

8 But to stay on schedule, we are going to  
9 wrap this one up. Again, thank you to the panel.  
10 We ask the Attorney Panel to assemble. We hope  
11 to conclude that so we can then go to lunch and  
12 be back with the following panel at 1:55. So,  
13 take a couple of minutes to change panelists and  
14 then we'll resume.

15 Thank you.

16 (Recess.)

17 CHAIRMAN HOGEN: Throughout the long  
18 exercise of meeting with the Tribal Advisory  
19 Committee and certainly there have been and will  
20 be criticisms of how some of that was conducted,  
21 one of the concerns expressed was there are a lot  
22 of legal issues here. You're not letting the

1 lawyers participate to the extent that they ought  
2 to and to attempt to address that, we have  
3 invited several of the attorneys who have been  
4 extremely active and informed, I think, in this  
5 area.

6 We have Michael Anderson from the  
7 Monteau and Peebles firm, Liz Homer from the  
8 Homer Law Office, Liz being a former member of  
9 the Commission, of course, and Joe Webster from  
10 the Hobbs, Straus, Dean and Walker firm, and Judy  
11 Shapiro of Shapiro Law Office.

12 So, with that said, we'll call on Mr.  
13 Anderson to make a presentation.

14 Panel 3 - Attorneys

15 MR. ANDERSON: Thank you, Mr. Chairman,  
16 and members of the audience, both tribal  
17 representatives and state representatives.

18 I'm Michael Anderson of the Washington,  
19 D.C., office of Monteau and Peebles, and our  
20 testimony today reflects testimony prior  
21 submitted to the Commission from the Gun Lake

1 Chunsanian Indians, and the Mechuptia Indians of  
2 the Chico Rancheria.

3 My statement today will summarize some  
4 of that prior testimony and also make a couple of  
5 new requests.

6 Our prior testimony discussed the  
7 restricted nature of the new Commission  
8 regulations as proposed and our view that it  
9 conflicts with a number of decisions from the  
10 circuit courts, both in the 8th, 10th and 9th  
11 Circuits.

12 I will not go into the details of those  
13 statements, those are in our record, but I did

14 want to focus on the economic impact issue.  
15 We believe there is a strong need for  
16 more analysis on the economic impact of these  
17 regulations, particularly with respect to  
18 transition time. You've heard from our other  
19 witnesses today that there is going to be a lot  
20 of time needed to convey all of the games that  
21 are currently not applicable or not compliant  
22 with the new regulations and to change the floor

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1 and go to manufacturers to either change the  
2 hardware technology and the floor make-up of  
3 those new games. That is going to require a lot  
4 of time, both in negotiating contracts and  
5 finding out things like do royalties still get  
6 paid if the games are no longer compliant with

7 regulations by the Commission, and also just the  
8 demand on manufacturers to provide these games.

9       So, there is going to be a lot of cost  
10 to the transition time that's going to be needed  
11 for these regulations if they are passed. That's  
12 aside from what we think are the substantive  
13 fundamental flaws in the legal analysis and  
14 support for these regulations.

15       There's also going to be an overall  
16 impact on reduced income from tribes, and you've  
17 heard it today, both from individual tribes  
18 talking about devastating impacts to their  
19 facilities and also just the national impact.  
20 There is going to be less entertainment value of  
21 these new games. There is going to be slower  
22 time for play. All of these are going to be very

1 relevant to what the final regulation should say  
2 and also how they're analyzed by the public.

3       There are consultation standards by the  
4 Commission and it's a good policy, if it's  
5 followed. You've handed out today the policy  
6 developed with some tribal input, but what that  
7 notes in the tribal consultation procedures and  
8 guidelines is that the Commission will promptly  
9 notify the affected tribes and initiate steps to  
10 consult and collaborate directly with tribes  
11 regarding the proposed regulation.

12       I would argue that that has not happened  
13 completely in this instance, particularly in  
14 terms of collaboration on these economic impacts.

15       There has been some case law in other  
16 jurisdictions and dealing with other agencies on  
17 the importance of consultation and the standards.

18 The recent case of Yankton Sioux Tribe v.  
19 Kemthorne dealing with this agency, the  
20 Department of Interior, on July 14th, 2006, is

21 very instructive.

22 The judge was not very kind to the

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1 department in that analysis. He said that the  
2 defendants, the DOI in that case, did not notify  
3 the tribes that their structuring could result in  
4 the loss of funding to Indian schools. The  
5 plaintiffs there demonstrated they are likely to  
6 succeed on their claim that the BIA failed to  
7 inform the tribes of the impact of the proposed  
8 federal action in violation of the BIA's  
9 government-to-government consultation policy.

10 In the end, the judge found that fair  
11 notice of agency intentions requires telling the  
12 truth and keeping promises. The school, the BIA

13 must include a candid discussion of what funds  
14 will be used to pay for the reorganization.  
15 Here, very high standards of what the agency  
16 should say to the regulated public, and in this  
17 case, most importantly, Indian tribes.

18 Chairman, you and I had a discussion  
19 during our consultation with Gun Lake about these  
20 issues of economic impact, and I wanted just to  
21 read a couple of the exchanges that you were  
22 generous enough to partake in in terms of our

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1 dialogue.

2 The question was about how many machines  
3 currently meet the current definitions that are  
4 proposed in terms of the bingo screen and the  
5 display. You said that, "We've seen in the



6 process of writing advisory opinions over the  
7 years quite a large number of different models  
8 and approaches. Not all of those, of course, do  
9 what is currently configured to accommodate half  
10 the screen to be the bingo card or half the  
11 display area, although there are others that do."  
12 So, I think it's an answer to the question.  
13 "Are there any out there?" "Yes, I  
14 think there are some." Some but no answer as to  
15 how many. "Are we looking at 10, 15, 20,000  
16 machines that are compliant now or not?" It's  
17 the kind of information that would be helpful to  
18 analyze these regulations. Are we talking about  
19 a small percentage of games that don't currently  
20 meet these proposed regulations or, as many have  
21 said, almost all the games?" Huge difference  
22 between the opinions of the regulated agency and

1 the tribes.

2       We talked a little bit about transition  
3 time. "What would be needed in terms of time to  
4 change these machines to come up with figures  
5 like the 49 percent display?" There was not any  
6 answer given in terms of what that would be. The  
7 answer given from you, Mr. Chairman, was, "Have  
8 we made inquiry into this area? Yes. Have we  
9 completed that exercise? No. What we want to  
10 know not only in this process but as we know, as  
11 you know, reach out elsewhere, try to get our  
12 arms around this and gather more information,  
13 and, you know, if we can find that it just can't  
14 be done or that it can't be done economically, in  
15 an economically viable fashion, we need to  
16 rethink it. We haven't seen the analysis that  
17 was promised there that there would be some type  
18 of getting the arms around this issue about what  
19 the economic impact would be."

20 Finally, and this information is all in  
21 the transcript of our meeting, you noted, "Well,  
22 what we have -- looked seriously at the impact,

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1 particularly with respect to the timing of the  
2 play, how many games you can play in a day and so  
3 forth. We aren't finished with that exercise.  
4 We'll continue that and yes, we can contract  
5 folks. We do have a contract with BMM, which is  
6 a gaming lab, but that isn't exactly their main  
7 area of activity, but they have data that would  
8 be useful in connection. We would welcome, you  
9 know, anyone else's input.

10 In terms of what kind of an economic  
11 impact analysis have we done, should we do, the

12 concern that I have expressed before and still  
13 have is I'm not sure it's useful to study  
14 something that might currently be unlawful; that  
15 is, if devices are being played purportedly as  
16 Class II but in reality under almost any test  
17 wouldn't fall under the Class II area, should it  
18 make a difference that enforcement of the law  
19 would, you know, curtail and make that less  
20 profitable?"

21 Finally, "We don't want to put something  
22 on paper that just devastates, ruins the Class II

1 industry. We don't think we're headed in that  
2 direction, but certainly it could have an impact.  
3 So, a number of areas, games, impact, all alluded  
4 to by the Commission as something that's very

5 important, that's something that we would need  
6 further information on, but to date, no  
7 information is available for the tribes."

8       So, as I conclude my time, a couple  
9 requests here. It's not unusual for agencies to  
10 do analysis or entities other than agencies. The  
11 tribes do economic analysis in their NEPA  
12 documents. Very common.

13       When Congress wants a bill, they have  
14 the CBO do an economic impact analysis for them.  
15 So, what we are requesting today is that there be  
16 an extension of the September 30th deadline, that  
17 there be a supplemental comment period on the  
18 economic analysis impact issue, that there be  
19 some type of process to agree on what the  
20 methodology is for that economic impact analysis.

21       For example, how many games are we  
22 looking at in Class II that would be affected?

1 How much reduced player time is at issue here?  
2 Eight seconds, 10 seconds, more? There could be  
3 a range of scenarios from no impact that the  
4 Commission might believe is at issue here or  
5 hundreds of millions or billions in terms of what  
6 the tribe believes, but at least there would be  
7 an agreed-upon set of parameters that we could  
8 look at together, consistent with your statements  
9 that we would collaborate together.

10 Likewise, on the overall economic impact  
11 analysis, there needs to be some bridging of this  
12 huge gap between the tribal expectations of what  
13 this rule would do and what the NIGC would do.

14 So again, we would ask that there be an  
15 opening of this comment period and then once that  
16 information, if the Commission agrees, is  
17 submitted and reviewed by the community, tribal  
18 regulated community and others, that there be a

19 comment period on that as well. So that is our  
20 request and our plea for you today, Mr. Chairman.

21 Thank you.

22 CHAIRMAN HOGEN: Thank you. Ms. Homer?

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1 MS. HOMER: Thank you, Chairman Hogen,  
2 and Vice Chairman Choney.

3 I want to express my appreciation for  
4 the invitation to speak here today. I know that  
5 I've been hounding you around the country on this  
6 issue and I really appreciate the opportunity to  
7 do so again here today, and on par with my usual  
8 concern about this, I think that you all know  
9 that this did occupy a very large part of my  
10 tenure on the NIGC, this issue of Class II

11 gaming, and as you know, in 2002, the NIGC, the  
12 Commission, a majority of the Commission,  
13 replaced three key regulatory definitions that  
14 had been originally adopted by the NIGC in 1992  
15 because these definitions and because the courts  
16 had expressed a very strong disapproval of the  
17 NIGC's definition which was a very distressing  
18 thing, particularly since the Indian Gaming  
19 Regulatory Act is centered on, it's based upon  
20 the classification of games.

21       So, to have the federal courts say to us  
22 not only did you, NIGC, get it wrong in your

1 interpretation of the laws substantively, but we  
2 find your regulations absolutely and completely  
3 unhelpful because they don't do anything more



4 than tell us that a Class II gaming device is  
5 something different than a -- it can't be a Class  
6 III gaming device.

7 The courts were very harsh in their  
8 criticism. They refused to give the NIGC the  
9 deference to which most federal agencies are  
10 entitled under the Chevron standard and it was  
11 distressing as the heads of this agency faced in  
12 making these distinctions to have received such a  
13 vote of lack of confidence by the federal courts.

14 You know, we had been encouraged, much  
15 as you are, you have been, by the Justice  
16 Department to kind of stay the course, you know,  
17 a duck is a duck, you know, if it quacks, it's a  
18 duck, and if it has spinning reels and it looks  
19 like a slot machine and acts like a slot machine,  
20 by golly, it must be a slot machine, and urged  
21 the Commission to basically disregard what the  
22 courts were saying with respect to what was

1 permissible within the scope of electronically-  
2 aided Class II gaming.

3 I don't see these things to be funny.

4 We took this responsibility very seriously and we  
5 weren't trying to be heroes and make everybody  
6 happy, I think, as some have criticized that  
7 Commission, but instead to take very seriously  
8 our legal responsibilities as the head of the  
9 agency to ensure that our interpretation of the  
10 law was proper, was correct, was consonant with  
11 the case law as was handed down by the federal  
12 courts, and to eliminate these so-called lack of  
13 distinction between Class II and Class III gaming  
14 which we viewed basically after hours and hours  
15 and months of deliberation as simply a  
16 misunderstanding as to what is the, as the court  
17 asked in Mega Mania, the essence of IGRA.

18           What is the essence of IGRA, and what  
19 went wrong? Well, what went wrong was the  
20 entanglement between the Johnson Act, which deals  
21 with gaming devices, and IGRA, which deals with  
22 games, and I think that that was the first

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1 epiphany that we had in terms of trying to flesh  
2 out regulatory definitions that created true  
3 elements, true legal elements that could be  
4 applied at all times to all forms of equipment in  
5 a way that will get us a relatively reliable  
6 result by applying these standards.

7           We feel, at least I feel and at the time  
8 felt that the definitions that we came up with  
9 respect to electromechanical facsimile, for

10 example, electronic aids make that distinction.

11 Now, I know that we've had discussions  
12 and you do not necessarily agree with that, but I  
13 nonetheless feel that it was sound and I believe  
14 that both the 8th and 10th Circuit Courts of  
15 Appeals have had opportunity to take a look at  
16 those regulatory definitions and did so with  
17 favor, and I think that that is a legally-  
18 significant fact, and I think that while we're  
19 not wanting to be critical of what the NIGC is  
20 doing, the NIGC has a special role to play.

21 IGRA was created at a special time in  
22 history when the federal policy was becoming much

1 more favorable. NIGC was created and staffed  
2 with people that are tribal members. There's a

3 reason for that. There's a reason why the NIGC  
4 was created as an independent federal regulatory  
5 agency, so that it wouldn't be subject to the  
6 political whims and pressures that might be  
7 brought to bear by other governmental entities,  
8 such as state governments, by other agencies  
9 within the Executive Branch.

10 The NIGC has the freedom and the power  
11 and the authority and the obligation, I would  
12 assert, to do the right thing for the tribes, to  
13 interpret the law in a way that ensures Indian  
14 Country is able to take full advantage of the  
15 benefits of IGRA as intended by the Congress, and  
16 I will close with that statement.

17 Thank you.

18 CHAIRMAN HOGEN: Thank you. Mr.  
19 Webster?

20 MR. WEBSTER: Good afternoon, Mr.  
21 Chairman, Commissioner.

22 My name is Joe Webster. I'm a Partner

1 with the firm of Hobbs, Straus, Dean and Walker  
2 here in D.C.

3 I've been involved with the Class II  
4 issue since the early 1990s on behalf of a number  
5 of clients, including the Seminole Tribe of  
6 Florida and a variety of tribes in Oklahoma.  
7 I've also been extensively involved in the  
8 advisory opinion process for Class II games.

9 More recently, I've been involved, along  
10 with the other members of this panel, in actively  
11 tracking and commenting on the NIGC's Class II  
12 rulemaking process.

13 When Congress passed the IGRA in 1988,  
14 it affirmed, consistent with the Supreme Court's  
15 decision in Cabazon, the right, and it is, it's  
16 a right, of tribes to offer a broad range of

17 bingo and bingo-type games if such games were  
18 otherwise generally permitted under state law.  
19 It also expressly authorized tribes to play such  
20 games using technologic aids and it was clear  
21 that tribes should have "maximum flexibility" to  
22 use modern technology to offer Class II games.

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1 Now, of course, in the years since the  
2 IGRA was passed in 1988, there have been  
3 significant advances in the types of technology  
4 available to play Class II games. These  
5 advancements can be found in both Indian and non-  
6 Indian gaming facilities and bingo halls.

7 For example, as many of you know, the  
8 State of Alabama permits thousands of advanced

9 high-speed electronic bingo games to be offered  
10 at a racetrack within the state. Those are  
11 clearly bingo games, you know, one-touch games,  
12 totally different than a slot machine, but those  
13 are permitted under state law.

14 Even more traditional bingo minders have  
15 advanced dramatically in recent years with many  
16 offering numerous features to the player,  
17 including full auto-daub and electronic accounts.  
18 So, the advancements in technology for bingo are  
19 certainly not limited to Indian facilities.

20 Despite these advances in technology,  
21 the NIGC has proposed regulations that would  
22 dramatically restrict the range of Class II games



2 these restrictions as necessary to draw a bright  
3 line between Class II technologic aids and Class  
4 III electronic facsimiles.

5 However, in our view, Congress and the  
6 courts already have drawn a clear line and the  
7 additional restrictions proposed by the  
8 Commission must certainly only muddy that  
9 line.

10 Simply put, any game that meets the  
11 three IGRA classification requirements for bingo  
12 can be played with electronic aids as a Class II  
13 game as long as the electronics are "readily  
14 distinguishable from the use of electronic  
15 facsimiles in which a single participant plays a  
16 game with or against a machine rather than with  
17 or against other players." That's quoting from  
18 the Senate report that accompanied the IGRA.

19 Said another way, facsimile was  
20 shorthand use by Congress to refer to games where  
21 players play against the machine rather than  
22 against other players. Now, this makes sense

1 since all of the list of Class II games, bingo,  
2 pull tabs, instant bingo, lotto, et. cetera,  
3 require competition between players.

4 Now, the courts have agreed with this  
5 distinction. For example, in the Mega Mania  
6 case, the 10th Circuit expressly stated that "the  
7 aid is distinguishable from a facsimile where a  
8 single participant plays with or against a  
9 machine rather than with or against other  
10 players." So, it's a very clear standard.

11 Now, not only have the courts and  
12 Congress identified that standard to distinguish  
13 between the two, the NIGC's current definition  
14 regulations which Ms. Homer referred to reflect  
15 this clear line.

16           The current definition found at 502.8  
17 says that a Class II game can be played in an  
18 electronic format as long as "the electronic or  
19 electromechanical format broadens participation  
20 by allowing multiple players to play with or  
21 against each other, rather than with or against  
22 the machine."

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1           So, there is no confusion. The NIGC's  
2 current definition is clear. It's consistent  
3 with the legislative history of the IGRA, and  
4 it's consistent with the case law. There simply  
5 is no basis for the NIGC to change the existing  
6 definition which provides both clarity and game  
7 design flexibility, especially since, as I said,

8 it is supported by both case law and the language  
9 of the IGRA.

10 In sum, the IGRA and the Commission's  
11 existing regulations provide adequate guidance on  
12 game classification. There is no need for the  
13 Commission to change the definition of facsimile  
14 or add an entirely new Part 546 to impose onerous  
15 new classification requirements.

16 The result of this proposal would be to  
17 limit Class II gaming to a very narrow range of  
18 games that would have very little, if any,  
19 commercial viability. Further, the proposed  
20 technical standards, while well intentioned,  
21 would make Class II games extraordinarily  
22 expensive to produce and maintain.

1           Rather than move forward with  
2 classification regulations that are fundamentally  
3 flawed, we urge the Commission to withdraw those  
4 proposals and instead focus on developing  
5 reasonable Class II technical standards. The  
6 current proposal contains many good elements, but  
7 there are also many provisions that are overly-  
8 restrictive or simply unnecessary.

9           We are advised that the technical  
10 standards alone are likely to prevent the  
11 development of commercially-viable Class II  
12 games. With this in mind, we hope that the  
13 Commission will make a new effort to reach out to  
14 tribes and vendors to develop reasonable  
15 technical standards to protect game integrity and  
16 promote compatibility between game systems.

17           After the technical standards are  
18 completed, the Commission could then take a fresh  
19 look in cooperation with the tribes at whether or  
20 not there is in fact any need to provide  
21 additional guidance on classification issues.

1 opportunity to testify here today.

2 CHAIRMAN HOGEN: Thank you. Ms.

3 Shapiro?

4 MS. SHAPIRO: Good afternoon, Chairman

5 Hogen and Commissioner Choney.

6 Thank you for the opportunity to assist

7 the Commission to understand the distinction

8 between Class II and Class III games.

9 I have spent many years assisting tribes

10 to incorporate new technologic aids in Class II

11 gaming, and you are surely aware that I have been

12 closely following the Commission's development of

13 classification standards.

14 The vigorous dispute among the tribes,

15 the NIGC and the Justice Department concerns  
16 whether a Class II technologic aid can be fast,  
17 fun and lucrative, and whether such speed,  
18 entertainment and profit blur the line between  
19 Class II and Class III. I suppose I should add  
20 the states to this dispute now, too. These  
21 questions are not central to game classification,  
22 only to economic viability.

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1 The Commission's proposed rule adds  
2 several arbitrary delays to bingo play.  
3 Apparently the Commission believes that a Class  
4 II game must be played slowly or at least slower  
5 than technology might otherwise permit, but  
6 nothing in the statute compels that result. The

7 statute is silent on time requirements. The

8 courts have not been.

9 In *Seneca Cayuga v. NIGC*, the 10th

10 Circuit found that an electronic player terminal

11 did not alter the classification of the

12 underlying pull tab game. Rejecting the DOJ

13 argument as based on superficial similarities

14 between the slot machine and the pull tab

15 dispenser, the court stated pull tabs, even when

16 sped up, placed under lights and depicted with a

17 spinning machine on the side, is still pull tabs.

18 The same reasoning applies to bingo.

19 Speed of play does not transform bingo into a

20 facsimile. Neither does a game's entertainment

21 value. NIGC advisory opinions consistently find

22 that an entertaining display on a terminal does



1 not transform bingo or pull tabs into a Class III  
2 game, but speed and entertainment value taken  
3 together are central to economic viability.

4 DOJ argues that Congress did not intend  
5 to permit lucrative forms of gaming without  
6 compacts, but tribes have been forced to develop  
7 innovative Class II environments to compensate  
8 for their failed power to compel good faith  
9 compacting.

10 Even though Congress may not have  
11 expected Class II gaming to be so lucrative,  
12 neither did it expect it to be worthless. The  
13 dictionary definition of lucrative is profitable.  
14 IGRA's intent to facilitate economic self-  
15 determination would be frustrated were Class II  
16 gaming to be wholly unprofitable.

17 As proposed, the regulations would not  
18 give necessary effect to the statute. Requiring  
19 arbitrary time delays and multiple releases,  
20 restricting card size display and range of

21 numbers, and demanding two-inch labels cannot  
22 replace the distinction already created by law.

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1 I'm very much aware that the Commission  
2 believes that its own 2002 definitions were  
3 mistaken and that it thinks new standards are  
4 needed to define the line between Class II and  
5 Class III gaming. With all due respect, I  
6 believe that the Commission's good faith efforts  
7 contain a fundamental flaw.

8 The Commission is not charged with  
9 redefining the game of bingo. The Commission's  
10 authority to regulate Class II gaming is granted  
11 by statute, the same one that confirms the  
12 tribes' right to conduct Class II gaming,  
13 including technologic aids. That same statute

14 defines bingo with three criteria determined by  
15 the 9th Circuit to be the sole criteria for the  
16 came. The Commission's job is to implement that  
17 statutory definition, not replace it.

18 I understand that the IGRA is not the  
19 most effectively-crafted legislation. Tribes  
20 have had to deal with its shortcomings. Congress  
21 didn't take the time to define technological aid  
22 or facsimile, but the Commission has some

1 resources to draw on. As other speakers have  
2 pointed out, the report states the intent that  
3 tribes have maximum flexibility in the use of  
4 technology. It further explains that aids were  
5 readily distinguishable from an electronic

6 facsimile, and I'll say it again, in which one  
7 player plays a game with or against a machine  
8 rather than with or against other players.

9 Over the past 18 years, readily  
10 distinguishable has been a battleground. The  
11 first Commission had a simple rule. Don't plug  
12 it in. Too simple. Somehow bingo ball blowers  
13 were permitted and the statute itself permits  
14 numbers to be electronically determined.

15 The cases have clearly evolved to accept  
16 play of bingo in electronic medium. Over the  
17 Justice Department's strident objections, federal  
18 appellate courts have found no problem with the  
19 use of an electronic bingo card nor the  
20 electronic daubing of that card.

21 For a bingo game, the primary question  
22 remains whether the three statutory criteria are

1 satisfied and whether more than one player's  
2 competing for the bingo prize, not just a single  
3 player against a self-contained game.

4 Chairman Hogen, I remember clearly in  
5 the Spring of 2003 when Seneca-Cayuga came down,  
6 you spoke to the Oklahoma Indian Gaming  
7 Association. You expressed satisfaction that the  
8 court had deferred to the NIGC's definition of  
9 technologic aids, the same decision you now  
10 propose to set aside.

11 The court approved the Commission  
12 reading that would be more likely to expand the  
13 pool of tribal revenue through greater variety  
14 and offerings. That court held that the Indian  
15 Canon of Construction compelled the Commission to  
16 resolve any ambiguities in a remedial statute to  
17 the benefit of the tribes.

18 At that meeting, you pointed out that  
19 the court had charged the Commission with seeking

20 whenever possible to safeguard and enhance the  
21 profitability of tribal gaming. That's what the  
22 Commission should be doing now.

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1 The regulations as currently proposed  
2 would unnecessarily delay play, limit design  
3 options and generally undercut the opportunity  
4 Congress intended when it authorized Class II  
5 technologic aids. The NIGC should not  
6 unnecessarily limit the tribes' right to use the  
7 same technology available to the rest of the  
8 country.

9 Thank you.

10 CHAIRMAN HOGEN: Thank you.

11 We've all discussed this before with me  
12 doing most of the talking, maybe not enough

13 listening, but one of the things that's got stuck  
14 in my head in connection with this is what came  
15 out of some of the Mega Mania cases, that the  
16 observation that the play of the game was really  
17 outside the machine, the machines were just aids  
18 to play, and that there was player participation  
19 and that was permitted in this format that Mega  
20 Mania permitted or utilized.

21       It seems to me that when you go back to  
22 fundamental characteristics of the game, players

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1 participating, that is, the success of the game  
2 being dependent on the players participation, and  
3 if you don't participate right, that is, if you  
4 don't cover your number, you can lose.

5 Is there any significance to that? Am I  
6 missing the boat when I think that you need to  
7 build in some time in these games to permit some  
8 real qualitative participation by the players?

9 MS. HOMER: I think personally, Mr.  
10 Chairman, I think that players are participating  
11 when they operate the equipment in the first  
12 place. I think that player participation  
13 involves the player engaging in the game.

14 I can understand why you may feel that  
15 you need an element beyond that, so that it  
16 satisfies your concern that there is a form of  
17 participation, you know, more significant than,  
18 you know, putting the coin in the machine and  
19 pushing a button, but I'm not really sure the  
20 player participation really needs to be any more  
21 than that.

22 I don't know why it has to be any more



1 than that because you have people that are  
2 consciously, volitionally, wilfully going to  
3 these facilities to engage in these games, in the  
4 play of these games. I think that that is  
5 sufficient.

6 MR. WEBSTER: Mr. Chairman, I guess the  
7 way that I often look at it is you're going back  
8 to the language that the statute has. We're  
9 talking about technologic aids and so the  
10 question is, is the technology aiding the player,  
11 and the technology can aid the player by  
12 performing all sorts of functions, as long as it  
13 doesn't cross the line into being a facsimile by  
14 allowing that one player to play alone against  
15 the machine rather than involving other players.

16 So, auto-daub which I know has been an  
17 issue that we've talked about a lot, to me, what  
18 is auto-daub? It's the device aiding the player

19 by covering the numbers for him as they're drawn  
20 by the ball drawer or by the random number  
21 generator. You know, that's clearly aiding the  
22 player and that's okay, as long as you don't have

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1 a self-contained game which isn't linked to  
2 participating against the common ball draw with  
3 other players where the player -- you know, where  
4 his results are solely based upon that individual  
5 unit and so that that's acceptable.

6 I guess, just to contrast it, you know,  
7 there's been talk about what is a bingo  
8 facsimile? To me, a bingo facsimile would be a  
9 self-contained unit where there's a bingo card  
10 and a ball draw and the player's results are  
11 based solely upon what happens on that ball draw

12 on his card and I know that there used to be  
13 games out there, and I think in some not Indian  
14 markets, there still are bingo games that have  
15 that look but they are not linked together. So,  
16 in my view, those would be facsimiles. That's  
17 what Congress was talking about, although perhaps  
18 not in the most helpful language or the clearest  
19 language.

20 MS. SHAPIRO: And I have to agree.

21 We've been practicing together too long, but to  
22 say that the game is not in the machine is that

1 it's not in the box alone. It's not a player  
2 playing only against the machine, and in all of  
3 these games, there was a link network. There are

4 other players playing the game. The game is  
5 something more than the sum of player and box.  
6 It's not solipsistic play. It cannot be because  
7 there always has to be another player. There  
8 always is a network, and in that context,  
9 broadening participation may not mean the number  
10 of times that a player pushes a button.

11       Broadening participation may mean  
12 reaching a critical mass of players across  
13 geography limits. It may be able to do it in  
14 times when there otherwise aren't enough people  
15 in the room. It may even mean that you can have  
16 one player in one room of a facility and another  
17 player in another room that would not otherwise  
18 be possible.

19       It enables games to be played more  
20 readily with more people who might not otherwise  
21 get in games and that is broadening  
22 participation, so long again as they're not

1 playing only against the machine and that is what  
2 Congress said you couldn't have and that's  
3 sufficient.

4 CHAIRMAN HOGEN: I think you make valid  
5 points, and I think that if IGRA only said you  
6 can play bingo with electronic aids, then you  
7 could have the machine do it all; that is, all  
8 you'd have to do, as Liz said, is just show up,  
9 put your money in, but they add to that  
10 qualification but not a facsimile of an  
11 electronic facsimile of a game of chance and so  
12 that's a concern that I have, not to say that I  
13 could never buy the scenario you folks have been  
14 presenting, but it remains a concern, and any  
15 additional, you know, logic, reason, whatever  
16 that you could present us with as we try to deal  
17 with that would be useful.

18 MS. SHAPIRO: I read one of the  
19 transcripts of one of the consultations in which  
20 you said that some of the commissioners believed  
21 that it was okay to play a facsimile as Class II,  
22 and I don't think any of us are saying that.

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1 We all know the statute says you may not  
2 play a facsimile. I think the difference among  
3 all of us is what is a facsimile? Some of us  
4 believe that a facsimile is a game which might  
5 look like bingo or might look like pull tabs but  
6 lacks the element of player competition and  
7 therefore is a facsimile only and that's where we  
8 think the line is drawn.

9 CHAIRMAN HOGEN: Well, I think as I read  
10 this definition that we're thinking about

11 changing, it says something to the effect it  
12 can't be a facsimile of the game of chance,  
13 except for bingo, and then you can do it that  
14 way. Now, maybe I will need to reread that, but  
15 I think that's --

16 MS. HOMER: I would really like to  
17 address that because, I mean, that was one of the  
18 issues that, you know, we spent a great deal of  
19 time tweaking and playing with, and I would  
20 commend your attention because I know that we  
21 don't have the time this afternoon, but to the  
22 preamble, because we discussed at length why we

1 had taken that approach.

2 It was not that we were saying that you

3 could play bingo as a facsimile. We're saying  
4 that there is a difference between a bingo aid  
5 and a pull tab aid, and we had to craft a  
6 distinction because our goal, and I don't know if  
7 we've ever actually had this talk, but our goal  
8 was to capture the state of the case law as it  
9 was as of that date, and there was outstanding  
10 case law with respect to the pull tab equipment  
11 that said you must have a tangible medium.

12       We chose not to touch that case law one  
13 way or the other. We didn't adopt it and say  
14 yes, we didn't reject it either. We felt that in  
15 the future, any kind of future case law or future  
16 opinions by the NIGC could address those kinds of  
17 issues.

18       I mean, so there are a couple of little  
19 oddities perhaps in the way that the language was  
20 framed, but it was clearly designed to capture  
21 the law as it existed at that day without going  
22 one step further or one step back and that's what



1 we tried to do.

2       But I think that it's very clear in the  
3 way that we crafted the definitions that our  
4 purpose was basically to alter the analytical  
5 framework, so that you're not starting with the  
6 question of whether you've got a facsimile, but  
7 you start with the question of whether you have  
8 an electronic aid, and you start the analysis by  
9 saying what is the game we're playing here?

10       Is that game being aided by this  
11 technology or have you crossed that line over and  
12 become a prohibited facsimile that requires a  
13 compact?

14       I think that the regulatory definitions  
15 are very clear that you can't have a facsimile,  
16 and I don't think there's any doubt in anybody's

17 mind, certainly it wasn't in our mind at the  
18 time, that you cannot have a facsimile as a Class  
19 II game, and I would again commend you to read  
20 the preamble because we do discuss what we were  
21 trying to do with the legal analysis by using the  
22 language that we did, and let me just close by

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1 saying that the way Joe stated it is exactly what  
2 we intended.

3       You know, if you're playing bingo on a  
4 stand-alone gambling device, you know, and it's  
5 not linked, you're not playing the game with  
6 other players, that would be a facsimile and  
7 that's actually how we started doing the  
8 analysis. What is the true distinction between a  
9 facsimile and an aid? What is the true

10 distinction between Class II and Class III?  
11 Class II are games that are played between  
12 players. That's the bottom line difference and  
13 that's what we tried to craft into those  
14 definitions.

15 CHAIRMAN HOGEN: Okay. Thank you. I  
16 know I'm eating into the public comment time, but  
17 let me just make one further comment before we  
18 turn it over to the public here.

19 Ms. Homer, you mentioned the duty of the  
20 Commission and how we are supposed to be looking  
21 out for Indians and looking out for tribes, and  
22 my concern has always been that if we come to a

2 one can't distinguish what's being played as  
3 Class II from Class III, that somebody, whether  
4 it's the states, whether it's Congress or the  
5 Justice Department, is going to come along and  
6 say, hey, there's supposed to be a distinction  
7 here. Who's supposed to be looking after this?  
8 The person or the group that's supposed to be  
9 looking after it is the National Indian Gaming  
10 Commission, and we abdicate our responsibility if  
11 we permit a drift in that direction where there  
12 can't be a distinction, and if we let that day  
13 come, I have grave concerns for the future of the  
14 industry.

15       Having said that, we would ask if there  
16 are any questions or comments that would like to  
17 be put to the panel.

18       MR. PENNEY: Yes. Good afternoon,  
19 Chairman Hogen, Vice Chairman.

20       My name is Sam Penney. I'm Vice  
21 Chairman of the Nez Perce Tribal Executive  
22 Committee. I've reviewed a lot of the documents

1 and in your opening comments, Mr. Chairman, you  
2 said that the Department of Justice wouldn't be  
3 participating in this forum, and we have a panel  
4 of attorneys that represent tribes in this issue,  
5 and I've always had a concern over the years, I  
6 served about 10 years as chair of our tribe,  
7 that, you know, when we have consultations or  
8 public forums or something that's recorded, that  
9 in my view, there's always a potential that these  
10 hearings can actually in some ways be used  
11 against us because I believe the Department of  
12 Justice -- there should have been someone here to  
13 explain their views or their stance on issues  
14 because we have tribal attorneys doing just that,  
15 and I'm just concerned that once this is all

16 done, hearing's over with, that I'm certain  
17 Department of Justice is going to have access to  
18 all these public comments that are being made  
19 here this morning.

20 To me, that's a big disadvantage to the  
21 tribes that are trying to protect their  
22 interests, and I commend the attorneys for

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1 sharing their views with us and that would be my  
2 question, how they view the Department of Justice  
3 not being here to state their views?

4 Thank you.

5 CHAIRMAN HOGEN: Any of the panel want  
6 to comment on that?

7 MR. WEBSTER: Well, I'll just say  
8 briefly, I think it is telling and it's something

9 that we're concerned about. I think it's  
10 important to keep in mind that the Justice  
11 Department opposed the passage of the IGRA in  
12 1988. They have not been friendly to Indian  
13 gaming from the beginning.

14 So, you know, they clearly opposed the  
15 Commission's original regulatory proposal as  
16 being too kind to the tribes and the Commission  
17 has tried to address the Justice Department's  
18 concerns. You know, frankly, we don't know  
19 whether Justice would even be satisfied with the  
20 proposal as drafted today which puts tribes in a  
21 very, very difficult position.

22 MR. ANDERSON: I guess I'd respond and

1 ask the Chairman, is there a way to develop a  
2 collaborative process as your regulations  
3 enunciate with the Department of Justice as this  
4 moves forward?

5 If there are new views that have not  
6 been explained in your preamble or surfaced in  
7 this hearing from the Department of Justice, is  
8 there something that the tribes can be privy to?

9 CHAIRMAN HOGEN: Well, the Department of  
10 Justice obviously isn't here and I certainly  
11 appreciate Mr. Penney's comment, very well put,  
12 and concern. There are lawyers that gave us that  
13 legal advice and we don't tell them what to do.

14 But they haven't been totally silent on  
15 this issue by any means. They've sent a proposal  
16 to Capitol Hill that said let's carve out of the  
17 prohibition against gambling devices in Indian  
18 Country a place for those computers and  
19 electronic and technologic aids for Class II and  
20 let's direct the National Indian Gaming  
21 Commission to draft regulations. So, I think,  
22 you know, that's in and of itself a statement of



1 their position.

2       As mentioned earlier, they did consult  
3 with respect to their original proposal. They  
4 learned a lot. They changed it as a result of  
5 that, and I think part of the reason they changed  
6 it were things that we presented to them, NIGC,  
7 but in terms of as we go down the road, how does  
8 the federal family fit together and participate  
9 in that, certainly something to consider, but the  
10 fact that we have an attorney-client relationship  
11 with them and we do have coordinating roles in  
12 terms of we're regulators, they're federal  
13 prosecutors, they have federal gaming statutes  
14 that they are mandated to enforce, present some

15 issues that will have to be addressed.

16 Further questions?

17 MR. STRAUS: Mr. Chairman, I'd like to  
18 address this question to you.

19 It's true, as you point out, that the  
20 Justice Department would be your attorneys if  
21 this got to court, but they also have their own  
22 regulatory functions and they don't always do

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1 what you want, witness the Santee Sioux case  
2 where they proceeded independently to prosecute,  
3 really prosecute the Santee -- it wasn't a  
4 criminal proceeding but it might as well have  
5 been -- the Santee Sioux Tribe, even though the  
6 tribe was acting on the specific advice of the  
7 chair of the NIGC.

8           So, I'd like to ask you the direct  
9 question. Has the Department of Justice signed  
10 off on the latest draft of the regulations?

11           CHAIRMAN HOGEN: No, they have not.  
12 That is, they haven't said we approve all of this  
13 and they haven't said we disapprove all of this.  
14 They did, you know, express a concern when we  
15 were ready to go to the Federal Register a year  
16 ago this spring about the approach that we took.  
17 After that, this whole business about an  
18 amendment to the Johnson Act came about and I  
19 view that favorably, but I don't know, you know,  
20 when push comes to shove, you know, what they  
21 will say in this connection.

22           MR. STRAUS: So, even if these

1 regulations are final and somehow the tribes  
2 learn to live with them, tribes would still not  
3 be assured at this point that they did not face  
4 proceedings by the NIGC to close them down -- by  
5 the Department of Justice to close them down at  
6 this point?

7 CHAIRMAN HOGEN: I think they'll be on  
8 much better ground than the Santee Sioux were  
9 just having the advice of the chief of staff of  
10 the National Indian Gaming Commission in that  
11 they would have some very fully vetted adopted  
12 regulations.

13 MR. STRAUS: But on the Johnson Act  
14 issue itself, which is a crucial one, these  
15 regulations don't cure that concern, don't take  
16 care of that. So that's still an open issue.

17 CHAIRMAN HOGEN: I think that remains an  
18 open issue, yes.

19 MR. STRAUS: Thank you.

20 MR. YANITY: Shawn Yanity, Stillaguamish  
21 Tribe. We believe in the reclassification issue

22 surrounding Class II gaming is a serious

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1 political concern. There are states within the  
2 union that have not entered into Class III  
3 compact negotiations with the tribes within its  
4 boundaries for whatever reason.

5 As we understand it, this becomes an  
6 issue because Seminole Tribe v. Florida does not  
7 necessarily guarantee good faith or sovereign  
8 immunity in Class III compact negotiations, an  
9 11th Amendment issue.

10 In the State of Washington, Class II  
11 gaming is the only leverage the tribe holds  
12 against the state government increasingly  
13 interested in revenue sharing.

14 With the addition of several tribal  
15 casinos in the next two years, there will not be  
16 enough license to ensure the economic viability  
17 of these tribal enterprises. Those facilities  
18 will have to pursue the Class II alternative to  
19 fund their tribal programs.

20 Tribal governments are the largest  
21 employer in many of the areas that would be  
22 affected by these changes. The NIGC's proposed

1 rule will result in the loss of jobs at Class II  
2 facilities. This means that tens of thousands of  
3 American jobs will be lost to areas of the  
4 country that can least afford it.

5 The Stillaguamish Tribe employs the  
6 majority of its membership in tribal enterprises

7 other than its casino. We do, however, employ  
8 Natives from 20 tribes other than the  
9 Stillaguamish. With the loss of these machines  
10 in regard to revenue generation, we will have to  
11 eliminate jobs within our facility.

12 The unemployment will have a cascading  
13 effect on those tribes whose members we employ,  
14 some of which do not have facilities of their own  
15 to employ their membership.

16 Thank you.

17 CHAIRMAN HOGEN: Thank you. Tracy  
18 Burris?

19 MR. BURRIS: Mr. Chairman, thank you  
20 very much, and I'll try to be quick, but as I  
21 always said to you and I said this in these  
22 deals, the more I listen to you and every time we

1 come back, I realize you keep learning something  
2 in the process and that's a good thing because  
3 your question to them awhile ago, when you were  
4 talking about that fundamental characteristics,  
5 you know I'm an old bingo man, and, you know, we  
6 talk about the point of sales.

7       You go in, you make a choice whether  
8 you're going to do it or not. Then you get to  
9 the machine, you choose what level you want to  
10 play in. They choose that when they buy in.  
11 They get to choose their cards. Before, we  
12 didn't give them that choice because we  
13 controlled the game in the regular bingo card,  
14 because what changes that some is when you change  
15 the cards when they choose.

16       Now you have to put enough out there and  
17 calculate the math. The daub to play, not  
18 opposed to that. It's a question of how soon and  
19 how far in between. We know that exists.  
20 Patterns. Patterns help choose the levels they



21 play. The truth of it is, they can choose a game  
22 by the patterns by which they can win on. Some

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1 would say that correlates to symbols. Fair  
2 enough. It is.  
3 The old bingo, they daub again. You  
4 sleep it, that's just a fiduciary rule that we've  
5 always made to speed the process up. So, it's  
6 all there, but the essence of what you're saying  
7 is, the question is if you take the old bingo  
8 king catalog and you flip through it and you look  
9 at the patterns, the bingo cards, the choices of  
10 patterns, the colors, all the things, the  
11 decisions that managers make to make a game exist  
12 and you look at the equipment.

13           There is not a disparity in between that  
14 if someone takes the time to look, but flash  
15 through it quickly instead of one page at a time  
16 and see what the effect is and that would help, I  
17 think, in this process because you can read it  
18 one page at a time or you can flash through it  
19 because time is moving fairly quickly and that  
20 seems to be a key issue here, is time.

21           So, as we all have learned this, I was  
22 not in Oklahoma, I was not one of the first

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1 tribes to put the machines in. I was a year and  
2 a half behind everyone else because it took me  
3 that long to decide it was the right thing for my  
4 tribe to do, and I constantly and consistently  
5 have been looking at this process.

6           The Commission originally brought up the  
7 game classification process and really talked  
8 about it in '97. We started the process in '98,  
9 got held up and now it's reiterated under this  
10 new term that you're on here.

11           So, I commend you for that. As a  
12 regulator, I think it's important, and I'll leave  
13 it at that, and I got two more deals.

14           From the last panel, the difference  
15 between a slot machine and bingo is tremendously  
16 different. If we all had slot machines,  
17 compacted for them, it would be a real simple  
18 issue. We wouldn't be having this conversation.  
19 A slot machine is a slot machine. It's a  
20 mechanical reel. We all, if we studied that, and  
21 I've went to great links to learn this, to study  
22 that, what a slot machine is and what we're doing

1 here. By God, give me the slot machine because  
2 it's a heck of a lot easier. I could end my  
3 days, do everything I do 10 times easier.  
4 Operationalwise, I wouldn't have half the staff I  
5 needed to do this. There's a lot of things I  
6 could do easier if I had those.

7       Unfortunately, I don't. So, we work  
8 with what we have and we use that technology to  
9 help us move that, and the other is on those  
10 people, which should be said, states have a stake  
11 in it now more than ever after 20 years of  
12 whether or not they -- what makes it equal is  
13 whether it's non-revenue or revenue compact. So,  
14 those are important issues that drives even the  
15 policymakers for the states, too.

16       So, thank you very much.

17       CHAIRMAN HOGEN: Thank you. Okay. We  
18 have less than -- okay. One more comment or  
19 question before we go to lunch.

20 MR. REID: Thank you very much. You  
21 know, I didn't get to speak last time on the  
22 other panel here, but I was noting and some of

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1 the other ones were, too, the intent of, say, not  
2 a hammer and that was by Congress making that in  
3 that report.

4 I'll just make a statement here.

5 Congress, history and interest, concern for  
6 Indian people, have always been a trust  
7 relationship between Congress and tribes to  
8 always see to self-sufficiency, economic  
9 development and stronger governments, as the  
10 report that accompanied the IGRA reveals on the  
11 concerns that modern technology maximizes player

12 participation of tribal economic development.

13 I think that was left in there because  
14 of the fact that they knew that there were states  
15 that weren't going to allow participation of  
16 gaming in the Class III and that Class II was  
17 something that tribes could use.

18 I'm not a mindreader, but I'm sure that  
19 Congress has always had the interest of the  
20 Indian tribes in developing their stronger  
21 government and self-sufficiency. So, I'd just  
22 like to say that I don't think that they did

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1 leave that for purpose.

2 Thank you very much.

3 CHAIRMAN HOGEN: Thank you. Certainly

4 Class II is extremely significant and for a lot

5 of reasons, and we can never lose sight of that.

6 Okay. Thank you very much, panel. We  
7 appreciate your view. We might send you some  
8 questions, which we would hope you might respond  
9 to to help us in this process.

10 We will adjourn until 1:55. You can go  
11 through security and go down to the cafeteria or  
12 the snack bars and hopefully we'll all be back  
13 here in time to start the Manufacturers Panel.

14 Thank you. We're in adjournment.

15 (Whereupon, at 1:05 p.m., the public  
16 hearing was recessed, to reconvene at 1:55 p.m.)

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20 AFTERNOON SESSION

21 (2:00 p.m.)

22 CHAIRMAN HOGEN: Good afternoon and