



SUSANVILLE INDIAN RANCHERIA

October 27, 2004

Philip Hogen, Chairman
National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, DC 2005

Dear Chairman Hogen:

On behalf of the Susanville Indian Rancheria, I submit the following comments on the third draft of the proposed class II gaming classification standards.

First, the Susanville Indian Rancheria is greatly disturbed by the lack of meaningful consultation employed by the National Indian Gaming Commission ("NIGC" or "Commission") in carrying out this rulemaking process. Little, if any, of the comments made by the advisory committee's tribal representatives have been incorporated into the draft regulation. Additionally, comments from tribes not participating on the advisory committee have yet to be shared with the tribal representatives on the advisory committee. The Commission's recently established Consultation Policy requires the Commission to conduct meaningful and direct consultation with individual tribes and their recognized leaders when formulating and implementing new or existing regulatory policies. Accordingly, we urge the NIGC to correct the deficiencies listed above and to directly consult with individual tribe around the country.

Secondly, many provisions within the NIGC's rulemaking slow the play of class II games and make them less lucrative, in direct contravention to case law and the Indian Gaming Regulatory Act's (IGRA") stated purpose of promoting tribal economic development and self-sufficiency. This is simply unacceptable.

Third, the current rulemaking redefines class II gaming in such a way that reclassifies a number of games that the federal courts, tribal gaming commissions, and the NIGC have previously determined to be class II. Instead of addressing the integrity issues common to technical standards, the rulemaking instead focuses on the legal aspects of class II gaming. Some of the more troubling provisions include the following:

- Prizes. IGRA specifies only that a game of bingo must be played for prizes. The NIGC is now seeking to restrict both the amount and types of prizes that can be offered. Features such as these are marketing decisions beyond the scope of IGRA.
- Bingo cards. While IGRA requires that bingo be played with cards, the NIGC is now attempting to regulate all facets of a bingo card including both its size and number of squares.

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- Timing of card selection. 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. Such restrictions lack support from either IGRA or the courts, and stand in direct conflict with long-established games such as Bonanza Bingo.
- Auto-daub is acceptable. IGRA expressly authorizes the use of technological aids in the play of class II games. Further, the courts have held that the manner in which a player covers their cards(s) is irrelevant. The NIGC's attempt to prohibit this advancement in technology is without legal support.
- Bingo ball draw. NIGC arguments that balls must be released to players "in close proximity" to the time at which they were generated, also lacks support under IGRA. Games such as Bonanza Bingo with so-called "pre-drawn balls" predate IGRA and were not intended to be eliminated by its enactment.
- Multiple ball releases. While the NIGC has previously argued that a game of bingo cannot be won after only one release of balls, they are now seeking to extend this requirement to the interim portions of a game of bingo. Doing so, however, violates the holdings of the *MegaMania* cases.
- Different interim patterns are permissible within a common game. Nothing prohibits players who are competing for the same gaming-winning pattern from competing for different interim patterns. As the courts have held, the proper focus of a game classification analysis is whether the game "as a whole" meets the three statutory requirements of bingo – not one of its constituent parts. To do otherwise is to add a limitation upon the game not envisioned by Congress.
- House banking. Unlike traditional house banked games such as blackjack, in 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 against the game's players. As such, the NIGC should avoid placing arbitrary restrictions upon the game of bingo.
- Broadening participation. Contrary to the latest draft, technologic aids are not uniformly required to broaden participation. As such, requirements such as those calling for a minimum of either six players in every game or a delay of two seconds between games should not be placed upon the game of bingo. Instead, the 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.

- Tangible pull-tabs are not required. The NIGC seeks to require “tangible” or Paper pull-tabs when the game of pull-tabs is played with electronic equipment. Again, this presumption is not supported by either IGRA or the courts.
- The Johnson Act lacks relevance in a game classification analysis under IGRA. The NIGC’s 2002 rulemaking 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 technological 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.

Fourth, the draft rule fails to resolve the basic problems associated with the NIGC’s present game classification process. For example, there is not procedure for appeal outside the enforcement context, creating a situation in which a tribe may be faced with an enforcement action against it, based on a non-final, non-binding, non-appealable NIGC opinion. 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.

Finally, the draft rule compounds this problem 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. The draft rule therefore strips the tribe of its sovereign powers, affirmed by IGRA, a result that the tribe vehemently opposes.

For the aforementioned reasons, the Susanville Indian Rancheria opposes the third draft of the proposed class II gaming classification standards.

Sincerely,



Stacy Dixon
Tribal Chairman

Cc: Susanville Indian Rancheria Tribal Business Council
Susanville Indian Rancheria Gaming Commission

