Department of the Interior

National Indian Gaming Commission

25 CFR 502.8

AGENCY: National Indian Gaming Commission

ACTION: Notice of withdrawal of proposed rule

SUMMARY: The National Indian Gaming Commission is withdrawing the proposed modification to the definition of "Electronic or electromechanical facsimile" published in the Federal Register on October 24, 2007. (72 FR 60482.)

FOR FURTHER INFORMATION CONTACT: John Hay at 202-632-7003; fax 202-632-7066. These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: Under Chairman Phil Hogen, The National Indian Gaming Commission (Commission) began its effort to craft classification standards, of which this amended definition was a part, in early 2004. The procedural mileposts leading up to the publication of the proposed rule, amended "Definition for Electronic or Electromechanical Facsimile" 72 FR 60482 (October 24, 2007), are well known and need not be recounted again here.

About the reasons for this long effort, much has been said and written, and many and varied motives have been ascribed to the Chairman and the Commissioners. These likewise need not be recited here.

A brief response is, however, appropriate.

The Commission's motivation has always been the long-term health and well-being of Indian gaming, for gaming is the single greatest engine for economic development in Indian Country in history. As Chairman Hogen has consistently said –

though his words have often been lost in the cacophony of criticism – he perceives a risk to the long-term well-being of Indian gaming in the exploitation of technology as an aid to the play of Class II games. IGRA, of course, permits tribes "maximum flexibility" in the use of technology in Class II gaming, but it also does make a distinction between Class II gaming and Class III gaming. The risk arises when the exploitation of technology erases, or is perceived to erase, that distinction.

The risk itself is inchoate, but it could take any of the following forms, to the great detriment of Indian gaming. If states perceive that tribes are playing Class III games under the guise of Class II gaming, they may expand legalized gaming within their own borders, as the State of Alabama is doing now. Indian gaming operations located far from population centers will be greatly harmed as a result. Patrons will spend their money downtown and closer to home rather than driving out to the reservation. If a perception that tribes are not following IGRA becomes sufficiently widespread, the Department of Justice may bring Johnson Act gambling device actions against tribal gaming operations again. Tribes have been successful in past litigation, but those cases involved games that less resemble slot machine than do games in play today, and the outcome of litigation over today's games might be different. Finally, Congress may choose to act, and the Commission would not want to see IGRA amended to restrict gaming or otherwise changed to the detriment of Indian tribes.

Throughout the long process of crafting the Classification regulations and amending the definition of "facsimile" – throughout all of the advisory committee meetings; throughout all of the comment periods, both formal and informal; throughout all of the Congressional hearings – the Commissioners have repeatedly stated that it takes

all comments to heart and that until the day the Commission takes final action, their minds are not made up. These statements too were lost in the cacophony.

The Commission understands the terrific economic costs that the Classification regulations and amended definition will have on Indian gaming and Indian Country, as set out in its two economic impact reports, its cost-benefit analysis, and in comments it received. The Commission has heard from many tribal leaders and representatives that should the states, the Justice Department or the Congress seek to act against tribal gaming interests, the tribes stand ready, willing, and able to address those challenges head on. The Commission has also heard that it should seek alternatives to adopting Classification regulations, for any problems concerning classification are local, rather than national, in scope. In short, the Commission has heard that the risks about which is concerned are not as great as it fears and that the costs of the Commission's proposed solution are too great. The Commission sincerely hopes that the voices that have so spoken are correct.

As Chairman Hogen stated at the June 5, 2008 Sovereignty Symposium in Oklahoma City, the proposed rule, "Definition for Electronic or Electromechanical Facsimile" 72 FR 60483, (October 24, 2007), is withdrawn. This withdrawal does not mean that the Commission believes "one-touch" bingo games are Class II. Going forward, the Commission intends to address this and other classification issues through a combination of training, technical assistance, and enforcement actions.

Date: September 24, 2008

Philip N. Hogen
Chairman, National Indian Gaming Commission

Norman H. DesRosiers
Vice Chairman, National Indian Gaming Commission