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**Remarks to Western Governor's Association
Executive Summit on Indian Gaming
March 30, 2005 - Denver, Colorado**

Good Morning. Thank you, Governor Owens and Governor Rounds, for your hospitality and your leadership in having this important meeting. And to the distinguished leaders here today, including Attorney General Larry Long, who is one of my bosses, and distinguished leaders of tribal governments, including my good friend and accomplished Chairman of the Agua Caliente Band Richard Milanovich, and other leaders among Indian people, including John EchoHawk here today.

My remarks today are my own but mostly reflect the views expressed by the Western Attorneys General, in correspondence to the Congress & the NIGC.

Let me, without delay, set forth a view that the NIGC has taken the wrong path in this field and will not easily be able to extract itself. In 2002, the NIGC dropped the workable and supportable regulations defining the elements of IGRA and substituted a pandora's box.

Here's where the NIGC went wrong - and badly wrong - in the 2002 re-writing of the definitional regulations, a 2 to 1 decision, with chair Monte Deer dissenting.

- the NIGC wrote the Johnson Act out of IGRA - the Johnson Act is part of the U.S. criminal code prohibiting the use and possession of gambling devices on federal lands and Indian country - and was incorporated by Congress in IGRA
- it required "electronic and electromechanical facsimiles" to replicate all the characteristics of a game - not most, not some. Thus, an electronic gambling device that has pulled from it one small element - or has a manual, tangible or delay component - will by regulation convert to a "technologic aid."
- it dropped its test that technologic aids must be "readily distinguishable" from the use of electronic facsimiles.

- it substituted “broadening participation” – playing with or against other players – as the lodestar for allowing devices in class II gaming - something that is not helpful, given that most all class II games are non-house-banked and played among or between players anyway.

The consequences to the States of the actions of the NIGC - in the 2002 regulations re-write, in advisory opinions, in the new technical and classification standards proposals - is profound.

By de-coupling the Johnson Act from IGRA, NIGC now allows as class II games electronic devices that operate similarly to slot machines, clearly replicate the games electronically (simply not all the elements of the game, but clearly most of the elements), may be played at much greater speed, are not “readily distinguishable” from an “electronic or electromechanical facsimile of a game of chance” (a test the NIGC dropped),. These are devices that should be Class III games, subject to a tribal-state compact.

The increased use of devices like this in Class II gaming (I do not call them “Class II devices,” a confusing and blurring title - either they are aids or facsimiles) is and will become the means for gaming manufacturers and tribes to avoid compacting with States, avoid the negotiations with Governors and state agencies, avoid joint tribal-state regulatory regimens, and avoid the clear intent of IGRA, which calls for a tribal-state agreement for operating devices such as these.

It is worth remembering that among the purposes in IGRA, in addition to promoting tribal economic development, is the purpose of providing a regulatory structure adequate to “shield [tribal gaming] from organized crime and other corrupting influences . . . and to assure that gaming is conducted fairly and honestly by both the operator and players.” 25 U.S.C. 2702(2).

In short, the changes in 2002 have provided an opportunity to write States out of Indian gaming - clearly not the intent of Congress in S. 555 - the bill that became IGRA.

The States have consistently opposed, as has the U.S. Department of Justice, the 2002 regulatory re-writing of class II gaming elements. The States and DOJ in fact *supported* the NIGC in defending the 1992 definitional regulations - regs that were faithful to the statute, as found by the D.C. district and circuit courts.

The opposition of the State and DOJ to the 2002 re-writing of the definitional regulations went to the re-writing of “electronic, computer or other technologic aid to gaming” and “electronic and electromechanical facsimile.” The States were opposed principally because the 2002 revisions wrote the federal Johnson Act out of the statute, notwithstanding that IGRA accounts for the Johnson Act explicitly in its text, providing it is waived only for gambling devices used under a tribal-state compact. Additionally, congressional intent clearly points to the conclusion that IGRA is not intended to amend or otherwise alter the Johnson Act.

The trouble started when, in the 2002 definitional regulations re-write, the NIGC discounted and dropped reference to the Johnson Act, saying it was a unworkable guide - notwithstanding it is the law and is incorporated in IGRA.

The Johnson Act defines a “gambling device” to include “any . . . machine or mechanical device . . . designed and manufactured primarily for use in connection with gambling, and . . . by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property.” 15 U.S.C. 1171(a)(2). It does not include within its scope devices that may allow a player to keep track of cards or devices like bingo blowers.

IGRA fully recognizes and keeps the Johnson Act intact by providing that is waived in Indian country *only* when a device is the subject of a tribal-state compact, i.e. as a class III activity. (“[t]he provisions of section 1175 of title 15 [the Johnson Act] shall not apply to any gaming conducted under a Tribal-State compact that - - (A) is entered into under [25 U.S.C. 2710(d)(3)] by a State in which gambling devices are legal, and (B) is in effect.” 25 U.S.C. 2710(d)(6).) The 1992 regulations recognized this when it set forth that “electronic and electromechanical facsimiles” are gambling devices as defined by the Johnson Act. 25 C.F.R. 502.8 (1992).

There is no implied exception that permits a Johnson Act device to be used in any other category of gaming under IGRA.

IGRA also refers to the Johnson Act in defining Class II activities where it provides that such gaming is allowed when located in a state where the gaming is permitted “and such gaming is not otherwise prohibited on Indian lands by federal law.” “[N]ot otherwise prohibited” by federal law refers to the Johnson Act.

Indeed, the legislative history is consistent with this view. The Senate Report to S.555 makes clear the Johnson Act applies to IGRA. The Report states that

Congress intended the statutory reference to “not otherwise permitted” devices in the class II definition to pertain to “gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175,” the Johnson Act. S. Rep. No. 446, 100th Congre., 2d Sess. 12 (1988).

Additionally, the sponsor of the bill and chair of the Senate Indian Affairs Committee, Senator Daniel Inouye, in colloquy, stated that the bill is “not intended to amend or alter the Johnson Act in any way.”

Yet the NIGC relied on certain cases in the federal courts, and not others, to change the regulations in 2002 to write the Johnson Act out of IGRA. (The NIGC cited *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000) and *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000) (although, as the Commission notes in its prologue to the 2002 revised regulation, “at least one of [the cases] gave deference to the Commission's findings as to the devices in question.”) 67 Fed. Reg. No. 41166-41174 (June 17, 2002) (Number 116). However, the court cases are distinguishable, one from the other, and do not uniformly conclude that IGRA class II gaming does not include the prohibitions of the Johnson Act, as has been claimed.)

More recently, the conflicting court cases include *United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607 (8th cir. 2003) and *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003). Yet these two do not line up with each other or with other lower court decisions: *Santee Sioux* correctly noted that IGRA does not provide an exemption from the Johnson Act for gambling devices used in class II gaming, but it found the devices at issue were not Johnson Act devices because they did not “deliver” money or property. It should be noted, however, that the Johnson Act does not require devices to “deliver” money or property, only that the player become “entitled” to money or property by operation of the device and by an element of chance, the latter of which may or may not be a function of the device.

Let me finish with some examples where I see problems with the NIGC's classification regulations:

First, in the proposed revision to Part 546, question number 9, describing how a bingo card minding device might operate, the NIGC proposes that the player touch a daub button in response to numbers called and displayed on the device. But the description allows the card minding device to interface directly with electronic equipment used to generate the pertinent numbers in the game and inform the players of the numbers or other designations. The proposed

regulation then warns that the card minding device must not function in a manner that automatically covers the selected numbers or designations, as if this distinction makes a difference. Ultimately, the combination of electronic selection of numbers and a single touch of the player to “daub” work together to make it a classic Johnson Act device and an electronic facsimile of a game of chance. It replicates virtually *all*, and clearly *most* of the elements of the game in the device. The Commission appears to believe that the insertion of a single manual step, the introduction of a tangible medium, an additional push of a button or the delay of additional milliseconds will distance the device from being a facsimile. In fact, such devices are not merely aids to the game of play, but electronic facsimiles of a game of chance.

Second, there is no merit in the contention that the use of gambling devices is permissible as long as a game is played *among* players and not against a house bank or against a machine as a house-banked game. The Johnson Act does not make any distinctions based on who or what banks a game. It is true that non-banked card games and bingo, as commonly played, are class II games by definition in IGRA; such games are played by having the stakes in the game shared by those who contribute to the pot or the game pool. However, IGRA does not distinguish class II and class III activities on the basis of whether they are house-banked or not, even if it places non-banked card games and bingo in class II. Lotteries, for example, are not house-banked games and are clearly class III activity under IGRA. NIGC has relied on a false distinction, relying on a test examining whether games are played so as to broaden participation of players. IGRA provides no such test.

I would be pleased to discuss additional examples of similar problems in the regulations as adopted in 2002 and as currently proposed. These developments have promoted and will continue to promote the use of devices in violation of the Johnson Act and IGRA, increase the playing of class II games that should be class III compacted games, and ultimately write the States out of Indian gaming altogether, contrary to the intent of Congress.

Thank you.