only required to cover one number in which to win.
[41] *Classification Standards* at §3(c)(iii).
[42] *Classification Standards* at §3(a)(viii).
[43] *Id*.
[44] 25 U.S.C. §2702(1) (2001).

conflict with the very same games common at the time of IGRA's enactment illustrates their status as restraints upon the game not intended by Congress.

- *Assistance in Daubing Prohibited*

NIGA opposes all attempts to prohibit technologic aids that assist a player in daubing. Nothing in IGRA or case law 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 class II games.

Both the courts and the NIGC have evaluated the manner in which players cover the numbers on their card and have identified and addressed several issues. The first of these issues is whether a player actually *covers* numbers on their card when they request an electronic player station to cover the numbers on their behalf. Traditionally, a player 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) by either pressing a button on the console or by touching the display itself.

In dismissing the argument that MegaMania failed 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."[45] To the contrary, the court emphasized that IGRA "merely require[s] that a player cover the numbers without specifying how they must be covered."[46] 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."[47] As such, both the courts and the NIGC have found electronic daubing acceptable,[48] and it remains so within the current draft.[49]

When a player requests assistance in daubing through electronic means, she is essentially requesting the type of assistance offered by reader/dauber aids commonly known as "bingo minders." Bingo minders, which pre-date IGRA and are used widely in both tribal and non-tribal gaming facilities, monitor the game's progression and automatically cover all matching numbers on each of the player's cards. Essentially, each player enters their bingo cards into the minder, typically through the use of an identification number, and once game play begins, the bingo minder monitors the game's progression and covers matching numbers on each of the player's cards, often with no

[45] *United States v. 103 Electronic Gambling Devices*, 1998 WL 827586, at *6 (N.D. Cal Nov. 23, 1998), *aff'd* 223 F.3d 1091 (9th Cir. 2000).
[46] *Id.*
[47] *Mystery Bingo* at 10.
[48] *See also United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000); *Reel Time Bingo*; *National Indian Bingo Game Classification Opinion*, National Indian Gaming Commission, November 14, 2000 ("*National Indian Bingo*").
[49] *Classification Standards* at §3(e)(vii).

additional interaction by the player. The aid is programmed to locate and display the player's best card, and to alert the player through a series of beeps of any winning pattern. If a winning pattern is achieved, the aid prompts the player to claim within a designated claim period. If a player fails to claim, the prize is forfeited and the game continues.

Incorporating the benefits of a reader/dauber device into another class II game is merely the natural progression of changing technology, as well as the natural progression of daubing through means of an electronic player station. As discussed earlier, both the courts and the NIGC have found that a player does not have to separately locate and cover each number drawn.[50] To the contrary, IGRA "merely require[s] that a player cover the numbers without specifying how they must be covered."[51] The statutory requirements of bingo are satisfied so long as numbers *are* covered when similarly numbered objects are drawn or electronically determined.[52]

The type of assistance provided by bingo minders has often been referred to as "auto-daub," a term used loosely to refer to a family of features that assist players in covering numbers on their card. While similar in the type of assistance provided, the manner in which auto-daub operates may vary from game to game. In some versions, the player must manually elect this assistance during each game. In others, auto-daub is the default; it is always on and assists the player without additional action. In all cases, however, when activated, auto-daub aids the player by daubing at the appropriate time during the game's natural progression. The feature cannot play independent of the player, nor does it change the game's character or outcome.

Importantly, regardless of the manner in which the daub assistance operates, this feature does not eliminate the statutory requirement that the holder of a card cover numbers when they are drawn. The game's sequencing remains intact because the player, through the use of an aid, does not perform the daubing function until *after* each release of balls. With or without an aid that assists a player in covering numbers on their card, it remains true that "the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined."[53]

Nonetheless, the NIGC now seeks to prohibit this type of an aid.[54] Nothing in IGRA or judicial interpretations of the 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 the mode of daubing to be irrelevant. Furthermore, as technology has progressed, the NIGC has acknowledged that there is no requirement of a "manual" component in a game of bingo.[55] The NIGC's attempt to prohibit bingo minders to enhance its argument against "auto-daub" is both insulting and commercially

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[50] *See 103 Electronic*, 223 F.3d 1091; *162 Megamania*, 231 F.3d 713; *Reel Time Bingo*.
[51] *U.S. v. 103 Electronic Gambling Devices*, 1998 WL 827586, at 6 (N.D. Cal), *affirmed* 223 F. 3d 1091 (9th Cir. 2000).
[52] *United States v. 103 Electronic Gambling Devices*, 1998 WL 827586, at *6 (N.D. Cal Nov. 23, 1998), *aff'd* 223 F.3d 1091 (9th Cir. 2000).
[53] 25 U.S.C. §2703(7)(A)(i)(II) (2001).
[54] "Each player in a game must take overt action to cover (daub) the player's card(s) during play of the game by touching the screen or a designated button one time after each batch of numbers or other designations is released." *Classification Standards* at §3(e)(xiv).
[55] 67 Fed. Reg. 41,166, 41,171 (June 17, 2002).

debilitating, placing tribes at a disadvantage to non-tribal bingo operations. As such, the NIGC's proposal within the current draft violates IGRA.

- *Ball Draw Requirements*

As an initial matter, NIGA opposes the NIGC's attempts to require that balls be released to players "in close proximity" to the time at which they were generated. Again, IGRA places no such limitations on a game of bingo. Games such as Bonanza Bingo, using so-called "pre-drawn balls," predate IGRA and were not intended to be eliminated by its enactment. These provisions should be removed from the draft regulation.

With regard to the numbers or other designations comprising the ball draw, the NIGC has found that they must both be drawn or electronically determined in a random manner, and that they must be used in the same sequence as generated.[56] Without support, however, the current draft adds that "[t]he minimum number of numbers or other designations in the non-replacement pool from which selections may be randomly drawn or electronically determined is 75 and the maximum number is 150."[57] Again, restrictions upon the game outside those intended by Congress should be removed from the draft regulation.

- *Multiple Bingo Ball Release Requirement*

The NIGC has previously asserted that a game of bingo cannot be won after only one release of balls. The current draft extends this requirement to the *interim* portions of a game of bingo as well. Doing so violates the holdings of the Ninth and Tenth Circuit Courts of Appeal in the *MegaMania* cases, and as such, NIGA opposes inclusion of these requirements.

In examining whether a game is won by the first person who covers a previously designated arrangement on their card, the NIGC recently began to focus on the "method of play" by which a participant wins.[58] In a recent game classification opinion, the NIGC argued that because IGRA requires the game to be "won by the first person," a game of bingo must include some element of tension, or "a contest or race among players to be the first to win."[59] The NIGC thereby deduced that a game cannot be won after only one release of numbers because such a game would not contain the required element of tension.[60]

In reaching this conclusion, the NIGC looked to the reasoning of the Tenth Circuit Court of Appeals in finding the MegaMania game to be a class II game.[61] They began by describing the game.

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[56] *Mystery Bingo* at 15.
[57] *Classification Standards* at §3(a)(ix).
[58] *Mystery Bingo* at 10.
[59] *Id*.; *See also Rocket FastPlay Bingo 1.0 Advisory Opinion*, National Indian Gaming Commission, October 18, 2004.
[60] *Mystery Bingo* at 10.
[61] *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000).

> "According to the Tenth Circuit, in MegaMania, numbers are drawn by a bingo blower and released three balls at a time. If a player wants to continue playing the game after the first three balls are drawn, the player pays additional money to stay in the game for the release of the next three balls. Ball draws occur approximately every ten seconds. The game is won by the first person to cover a five-space straight line on an electronic bingo card."[62]

From this description and the court's analysis, the NIGC inferred that multiple rounds, where numbers are revealed to participants, are "an inherent character of bingo."[63] Consequently, the NIGC asserts that a game with only one release of balls is not being "played like MegaMania," and therefore falls outside the statutory definition of either bingo or a game similar to bingo.[64]

While noting the importance of a player's involvement in the "successive rounds," the NIGC recognized that while a game of MegaMania cannot be won with one release of balls, it can, at least in theory, be won with only two.[65] Given that three balls are released at a time, a player can potentially achieve the five-space game-winning pattern with two releases of balls (three balls each for a total of six balls). Still, the Tenth Circuit found MegaMania to be a class II game.[66] The NIGC thus opined that a game that can be won with only two releases of balls can satisfy the definition of class II gaming.[67]

While it is true that MegaMania could only be won after at least two releases of balls, the NIGC's assertion that this is a required element of the game of bingo lacks support. Certainly, the same cannot be said of any secondary or interim portions of the game. We again turn to the reasoning of the Tenth Circuit Court of Appeals in its review of the MegaMania game.[68] Players of MegaMania compete both for the game-winning pattern and for secondary prizes associated with a portion of the game called "CornerMania." In its examination of the MegaMania game, the Court of Appeals spent a great deal of time evaluating whether this particular feature removed the game from the statutory definition of bingo, and thus from the definition of class II gaming. The court held that CornerMania does not change MegaMania's status as a class II game.[69]

As described by the court, CornerMania is played along with the primary game and is won by a player who covers two, three, or four corners on a card.[70] Each game will have a winner of both the primary MegaMania game and the secondary CornerMania game.[71] In the event the MegaMania

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[62] *Mystery Bingo* at 11.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *162 Megamania*, 231 F.3d at 723; s*ee also United States v. 103 Electronic Gaming Devices*, 223 F.3d 1091, 1103 (9th Cir. 2000).
[67] *Mystery Bingo* at 11.
[68] *162 Megamania*, 231 F.3d 713.
[69] *Id*. at 722.
[70] *Id*. at 717.
[71] *Id.*

game is won before CornerMania, balls continue to be released, three at a time, until the CornerMania game is won.

Because balls are released to the players three at a time, a player of MegaMania can potentially achieve a two or a three corner pattern with just one release of balls. As such, a player can potentially win the prize associated with CornerMania in the *first* release of balls. Regardless, the court held that the CornerMania game does not change MegaMania's class II status.[72] Following the court's reasoning, multiple releases are therefore not required to achieve secondary or interim prizes of a class II game.[73] As such, the current draft is without legal basis in proposing that "[t]wo or more releases are required before a player is eligible to win any prize in any game."[74]

- *Prohibition on Diverse Interim Patterns*

Both the courts and the NIGC have established that interim and/or consolation patterns and prizes are permissible within a game of bingo, and that their presence has no material affect on the game's status as a class II game.[75] Additionally, nothing prohibits players who are competing for the same *game-winning* pattern from competing for different *interim* patterns, yet this is what is being proposed within the Classification Standards. As the courts have held, the proper focus of a game classification analysis is whether the game "as a whole," and not each of its constituent parts, meets the three statutory requirements of bingo. As such, provisions within the current draft that limit the flexibility of diverse interim patterns should be removed.

For example, the current draft claims that "[i]n order for players to be considered as participating in a common game, and to meet the requirements for the minimum number of players, each player must be eligible to compete for all winning patterns in the game."[76] Although permitting players in a common game to compete at differing buy-in levels, with their prize amount varying accordingly, the current draft adds the prerequisite that all prizes must be "based on achieving pre-designated winning patterns common for all players."[77] As described below, neither IGRA nor case law limits the flexibility of offering different *interim* patterns within a common game where players play for the same *game-winning* pattern.

In the *MegaMania* line of cases, the courts have held that the game of MegaMania – including its interim game, CornerMania – is a class II game. Relevant here is the fact that the characteristics of the interim portion of the game varies from the larger game. In MegaMania, once the game-winning pattern is achieved, no one else can achieve this same pattern and win. By contrast, multiple players can achieve the same CornerMania pattern (two, three, or four corners) at various times during the game and win an interim prize. The fact that one player achieves a corners pattern

[72] *Id*.
[73] *See Id*.; *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *Mystery Bingo* at 11.
[74] *Classification Standards* at §3(e)(vi).
[75] *See 103 Electronic Gaming Devices*, 223 F.3d at 1097; *162 Megamania*, 231 F.3d at 722.
[76] *Classification Standards* at §3(a)(v).
[77] *Id*. §3(d)(i)(b).

and "wins" is meaningless to the other players – all players obtaining a predetermined pattern receive a prize.

In reviewing the differing attributes of the interim and game-winning portions of the game, the courts discounted arguments that CornerMania transformed the larger game into one that is class III. In its analysis, the Ninth Circuit Court of Appeals stressed that an evaluation of whether MegaMania constituted the game of bingo required examination of the game "*as a whole*," and not of its constituent components.[78] As such, the proper focus of a game classification analysis is whether the game "as a whole" meets the three statutory requirements of bingo.

Adhering to this focus, the court dismissed the argument that within the CornerMania portion of the game, players are effectively playing against the machine as opposed to each other.[79] The government had asserted that because CornerMania could be won by multiple players, and that the amount of the prize awarded to each is wholly independent, players are not "competing" against each other, but instead are playing against the machine.

In its analysis, the court noted that within CornerMania, there are essentially two levels of competition.[80] The first occurs where no corners pattern has been achieved, yet the straight-line, game-winning pattern has been won. Here, players are competing to be the first to achieve a corners pattern and claim the associated prize. The second level of competition occurs where one corners prize has been won, yet the straight-line pattern has not. In this case, players are competing to win additional corners prizes before the game-winning pattern is won.

The Ninth Circuit went on to explain that while the fact that the game permitted multiple winners of interim prizes may be relevant if CornerMania were "a free-standing game," because it cannot be played without playing the entire game – the game of MegaMania – this feature did not alter the game's classification.[81] The Tenth Circuit followed suit, adding that CornerMania is merely an "interim part" of a larger game.[82] Consequently, as to the interim portion of a class II game, there is no requirement of competition for a singular prize, barring further winners. Nor is there even a requirement of simultaneously matching a pattern in the hope of a tie. Instead, the interim patterns and prizes may remain available as players participate in the larger game, regardless of the number of times those prizes are won.

In addition to finding that CornerMania does not cause MegaMania to fall outside the statutory definition of "bingo," it is also important to note the court's characterization of the "game" as the *entire game* – "the game of MegaMania." While other "interim parts" may be included, the "game" should be defined as nothing less than the portion being played for the straight-line bingo, or the game-winning pattern.

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[78] *103 Electronic*, 223 F.3d at 1098 ("The question before us, though, is whether *MegaMania*, not one of its constituent components, satisfies IGRA's statutory criteria for class II gaming. Thus, MegaMania *as a whole* is 'the game' to which §2703(7)(A)(i)(III) pertains.").
[79] *Id*. at 1100-01.
[80] *Id*.
[81] *Id*.
[82] *162 Megamania*, 231 F.3d at 721.

The meaning of the "game" was also addressed when the government argued that multiple winners cause MegaMania to fall outside the statutory definition of "bingo" because the game is no longer "won by the first person 'covering' the designated arrangement of numbers."[83] In dismissing this argument, the court stated:

> "The first player to win a previously designated arrangement of numbers – the straight-line game – does win. There is nothing in the statute or regulations which prevents the awarding of interim or consolation prizes. The government's characterization of the corners game as being wholly and separate from the straight-line game is misleading and incorrect. The player pays 25 cents for a three-ball draw which entitles the player to participate in the straight-line game *and* the corners game. The player does not have to pay 'extra' to participate in the corners game and the player does not have the option of playing only the straight-line game or the corners game."[84]

It is particularly significant that federal courts have accepted varying features within the interim portions of the game, particularly the ability of players to win multiple interim prizes at various stages of the game without impacting the winning ability of others. The court's recognition of multiple levels of competition within a class II game of bingo is echoed by the NIGC's intent of ensuring that players "play with or against each other rather than with or against a machine."[85] Even where a common game contains different *interim* patterns, players continue to play "with or against each other" – players play *with* each other for interim patterns, and *against* each other for the game-winning pattern. Given that one player's achievement of an interim pattern is irrelevant to all other players, so too is the consistency of these interim patterns.

The interim patterns and prizes remain a part of the larger game – a game in which players, playing with cards bearing numbers, cover corresponding numbers as they are drawn, and are awarded prizes based on covering pre-determined patterns. Regardless of the game's interim parts, players continue to compete within the "game," and the "game" is still *won* by the first player to cover the game-winning pattern.[86] Because the statutory requirements of "bingo" continue to be satisfied, differing interim patterns do not cause the game to fall outside the definition of bingo. This limitation should therefore be removed from the Classification Standards.

- *Using "House Banking" as a Test*

Unlike traditional house banked games such as blackjack, in bingo and games similar to bingo, the house is not a participant in the game. At no time does the house have its own card, nor does it take on or compete for prizes against the game's players. The NIGC is nevertheless interpreting the term

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[83] *Id*. at 721-22.
[84] *United States v. 103 Electronic Gambling Devices*, 1988 WL 827586, *8 (N.D. Cal. Nov. 23, 1998); s*ee also 162 Megamania*, 231 F.3d at 722.
[85] 25 C.F.R. §502.8 (2004).
[86] *See United States v. 103 Electronic Gambling Devices*, 1998 WL 827586, *8 (N.D. Cal. Nov. 23, 1998), *aff'd* 223 F.3d 1091 (9th Cir. 2000).

"house banked" to apply to bingo games in which the fee to the operator is a portion of the players' fee to play the game. Both the Ninth and Tenth Circuit Courts of Appeal have held that the fact that the house retains a percentage of the amount wagered does not make a game "house banked" as that term is defined elsewhere by the NIGC. This proposal mixes and confuses that issue.

The NIGC's existing regulations define a "house banking game" as one "that is played with the house as a participant in the game, where the house takes on all players, collects from all losers, and pays all winners, and the house can win."[87] The current draft of the NIGC's rulemaking, however, creates a new definition of house banked by asserting that games similar to bingo that utilize "a payout table or targeted retention ratio or return-to-player percentage" are "house banked and not eligible for a Class II determination."[88] This position marks a sharp divergence not only from case law, but also from the NIGC's own precedent.

In an earlier game classification opinion, the NIGC opined:

> "Another issue for consideration is whether the payment of a house fee or commission to the tribal operator makes the game a house-banked game. House-banked games are defined as Class III games by regulations of the NIGC. *See* 25 C.F.R. §§502.4(a) and 502.11. Under the definition set forth in the applicable regulation, to constitute a house-banked game, the house must be able to "win." In a house-banked game, the house, which is the banker, competes against all players, collecting from losers and paying winners.
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> "In electronic Wild Ball Bingo, the house is not a participant in the game. In contrast to a game such as blackjack, in which the house plays a hand and the success of the house depends on the success of the players, Wild Ball Bingo merely collects a fee. The fact that a tribal gaming operation collects a percentage of each payment, as in Wild Ball Bingo, does not make the house a player. Moreover, "the mere fact that the house nets a percentage of the players' fees for playing certainly cannot define a 'house-banking' game." *See U.S. v. 103 Electronic Gambling Devices*, 223 F. 3d at 1099."[89]

As such, the NIGC should avoid interpreting "house banked" as something other than the way in which it is defined by its own definitions, and certainly should avoid applying a definition that conflicts with case law. Both the Ninth and Tenth Circuit Courts of Appeal have held that the fact that the house retains a percentage of the amount wagered does not make a game house banked as that term is defined by the NIGC.[90] Any potential misunderstanding of the term's meaning within

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[87] 25 C.F.R. §502.11 (2004).
[88] "A version of an 'other game similar to bingo' operated with a payout table or targeted retention ratio or return-to-player percentage is house banked and not eligible for a Class II determination under these Standards." *Classification Standards* at §5(b).
[89] *Wild Ball Bingo.*
[90] *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1099 (9th Cir. 2000); *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 721 (10th Cir. 2000).

the definition of "other games similar to bingo" is alleviated by simply applying the term as currently defined by the NIGC. This approach also provides consistency with existing case law.

An alternate approach, however, would be to eliminate the requirement that a game similar to bingo cannot be house banked – an approach also with ample support. According to Congress, if a game is either bingo, pull tabs, lotto, punch boards, tip jars, instant bingo, or an other game similar to bingo, it is class II by definition.[91] Whether any of these seven categories of games are house banked is simply not relevant to their classification. By definition, they are class II.

As reflected in the legislative history, the term "house banking" was intended to have a more narrow application than now being asserted. IGRA provides that class II games do not include "any banking *card* games, including baccarat, chemin de fer or blackjack."[92] As the Senate Committee on Indian Affairs reported:

> "Section (4)(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as Class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games, and are subject to the class II regulatory provisions pursuant to section 11(a)(2). Subparagraphs (1) and (II) are to be read in conjunction with sections 11(a)(2) and (b)(l)(A) to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs."[93]

Thus, the "house banking" requirement was intended by Congress to distinguish between class II and class III *card* games, not the seven enumerated games it had already defined as class II. By extending this requirement to "games similar to bingo," the NIGC erroneously *limited* the congressional definition of class II games. As explained in the preamble to its 1992 rulemaking, the NIGC believed that an expansive application of the "house banking game concept" provided an easy way of implementing Congress' intent in defining class III gaming.[94] Hindsight now shows, however, that this "quick fix" not only conflicts with Congressional intent, but that requiring games similar to bingo to meet a house banking test also serves to impose an unintended limitation upon the scope of class II gaming.

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[91] 25 U.S.C. §2703(7)(A)(i) (2001).
[92] *Id*. §2703(7)(B) (emphasis added).
[93] S. Rep. No. 100-466, at 9 (1988).
[94] "Some commenters pointed to the fact that the IGRA mentions banking games only with respect to card games and there only as they related to nonbanking card games. The Commission, however, finds the distinction between house banking games and other games useful in defining class III games. In the view of the Commission, house banking games are a subset of casino games that Congress intended to include in class III. Because the house banking game concept provides a simple test for implementing congressional intent the Commission adopted it. Therefore, the Commission rejected the suggestion that the concept of banking apply only to card games." 57 Fed. Reg. 12,382, 12,385 (April 9,1992).

It is also worth noting that this portion of the preamble conflicts with the NIGC's reasoning in other portions thereof. As previously discussed, Congress had already provided that seven categories of enumerated games – including games similar to bingo – are class II games. The NIGC recognized elsewhere within the preamble that requiring these games to meet a house banking test would have been inconsistent with IGRA's statutory scheme. As the NIGC explained, "[t]he NIGC has determined that whether or not a game is a house banking game or a stakeholder game is not relevant to the classification of games that Congress expressly placed in class II: Bingo, lotto, pull-tabs, instant bingo, and tip jars."[95]

While the NIGC neglected to include "other games similar to bingo" in this listing, it bears to reason that because IGRA precludes the use of house banking for the other enumerated class II games, it also precludes its use for this one. As the NIGC noted, "the concept of house banking game is not relevant to games enumerated in the IGRA as class II games."[96] Because "games similar to bingo" are "games enumerated in the IGRA as class II," the "concept of house banking game is not relevant." Consequently, these sections of the current draft should be modified accordingly.

- *Arbitrary "Uniformity" Standards for Broadening Participation*

Contrary to the latest draft, not all technologic aids are required to broaden participation. As opposed to a required element, equipment that "broaden[s] participation levels in a common game" is instead an indicator that the equipment is a technologic aid; a position that was recently upheld by the Tenth Circuit Court of Appeals.[97] As such, proposed requirements such as those calling for a minimum of either six players in every game or a delay of two seconds between games are arbitrary distinctions that are not supported by law. Instead, the legal focus should be upon ensuring that a player cannot play alone against a machine, a standard that is satisfied simply by requiring the participation of two or more players. Timing and player population are marketing, not regulatory issues.

By definition, electronic equipment that satisfies the definition of an electromechanical facsimile is outside the definition of a technologic aid.[98] An electronic or electromechanical facsimile is defined by the NIGC as:

> "[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

[95] 57 Fed. Reg. 12,382, 12,388 (April 9, 1992).
[96] *Id*.
[97] 25 C.F.R. §502.7(b)(1); s*ee also* 67 Fed. Reg. 41,166, 41,170 (June 17, 2002); *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003) (internal cites omitted), *cert. denied*, March 1, 2004, ("In MegaMania, we held that the device at issue was a technologic aid in part because it broadened participation in the underlying game of bingo. We did not hold that broadening participation was a requirement, nor did we endorse any such categorical rule. Rather, like the subsequently published NIGC regulations, we identified the broadening of participation as a factor favoring a finding that a device is a Class II aid.").
[98] *Id*.

> electronic or electromechanical format broadens participation by allowing multiple players to play with or against each other rather than with or against a machine."[99]

This definition reflects the fact that the use of electronic aids to play bingo, lotto, and games similar to bingo does not, in and of itself, transform such games into facsimiles. Rather, as long as the aid requires players to compete against each other in a common game, such games can be played in an electronic format, even a *wholly* electronic format, without implicating the facsimile prohibition. Put another way, as long as "multiple players" (two or more) are playing with or against each other in a common bingo game, the game *is* bingo, and is *not* a facsimile of bingo. The fundamental characteristics of the game are preserved, unaltered by the game's electronic format.[100] This in large part accounts for the fact that electronic player stations are specifically identified by the NIGC as technologic aids.[101]

In contrast, under the definition quoted above, a device that allows a single player to play a bingo card alone against the device would be a facsimile of bingo. Given that IGRA's definition of bingo refers to the game being won by the "first player" to cover, this is a logical result. Because IGRA requires multiple players (at least two) to play with or against each other, a game with only one player could not be bingo under IGRA.

The NIGC explained further within the preamble to its 2002 rulemaking that the intent behind "broadening participation" is in fact to ensure that players "play with or against each other rather than with or against a machine."[102] "What IGRA does not allow with regard to bingo, lotto, and other games similar to bingo," they continued, "is a wholly electronic version of the game that . . . permits a player to play alone with or against a machine rather than with or against other players."[103]

Accordingly, the NIGC recently elaborated within an advisory opinion that a technologic aid is further distinguished from an electromechanical facsimile by an electronic format that "enhances the bingo-like characteristics of the game."[104] The NIGC went on to describe these "bingo-like characteristics" as the "interactive participation among players, not against the machine"[105] – an apparent reference to subsection (b) of the technologic aid definition, which specifies that a key indicator of whether a particular machine or device is a technologic aid is whether it "allows[s] a player to play a game with or against other players rather than with or against a machine."[106]

Unfortunately, this is yet another area in which the current draft seeks to impose far more stringent requirements upon class II gaming. For example, the current draft states that the "system" *must* "be

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[99] *Id*. §502.8.
[100] *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 725 (10th Cir. 2000).
[101] 25 C.F.R. §502.7(c) (2004).
[102] *Id*. §502.8.
[103] 67 Fed. Reg. 41,166, 41,171.
[104] *Mystery Bingo* at 14.
[105] *Id*.
[106] 25 C.F.R. §502.7(b)(3) (2004).

designed to broaden participation." While a wholly electronic bingo game must broaden participation in order to avoid falling within the prohibition against facsimiles, not all aids must do so (such as ones that are not wholly electronic). Extending this requirement to *all* technologic aids conflicts with the NIGC's existing regulations. Furthermore, the current draft goes on to specify the particular manner in which participation must be broadened. The draft specifies that a game must provide "reasonable and sufficient opportunity for at least six players to enter the game."[107] Where six players have not elected to play, the system must provide for a delay in game play.[108]

These provisions are alarming for at least two reasons, the first being that they ignore the fact that the broadening of participation can take many forms. As noted above, under the current definition regulations, participation is broadened if the game requires at least two players and never permits a player to play alone with or against the machine. In other words, participation is necessarily broadened if players are linked together in a common game through a central server. Further, there are other ways in which an electronic aid can broaden participation. The NIGC has stated that multiple ball releases broadens participation.[109] Such releases, they conclude, "requires players to play against each other rather than just against the machine."[110] A game's participation levels may be broadened by other factors too, such as allowing players at different buy-in levels to compete against each other. Focusing upon just one factor is imperfect at best.

Second, there is no support for an argument that a game of bingo must include more than two players. It cannot be said that two players is insufficient to "broaden participation," or that a game is any less bingo if only two players are participating. Requiring the participation of six players or a delay in game play, is arbitrary and without support. It is particularly misguided in that the NIGC has previously opined that the focus should be upon ensuring that a player cannot play alone against a machine – a standard that is satisfied by requiring the participation of just two players.

- *Misplaced Application of the Johnson Act*

The NIGC's 2002 rulemaking, supported by the decisions of three federal appeals courts, removed the Johnson Act from the classification of games under IGRA. As such, a game classification analysis should begin with determining whether the equipment is a technologic aid to a class II game, and if so, should end there. To then evaluate whether the equipment may also fall within the Johnson Act definition of a "gambling device" runs counter to judicial holdings. The NIGC should avoid any return to the notion that the Johnson Act should be included in a game classification analysis under IGRA.

Just as "electromechanical facsimiles" are specifically excluded from class II gaming, so too are "slot machines of any kind."[111] This exclusion has again become relevant as the NIGC now seeks to delineate a "fine line" between class II and class III gaming. Of concern to our members is that

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[107] *Id*.
[108] *Id*.
[109] *Mystery Bingo* at 14.
[110] *Id*.
[111] 25 U.S.C. §2703(7)(B)(ii) (2001).

in the process, an attempt will be made to reinsert the Johnson Act into a game classification analysis under IGRA – a consideration abandoned by the NIGC and upheld by the courts.

The Johnson Act, which predates IGRA by thirty years, prohibits the possession, use, sale, or transportation of "gambling devices" under a variety of circumstances.[112] In an effort to "anticipate the ingeniousness of gambling machine designers,"[113] its provisions are intentionally wide-ranging, and it has thus been held to cover a broad range of devices.[114] IGRA, on the other hand, was designed to create a regulatory scheme for gaming activities on Indian lands. Whereas the Johnson Act was intended to determine whether something *is* a "gambling device," IGRA was intended to establish the prerequisites to their operation.[115]

In an effort to clarify the distinction between technologic aids and electromechanical facsimiles, the NIGC first defined these terms in 1992.[116] "Electromechanical facsimile" was defined to mean "any gambling device as defined in 15 USC 1171(a)(2) or (3)," a reference to the federal Gambling Devices Act, more commonly known as the Johnson Act. Within the definition of class III gaming, "slot machine" was clarified to mean "[a]ny slot machines as defined in 15 USC 1171(a)(1). . .," again referencing the Johnson Act.[117] As a result, both an "electromechanical facsimile" and a "slot machine of any kind" fall within the Johnson Act's definition of a "gambling device."[118]

With time, however, linking the definition of "facsimile" with the Johnson Act proved to be unworkable.[119] As the NIGC observed, "[w]ithin the context of IGRA, there is no question as to 'gambling' per se – all Indian gaming is 'gambling.' Accordingly, determining whether the

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[112] 15 U.S.C. §1175(a) (1998).
[113] *Lion Manufacturing Corp. v. Kennedy*, 330 F.2d 833, 836-37 (D.C. Cir. 1964).
[114] *See, e.g., United States v. H.M. Branson Distrib. Co*., 398 F.2d 929, 933 (6th Cir. 1968) (pinball machines with knock-off meters that can accumulate free games); *United States v. Two (2) Quarter Fall Machines*, 767 F. Supp. 153, 154 (E.D. Tenn. 1991) (machines where the fall of coins could deliver hanging coins into a pay-off chute); *United States v. 11 Star-Pack Cigarette Merchandiser Machines*, 248 F. Supp. 933, 934 (E.D. Pa. 1966) (an attachment on a vending machine that could deliver a free pack of cigarettes); *United States v. Wilson*, 475 F.2d 108 (9th Cir. 1973) (a machine that sold store coupons and prize tickets in a prearranged order from a preprinted bundle even though the player could see the coupon or ticket he was buying).
[115] *See* 67 Fed. Reg. 41,166, 41,168 ("In other words, the ingenuity of gaming designers, which was designed to be constrained by the Johnson Act, is arguably intended to be given freer rein by IGRA in the context of class II gaming.").
[116] 57 Fed. Reg. 12,382 (April 9, 1992).
[117] 25 C.F.R. §502.4 (2004).
[118] 15 U.S.C. §1171(a) provides:
"(a) The term 'gambling device' means—
"(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
"(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
"(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part."
[119] 67 Fed. Reg. 41,166, 41,167-41,168.

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."[120]

Even more troublesome, including the Johnson Act in a game classification analysis under IGRA also produced nonsensical results. Bingo ball blowers, for example, fall within the Johnson Act definition of a "gambling device." Read together with the NIGC's definition of facsimile, a bingo ball blower was transformed into class III gaming – a result that Congress clearly did not intend. This inconsistency caused three United States Circuit Courts of Appeal to ignore these definitions, with one openly criticizing the NIGC's lack of guidance.[121]

As a result, in 2002, the NIGC specifically renounced linking the definition of facsimile to the Johnson Act.[122] The NIGC concluded that "[b]ecause of their inconsistent purposes, inclusion of the Johnson Act in a game classification analysis undermines the fundamental principles of IGRA."[123] Importantly, this same reasoning and conclusion applies equally to any analysis involving "slot machines of any kind." Any claim that a technologic aid to a class II game is transformed into class III gaming simply because it may also be a "slot machine," would similarly fail.

Recall that both "electromechanical facsimiles" and "slot machines of any kind" are excluded from class II gaming. Recall further that both terms were originally defined by referencing the Johnson Act's definition of "gambling device": "electromechanical facsimile," by referencing subsections (a)(2) and (3), and "slot machine," by referencing subsection (a)(1).[124] As such, both fall within the Johnson Act's definition of a "gambling device."[125]

The courts have held that Congress did not intend for the Johnson Act to prohibit the use of technologic aids,[126] and the Senate Report reflects as much.[127] Instead, a game classification

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[120] 67 Fed. Reg. 41,166, 41,170.

[121] *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994) (holding that the scope of gaming determination at issue in the case could be made by looking to the statute alone and without examining the Commission's regulatory definitions); *Sycuan Band of Mission Indian v. Hoache*, 54 F.3d 535, 542 (9th Cir. 1994) (resorting to the dictionary definition of facsimile as "an exact and detailed copy of something," rather than using the regulatory definition); *Diamond Game Enterprises v. Reno*, 230 F.3d 365, 369 (D.C. Cir. 2000) ("Boiled down to their essence, the regulations tell us little more than that a class II aid is something that is not a class III facsimile.")

[122] 67 Fed. Reg. at 41,168.

[123] 67 Fed. Reg. at 41,170 ("From the Commission's perspective, the Johnson Act has proven remarkably troublesome as a starting point in a game classification analysis under IGRA.").

[124] 25 C.F.R. §502.4 (2004).

[125] 15 U.S.C. §1171(a) (1988).

[126] "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." *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 715 (10th Cir. 2000). *See also United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1102 (9th Cir. 2000) (rejecting the notion that the Johnson Act extends to technologic aids to the play of bingo); *Diamond Game Enterprises v. Reno*, 230 F.3d 365 (noting that class II aids permitted by IGRA do not run afoul of the Johnson Act); *United States v. Burns*, 725 F.Supp. 116, 124 (N.D.N.Y. 1989) (indicating that IGRA makes the Johnson Act inapplicable to class II gaming and therefore tribes may use "gambling devices" in the context of bingo); *Seneca-Cayuga,* 327 F.3d at 1032 ("Absent clear evidence to the contrary, we will not ascribe to Congress the intent both to carefully craft through IGRA

analysis under IGRA should begin with determining whether the machine or device is a technologic aid to a class II game. If the answer is in the affirmative, the analysis is complete. There is no need to then evaluate whether the machine or device may also fall within the Johnson Act definition of a "gambling device."[128]

Because technologic aids to class II games are not prohibited by the Johnson Act, any claim that an aid is transformed into class III gaming simply because it may also be a "slot machine" would fail just this argument failed when referencing a "facsimile."[129] The NIGC should therefore avoid any return to the notion that the Johnson Act should be included in a game classification analysis under IGRA.

- *Games Similar to Bingo*

As detailed earlier, the NIGC now defines "other games similar to bingo" as:

> "Other games similar to bingo means any game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes."[130]

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."[131] 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

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this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA.").

[127] S. Rep. No. 100-446, at 12 (1988), "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."

[128] *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1035 (10th Cir. 2003).

[129] *Id*. at 1032 ("Accordingly, consistent with our holding in *MegaMania*, we hold that *if* a piece of equipment is a technologic aid to an IGRA Class II game, its use, sale, possession or transportation 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.")

[130] 25 C.F.R. §502.9 (2004).

[131] 57 Fed. Reg. 12,387 (April 9, 1992).

> 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." [132]
>
> "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."[133]

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." [134]

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 broader range of games than those satisfying the three specific requirements of bingo; an intention that was properly captured by the NIGC just two years ago. The NIGC should avoid reversing this position in its current rulemaking.

- *Lotto*

The current draft defines "lotto" as "a game of chance played (in the same manner as the game of chance commonly known as bingo) with cards bearing rows of numbers or other designations in which numbers or other designations are drawn or electronically determined from a finite pool of such numbers and each player covers the corresponding numbers or other designations if they

[132] 67 Fed. Reg. 41,166, 41,171 (June 17, 2002) *internal cites omitted*.
[133] *Id*.
[134] *Id*.

appear on a card held by the player, the winner being the player who first covers one complete row, column, or other pre-designated pattern or arrangement. The term is synonymous with 'bingo' and does not mean 'lottery' in general or the type of lottery operated by various states and denominated 'lotto' or some derivative thereof."[135] While lotto may be similar to bingo, it is not synonymous. If it were, there would have been no need for Congress to list it separately as a permitted class II game. NIGA therefore believes that this section of the Classification Standards should be changed accordingly.

- *Tangible Pull-Tab Requirement*

The game of pull-tabs is a lottery style game similar to bingo in that the fundamental nature of the game involves patterns or symbols that correspond to a winning symbol or combination of symbols. Yet because of the manner in which the game is played, many fail to recognize that the game, like bingo, constitutes a competition between players. In pull-tabs, players compete by drawing cards from a large deck. Each card, or "pull-tab," contains symbols or combinations of symbols that are revealed when the pull-tab is uncovered by the player. Winning combinations are pre-determined before the player purchases the card. A fixed number of pull-tabs in each deck, or "deal," contain winning symbols or combinations of symbols, which have been randomly distributed throughout the deck. Those players who draw cards bearing winning patterns or symbols win the corresponding prize. When all of the tickets in a deal are sold to players, the game ends.

The current draft requires the use of "tangible," or paper, pull-tabs when the game of pull-tabs is played with electronic equipment. Importantly, the NIGC bases this requirement on early cases that are now of significantly diminished precedential value. Requiring a tangible medium is not supported by either IGRA or recent court decisions, and should be removed from the regulation.

IGRA provides that the game of pull-tabs is class II gaming, provided that the game is played in the same location as bingo. Recent case law, as well as the NIGC's revised definition regulations, clarifies that the game may be played with electronic aids in the form of dispensers or readers and remain class II. Several early cases, however, examining particular facts, held that wholly electronic pull-tabs constitute facsimiles of the game, making it less clear whether the game remains class II where played in a wholly electronic format.

Although the NIGC identifies pull-tab dispensers and readers as permissible technologic aids, the new definitions stop short of specifically rejecting *Sycuan* and/or *Cabazon*. On the other hand, such a construction is possible were the NIGC to adopt a more reasonable view in light of the legislative history of IGRA, recent developments in case law, and its own current regulatory definitions (discussed below). Unfortunately, the draft regulations suggest a far more restrictive approach. The current draft states that "[i]n the game of pull-tabs, players compete against one another to obtain winning cards from a set of cards known as the "deal." Each deal contains a finite number of cards that includes a pre-determined number of winning cards. Each individual pull-tab within a deal is a paper card with hidden or covered symbols. When those symbols are revealed, there is a pattern indicating whether the player has won a prize. Winning cards are randomly spaced within the pre-

[135] *Classification Standards* at §2(i).

arranged deal. One deal consists of all of the pull-tabs in a given game that could be purchased."[136] The current draft also states that "[a]n electronic pull-tab is an electronic facsimile of a paper pull-tab that is displayed on a video screen."[137]

As in many cases addressing the game classification issue, the courts in the pull-tab cases struggled with the issue of how best to distinguish between an electronic aid and an electromechanical facsimile with little guidance from the 1992 NIGC regulatory definitions. Ultimately, the Ninth and D.C. Circuit Courts resorted to Webster's Dictionary for guidance on the issue, concluding that the machines at issue present the player with "electronic facsimiles" of the pull-tab game, readily conceding that it is extremely difficult to conceive what Congress meant by the term "facsimile."[138]

Since these cases were decided, however, the NIGC has revised its definition regulations based on a number of federal cases addressing the classification of games under IGRA, which have provided additional guidance as to the proper construction of the statute. Given further elaboration by the courts in this area of the law, and the subsequent rulemaking in 2002, there is a reasonable basis for concluding that the *Sycuan* and *Cabazon* cases are stale and of significantly diminished precedential value. Moreover, the game at issue in *Sycuan* involved stand alone machines in which the player was essentially playing against the machine as opposed to competing with or against other players.

In *Sycuan*, the court noted that the pull-tab machines present self-contained computer games copying the pull-tab principle in a wholly electronic format. It is not clear that the court would have come to the same conclusion had the game been played on linked machines using a common deck or deal. In fact, the court seemed most concern about the self-contained nature of the pull-tab game at issue:

> "The machine is not being used to facilitate "[s]imultaneous games participation between and among Reservations" or even among players on the same reservation. In any event, whatever the implications of the Senate Committee report, we are still left with the statute's plain term "electronic facsimile" (to say nothing of "slot machines of any kind") that is excluded from Class II gaming. That language compels our result.
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> "The Sycuan Band questions why Congress would permit as Class II gaming the traditional pull-tab game (with electronic aids to widen participation) and prohibit the same game *played entirely electronically in stand-alone machines*. We cannot and need not answer that question definitively; Congress has sufficiently dictated the result of this case in the statutory language it chose."[139]

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[136] *Classification Standards* at §2(f).
[137] *Id*. §2(g).
[138] *See*, *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1995); *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994), *cert. denied*, 512 U.S. 1221 (1994).
[139] *Sycuan*, 54 F.3d at 543 (*emphasis added*).

We read this language as leaving open the possibility that an electronic pull-tab device that is not self-contained and that truly facilitates simultaneous participation in a common game could be class II. The fact that the Ninth Circuit Court of Appeals subsequently held that MegaMania (which uses electronic bingo cards only) is class II supports this interpretation.

In *Cabazon*, the D.C. Circuit rejected an electronic pull-tab game that involved pods of five player terminals "linked to the same computer deal, thus allowing for five individuals to play simultaneously … ."[140] Despite agreeing that "the video version of pull-tabs is the same game as the paper version," the court broadly stated that "the video version of pull-tabs falls within the core meaning of electronic facsimile."[141] The court further explained that the "Act's exclusion of electronic facsimiles removes games from the class II category when those games are wholly incorporated into an electronic or electromechanical version."[142]

Cabazon could reasonably be read to mean that all devices that dispense electronic pull-tabs are class III facsimiles,[143] regardless of any other changes that might be made.[144] However, the option to have a pull-tab dispensed in electronic form does not necessarily make the device a class III facsimile. First, neither the IGRA nor the regulations require that pull-tabs only be played on paper cards. Certainly, there is no clear statement to that effect in the statute or regulations. Further, the legislative history explains that Congress intended that tribes have "maximum flexibility" to use "current technology" and "modern methods" to conduct class II gaming.[145] As our society and economy are increasingly digitized, it would be inconsistent with the legislative history quoted above to require that class II gaming be limited to paper.

Moreover, we believe that the *MegaMania* cases provide strong authority for the position that class II games need not use paper, since both courts (as well as the NIGC) determined the game to be class II, despite the fact that it uses electronic bingo cards displayed on a video screen. In fact, MegaMania does not even give players the option to use paper bingo cards. In reviewing the game, the courts seemed more concerned that the card look like a bingo card than with the medium on which it was presented. As stated by the Tenth Circuit Court of Appeals, MegaMania "is played with *an electronic card that looks like a regular paper bingo card* containing a grid of numbers

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[140] *Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 827 F. Supp. 26, 28 n.2 (D.D.C. 1993), *aff'd* 14 F.3d 633 (D.C. Cir. 1994).
[141] *Cabazon*, 14 F.3d at 636.
[142] *Id*.
[143] In fact, the D.C. Circuit's recent decision in *Diamond Game* supports this interpretation. Although not an issue before the court, the D.C. Circuit seems to suggest that pull-tabs must be paper in order to qualify as a class II game: "the Lucky Tab II is not a 'computerized version' of pull-tabs. Although the Lucky Tab II has a video screen, the screen merely displays the contents of a *paper* pull-tab." *Diamond Game Enterprises, Inc. v. Reno*, 230 F.3d 365, 370 (D.C. Cir. 2000) (*emphasis added*).
[144] In 1999, the NIGC issued a bulletin in which it sought to "provide tribes with guidance as to the general parameters of such [class II sub-]games." NIGC Bulletin No. 99-2 (Aug. 18, 1999). According to this guidance: "The pulltab version of instant bingo, also called 'break-open' bingo, has numbers or symbols that are concealed behind perforated window tabs. A participant removes *paper slips* acting as concealing flaps, thereby revealing numbers or symbols which can then be compared with the winning combinations printed on the reverse of card." *Id*. (*emphasis added*). Although the NIGC discusses paper pull-tabs, it does not state that *only* paper pull-tabs can be class II.
[145] S. Rep. No. 100-446, at 9 (1988).

…."[146] Since IGRA permits technologic aids to be used in connection with all class II games, there is no reason why paper should be required for some and not others, especially when no such separate treatment is suggested in the Act, the regulations, or IGRA's legislative history.

The flaw in the *Cabazon* court's analysis was its conclusion that playing a class II game in an electronic format makes the game a facsimile. A class II game is only transformed into a facsimile if the electronics are used to allow the player to play the game with or against the machine rather than with or against other players. For example, a facsimile of bingo is an electronic device that allows a player to play a bingo card alone against the machine. Similarly, a pull-tab facsimile is an electronic device that allows a player to play pull-tab cards alone against the machine. Applying this test, MegaMania is not a bingo facsimile because the electronics require that players play against each other in a common game and do not permit a player to play alone with or against the device. For the same reason, a system of linked devices that allows players to play against each other by purchasing pull-tabs from a common deal would not be a facsimile of pull-tabs – it would be pull-tabs.

II. COMMENTS SPECIFIC TO THE FIRST DRAFT OF THE TECHNICAL STANDARDS

Finally, NIGA is concerned with the first draft of the NIGC's technical standards. Not only are they excessive, but they also seem unsuitable for the class II gaming industry. While it is agreed that protecting the integrity of Indian gaming is an important goal, handcuffing it in the process serves no one's interest.

As an initial matter, NIGA believes that the NIGC should rethink this document in its entirety and limit its content to only those standards necessary to ensure the success of Indian gaming. It is baffling that the meetings thus far have focused on *legal* rather than technical standards, and NIGA feels strongly that the NIGC should meet with the advisory committee to discuss the Technical Standards before moving forward. As noted earlier, Indian country should be permitted the benefit of the technical expertise held by those tribal representatives serving on the committee. Finally, the Technical Standards should be issued as guidelines so that they may be tailored to the individual demands of diverse tribal communities and business environments. Some of the most troubling provisions are outlined below.

- *Section 2.1.4(8), Security for All Servers*. This section provides that "software packages that are not essential to the operation of the server must not be loaded onto the server." This provision would limit the ability of enhancing the functionality of servers by limiting software packages to those that are deemed "essential." For example, many programs, such as the Notepad and Wordpad applications of Microsoft Windows, are not necessarily *essential*, but are *useful* in enhancing the abilities and functions of the server. We oppose placing such limitations upon class II games.

- *Section 2.1.5(4), Server Application Requirements*. This section requires that the server store significant events either on the server or to a casino monitoring system. Paragraph

[146] *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 720 (10th Cir. 2000) (*emphasis added*).

4 of this section contains a list of events that are considered "significant," one of which is referred to as "Client Cash Clearance." This term should be clarified as it is unclear and ambiguous in this context.

- *Section 2.1.5(9), Server Application Requirements*. This section provides that the maximum number of machines enrolled at any one time can be no less than six (6). As discussed earlier, there is no support for requiring more than two (2) players within a common game, just as there is no support for an argument that two players is insufficient to "broaden participation." A game is no less bingo if only two players are participating. This requirement should therefore be removed from the current draft.

- *Section 2.2.2(3), Enable/Disable Requirements*. This is the first of many sections referencing "auditable" alarms. Auditable alarms are not utilized in the North American gaming market. Instead, a combination of light tower flashing and the reporting of events to a system are standard technology. As such, all sections referencing auditable alarms should be modified to reflect the technology utilized in North America.

- *Section 2.4.1(1)(a), Changes to Games and Sets of Games*. This section requires the bingo system to disable all client stations/bingo terminals attached to the system in order to change a set of games. Under the current draft, this disable feature would be required even for changes in a set of games on a single machine. Because this requirement could necessitate the interruption of bingo game play to numerous games, we believe that it is unreasonable. Instead, this requirement should apply only to the machines that are actually being changed.

- *Section 2.4.1(2), Changes to Games and Sets of Games*. This section reads as follows: "An automatic audit trail of all changes in the sets of games offered to players must be maintained. The audit trail must include the identity of the person making the changes, the time and date of the change, and the changes." This section would require the identity of the person making changes to the client stations/bingo terminals to be known. While it is possible for the bingo system to know the identity of the person making changes, this information is not supplied to the client stations/bingo terminal. This requirement should therefore be deleted.

- *Section 2.4.1(3)(a), Changes to Games and Sets of Games*. As written, this section assumes that pay tables are stored in the system, however, not all games are produced in this manner. The requirements contained within this provision are far too rigid for an evolving industry. Instead, the current draft should be flexible and allow for different types of products in the class II market.

- *Section 2.4.1(4), Changes to Games and Sets of Games*. This section requires that an "automatic audit trail of all changes to pay tables be maintained. The audit trail must include the identity of the person making the changes, the time and date of the change, and the changes. At a minimum this means logging of the following transaction types: addition of new pay tables; deletion of pay tables; swapping to an existing pay table."

This section incorrectly assumes that all changes are made within the bingo system. This is not necessarily the case. In many cases, this is a manual process and the information is not available at either the bingo system or the bingo terminal. This requirement should therefore be eliminated.

- *Section 2.4.2(2)(b), Adding and Removing Games*. This section allows for the removal or addition of games to the system, provided that at the time of removal or addition, there are no active players on any of the terminals linked to the system. Due to the advanced design in system products, system functionality may allow for the removal or addition of games with no impact to the system or bingo terminals when a game is removed. As such, this section should either be deleted or revised to authorize the removal or addition of games without interruption to all games on the system link.

- *Section 2.6(1), Communications Protocol Requirements*. This section is the first of many that require communications to be "encrypted." In particular, it provides that communications that traverse public areas must be encrypted and authenticated. Please note that encryption is not the standard used by gaming jurisdictions in the United States, and many forms of communication operate in a secure manner without the need for encryption. This section should be revised to read as follows: "Communications that traverse public areas (including wireless communications) must be secure."

- *Section 2.7, Failure/Recovery Scenarios*. This section contains requirements that must be met with regard to terminal, server, and power failure. Clarification should be provided as to whether dual UPS protection will be sufficient to satisfy this section, thus eliminating the potential for total power failures as identified under section 2.7(3).

- *Section 2.10(3), Downloadable Software/Games*. This section uses the term "trading day" as a delineation for a timeframe for game play. Given that this is not a term typically used in the gaming industry, its meaning should be clarified. In the alternative, the NIGC may want to consider using the term "business day" as that term is commonly used in various industries throughout the United States.

- *Section 2.10(6), Downloadable Software/Games*. This section requires that all meters be cleared after a successful download. This requirement seems to conflict with other requirements within the proposed technical standards, such as section 4.2.1.2. Furthermore, a master terminal meter set should remain intact at all times. In addition, this section improperly imposes a requirement that, since the introduction of multi-denomination games, is no longer applicable. As such, this section should be revised to allow the retention of these types of meters.

- *Section 2.10(9), Downloadable Software/Games*. Paragraph 9 of this section requires that previously loaded program versions remain within the terminal's memory in the event it might need to be reused at a later time. Since the terminal has the capability of downloading new programs, this requirement is not necessary. Additionally, storing a previous program version in the terminal's memory would only serve to add additional

costs both to the manufacturer and the operator. As such, this requirement should be deleted.

- *Section 3.3.2(11), Door Access Detection Devices*. This section is unclear and should be clarified.

- *Section 3.11, Electromechanical Meters*. This section sets the requirements for hard meters on the bingo terminals. Many jurisdictions throughout the United States have eliminated the requirement of mechanical meters as this technology is old and unreliable. Furthermore, more reliable technology, such as electronic meters, has been developed. All references to hard meters should be eliminated from the current draft.

- *Section 3.13.5, Printers*. This section requires that products be equipped with printers. Paragraph 2 of this section requires that a printer be able to simultaneously generate two identical copies of any printout with one copy to be ejected from the terminal and the other to be retained within the machine for audit purposes. Please note that the thermal printers that are commonly used in the gaming industry throughout the United States do not support two-ply printing. New printer technology would be necessary in order to facilitate this type of requirement. Furthermore, this requirement is unnecessary as an audit trail is created and maintained by the system; there is no need for the duplication of tickets.

- *Section 3.13.6, Audible Alarm*. As indicated under Section 2.2 above, there are several sections that contain requirements relating to "auditable" alarms. Auditable alarms are not utilized in the North American gaming market. Instead, a combination of light tower flashing and the reporting of events to a system are standard technology. As such, the sections referencing auditable alarms should be modified to reflect the technology currently utilized throughout the industry.

- *Section 4.1.3(1)b, c, d, e, Detection of Corrupted Memory*. These subsections require that the entire contents of critical memory be verified before or after a number of different transactions occur. While verifying an individual critical data element prior to its usage is acceptable, verification of all critical data prior to the usage of just one element is unnecessary. This sub-section should be modified to require verification of only the individual critical data element being accessed prior to usage.

- *Section 4.2.1, Meters To Be Supported*. The term "Progressive Occurrence Count" should be clarified. No such meter is used in the North American gaming market, and therefore it is unclear as to what is intended with regard to this type of meter.

- *Section 4.2.5, Self Audit Error Checking*. This section contains requirements on self-audit checks that would be required of all class II products. This type of requirement is overly burdensome and will hinder technological advancements in the class II market. As such, this section should be deleted.

- *Section 4.5.1.4(a), Coin Acceptance Conditions*. The section as worded requires the software to ensure that the coins are directed to the "hopper or the cash box when the hopper is full." Diverting coins to the hopper in this state would only exacerbate the problem of a full hopper. As such, this section should be reworded to state that coins must be diverted to "the cash box when the hopper is full."

- *Section 4.5.2.2(b and d), Bill Acceptance*. These sub-sections appear to contain the same types of requirements as those contained in 4.5.1.4 above relating to coin acceptors. As such, these subsections should also be revised to state that bills must be diverted to the cash box when the hopper is full.

- *Section 4.5.4(6), Voucher (Ticket) In*. This section requires that the voucher system notify the bingo terminal of the reason for a rejection of a voucher. This section should be reworded as follows: "If the voucher is invalid, the voucher system will notify the class II player terminal that the voucher is invalid."

- *Section 4.5.5.1(1), Cashless In/Out*. Please refer to the comments for Section 2.6 (1) above relating to communication protocol and encryption requirements. As indicated, encryption is not the standard used by gaming jurisdictions in the United States, and many forms of communication operate in a secure manner without the need for encryption. This language should be revised to more generally provide for secure methods with regard to the communication of information.

- *Section 4.6.2.2(2), Cancel Credit*. This section states that an option must be provided to allow a patron to exit a Cancel Credit state. Typically, the process of handling a Cancel Credit pay requires several steps and, for security and accounting purposes, operators generally do not prefer to allow a patron to cancel the process once it is initiated. This section should be reworded to state: "An option to exit the Cancel Credit state *may* be provided." This will allow flexibility from an operational standpoint.

- *Section 4.6.3.6, Hopper Pay*. This section requires the bingo terminal to support a hopper fill pay. This type of technology is unreliable and only forces the operator to perform tedious and unnecessary labor. This section should be removed.

- *Section 4.6.4.1(2)a, Ticket Voucher Printing, General*. Refer to the comments above for Section 3.13.5 regarding the requirement that ticket printers dispense two identical copies of each ticket printed.

- *Section 4.6.6, Residual Credit Removal*. This section prohibits Residual Credit Removal, which is defined in the regulation as "a means of conducting a gaming transaction to convert the fractional amount to either the coin value or nothing." It is unclear as to why the NIGC would want to prohibit this type of functionality. As such, clarification should be provided.

- *Section 4.7.3(1), Game Screen Meters*. This section states that certain meters "must be simultaneously displayed in credits and in dollars and cents in a format which is clearly visible to the player and easily distinguished." There is no reasonable basis for this requirement. In fact, it would be impossible to meet both criteria contained in this section, and furthermore, simultaneous dual displays of the same information might be confusing to the patron in that the patron may believe they are owed both amounts. This section should be reworded to state: "Meters concerning player entitlements (including Credit, Bet and Win meters) displayed on the game-screen must be displayed in a format which is clearly visible to the player and easily distinguished."

- *Section 4.7.6.1, Idle Mode Display*. This section requires that certain prior game information be available until the next game play. In bingo, the player is allowed to change their card before play commences. Once the card has been changed, it is critical that all prior game information is cleared from the game display to avoid disputes. As such, this wording should be changed to state "view until the next play or until a player's card is changed."

- *Section 4.7.6.1, Display Requirements with Non-zero Credit Meter*. Paragraph 4 of this subsection states that the total number of credits that would be wagered on the next play should be displayed. It is unclear as to how this information would be available prior to the play of a game.

- *Section 4.7.6.2, Display Requirements Following Hopper Collect*. This section specifically defines how hopper payout information should be displayed. These requirements are tedious and cumbersome and fail to provide any value to the operator or the player. Instead, this section should contain a general note as to what information should be displayed. This will allow operators and manufacturers the flexibility to display information in a fashion that is most compatible with their game operation.

- *Section 4.7.6.3, Display Requirements Following Cancel Credit*. The requirements contained within this section are burdensome and provide no value to the operator or the player. As such this section should be eliminated and replaced with a general note as to what information needs to be displayed. This will allow manufacturers the flexibility to display information in a fashion that is most compatible with their game operation.

- *Section 4.14, Multiple Games*. This section indicates that the possibility of multiple games per one device has not yet been addressed. This section should authorize multi-games as there is nothing specific to the game of bingo that would prohibit them.

- *Section 4.15.2.2(1), Progressive Jackpots, Communication With Progressive System*. Both the meaning and intent of this section is unclear. As such, it should be clarified.

- *Section 4.15.2.3, Progressive Jackpots, Modification of Progressive Jackpot Parameters*. Both the meaning and intent of this section is unclear. Please clarify.

- *Section 4.16.2(2)b, Actions Upon Events*. Please see the comments for Section 2.2.2 above as these apply to this section, as well.

- *Section 4.16.3(3), Actions on Clearance of a Fault Event*. Please see the comments for Section 2.2.2 above as these apply to this section, as well.

- *Section 4.16.4, Faults to be Treated As Events*. The sub-section for printer paper low requires the game to lock up to avoid running out of paper. Bingo Terminals currently being operated are able to continue play after paper has run out. This practice has no negative impact and should be permitted to continue. As such, this section should be modified accordingly.

- *Section 4.16.6.2(4), Bill Acceptor Faults*. Please see the comments for Section 2.2.2 above as these apply to this section, as well.

- *Section 4.16.7, Non-Fault Class II Player Device Events*. This section seems to imply that stand alone progressive awards are allowed. The intent and purpose of this section is unclear as it appears to conflict with language in previous sections. As such, the meaning of this section should be clarified.

- *Section 4.16.8(3), Notification of Faults*. This sub-section requires that class II electronically-aided games become "user friendly" in situations requiring human interaction. Please note that game manufacturers should provide operation manuals that would provide guidance and assistance for training purpose and it is believed that such manuals are sufficient in instances requiring human interaction.

- *Section 6.6, Encryption and Hashing*. Please see the comments for Section 2.6(1) above as these apply to this section, as well.

- *Section 7.1, Artwork, General*. Paragraph 20 of this section provides that "artwork graphics shall not be in any manner or form indecent or offensive." While the purpose behind this rule is understandable, such regulations are subjective in nature and it is unclear as to what types of standards will be applied. As such, this rule should be removed from the technical standards.

- *Section 7.2(9)a, Artwork, Bingo*. Please see the comments for Section 4.7.6.1 above.

- *Section 9.1.2(2)a, Systems to be Interfaced*. While we appreciate that SAS 6.01 is pointed out as a suitable protocol for class II gaming, one should note that SAS is not encrypted. We point this out in furtherance of our other points set forth above which indicate how unnecessary encryption is for class II gaming.

- *Section 9.3.5(1)c, Fault Conditions*. Please see the comments for Section 2.2.2 above.

- *Section 9.5.3(2), Mathematics*. It is unclear as to what a mathematical treatise incorporates. While the provision of par sheets for a test lab to review is acceptable, most will be unwilling to divulge the exact details as to how bingo patterns are developed. This information is confidential, and considered to be a trade secret. As such, this requirement should be deleted from the current draft.

Thank you for your consideration of our views on this important matter. Please contact me at (202) 546-7711 if you have any questions or need additional information.

Sincerely,

Ernest Stevens, Jr.,
Chairman

CC: Hon. John McCain, Senate Committee on Indian Affairs
Hon. Byron Dorgan, Senate Committee on Indian Affairs
Hon. Richard Pombo, Chairman, House Resources Committee
Hon. Nick Rahall, Ranking Member, House Resources Committee