STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL

BILL LOCKYER
ATTORNEY GENERAL

November 16, 2005

The Honorable Loni Hancock
California State Assembly
P.O. Box 942849
Sacramento, CA 94249-0014

Re: Investigation of Gambling Machines at Casino San Pablo

Dear Assembly Member Hancock:

Thank you for your letter of September 6, 2005, in which you request that the Department of Justice conduct an investigation to determine whether the gambling machines used at Casino San Pablo may be operated lawfully in the absence of a tribal-state class III, gaming compact between the Lytton Band of Pomo Indians and the State of California. Should that investigation conclude that those devices may not be operated in the absence of a compact, you additionally request that this office take appropriate legal action.

Before I received your letter, the Department of Justice had initiated an investigation into the legal status of the gambling machines in operation at Casino San Pablo. That investigation is ongoing. To date, our investigation discloses that the machines, which are manufactured by International Game Technology ("IGT"), contain two screens on top of one another. The upper screen contains a "virtual" bingo card with numbers and a window in which the "drawn" numbers appear, as well as a window that displays a progressive bingo prize. The upper screen also contains a play button on the bottom right hand corner of the screen. The lower screen contains virtual spinning reels, identical to the spinning reels on class III gaming devices found throughout California, which inform the player whether he or she has won and what has been won. Indeed, we are informed that the lower screens display game themes IGT utilizes on its class III devices. Below that screen are buttons that can be used to play the machine. Those buttons include a "change card" button and a "daub" button. It appears that more than one player must play the game at the same time, but we have not confirmed that fact. Though the machine utilizes virtual bingo cards and though a player is required to press a "daub" button at least twice

in order to win, it is the machine and not the player that actually "daubs" the correct numbers on the bingo card. Thus, a player can play the machine and win without even looking at the virtual bingo cards. The player may simply press the play button, press the "daub" button both times when requested to do so, and watch the outcome of play on the spinning reels. Observing the play of the game, my office's representatives found that virtually all players play the game with the spinning reel screen and ignore the bingo card screen.

We believe that the machines meet the definition of a slot machine under California law. (Pen. Code, § 330b, subd. (d).)[1] The attributes that define a slot machine pursuant to this section have been identified in appellate decisions as well as Attorney General opinions. For example, juke boxes and telephone card vending machines have been held to be "slot machines" where, though they dispensed songs and telephone cards in return for the money deposited, the devices also contained a jackpot or sweepstakes feature that, based solely on chance, awarded something of value in addition to the song or the phone telephone card. (*Trinkle v. Stroh* (1997) 60 Cal. App.4th 771 [jukebox]; *People ex rel. Lockyer v. Pacific Gaming Technologies* (2000) 82 Cal. App.4th 699 [telephone card].) A device has been held to be a "slot machine" even though it was not operated solely through the insertion of money but also required pressing additional buttons. (*Trinkle v. Stroh, supra*, 60 Cal. App.4th 771.) Machines that utilize the theme of a game of skill but which award things of value based on chance have been found to be "slot machines." (65 Ops.Cal.Atty.Gen. 123 (1982).)

I share your observation that the use of machines that meet the definition of a slot machine under California law, in the absence of an appropriate compact, is inconsistent with the

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[1] Penal Code section 330b, subdivision (d) provides as follows:

> For purposes of this section, "slot machine or device" means a machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

purposes and objectives of the Indian Gaming Regulatory Act (25 U.S.C. § 2701 et seq.) ("IGRA") as well as the Johnson Act (15 U.S.C. § 1175 et seq). Indeed, when requested to do so by the Governor, my office prepared a multi-state amicus brief in support of a petition for writ of certiorari filed by the United States in *Ashcroft v. Seneca-Cayuga Tribe of Oklahoma* (10th Cir. 2003) 327 F.3d 1019, in which the United States Supreme Court was requested to overturn that decision and the decision in *United States v. Santee Sioux Tribe of Nebraska* (8th Cir. 2003) 324 F.3d 607. Our brief specifically challenged the Tenth Circuit's conclusion that it was not necessary to determine whether a gambling machine constituted a prohibited slot machine under the Johnson Act before determining that a machine constituted a class II gaming device within the meaning of IGRA. Our office also supported the United States' position that the Eighth Circuit, in *Santee Sioux*, was wrong when it concluded that the device at issue was not a slot machine within the meaning of the Johnson Act. Indeed, it is our view that both decisions were wrongly decided because they both fail to require a determination as to whether a device is a "slot machine of any kind" within the meaning of title 25 United States Code section 2703(7)(B)(ii), before concluding that a device is a class II gaming device under IGRA.

The United States Supreme Court, however, failed to accept the United States' petition for writ of certiorari in those cases, and they are, therefore, established precedent. Moreover, the Ninth Circuit, in *United States v. 103 Electronic Gambling Devices* (9th Cir. 2000) 223 F.3d 1091, rejected the United States' position and held that "IGRA's three explicit criteria . . . constitute the sole *legal* requirements for a game to count as class II bingo." (*Id.* at p. 1096.)[2] In that case, the United States argued that a game that did not have the essential characteristics of the traditional game of bingo was not a class II game within the meaning of IGRA. The United States also argued that the game was not class II if it constituted a slot machine within the meaning of the Johnson Act. The court rejected both contentions, and found that Congress did not intend for the Johnson Act to apply to technologic aids to class II gaming and that the prohibitions in that Act only applied to electronic facsimiles of the game of bingo. (*Id.* at pp. 1101-1102.) It noted that one factor to consider in determining the difference between a technologic aid to a class II game and an electronic facsimile of the game was whether the game was self-contained or whether it was being played "outside the terminal." (*Id.* at p. 1100.) Thus, if the game required multiple players on different terminals in which the game was determined by

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[2] The three criterias are set forth in 25 U.S.C. § 2703(7)(B)(ii) as follows:

(I) . . . played for prizes, including monetary prizes, with cards bearing numbers or other designations;

(II) . . . the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) . . . 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 . . . .

more than the operation of a single terminal, the devices at issue could be technologic aids that widened participation in a class II game within the meaning of IGRA. (*Id.*) Further, while it is true that for class III gaming, each game must be permissible under state law before a tribe can conduct it (*Rumsey Indian Rancheria of Wintun Indians v. Wilson* (9th Cir. 1994) 99 F.3d 321.), that is not the case with respect to class II gaming. Under the decision in *Sycuan Band of Mission Indians v. Roache* (9th Cir. 1995) 54 F.3d 535, a state may not object to class II gaming on a game-by-game basis. Thus, if any class II game is permitted by a state, a tribe may conduct any other class II game, irrespective of whether the state allows that game to others.

The existence of these precedents, and the fact that it is the National Indian Gaming Commission ("NIGC") and not the State that has the responsibility for implementing the requirements of IGRA with respect to class II gaming (*United States v. 103 Electronic Gambling Devices, supra*, 223 F.3d 1091, 1096-1097), provide the State with no readily available judicial remedy should a tribe without a compact choose to operate machines that the State considers to be class III devices. (See, e.g., *Sycuan Band of Mission Indians v. Roache, supra*, 54 F.3d 535; 18 U.S.C. § 1166(d).) Moreover, the NIGC has in the past rendered advisory opinions regarding machines similar to the machines in operation at Casino San Pablo and concluded that those machines are class II devices. The NIGC's current standard for what constitutes a class II device has been set forth in advisory opinions issued by its staff. Most recently, for example, in a letter issued on August 4, 2005, the NIGC staff concluded that a "NOVA Bingo System" is a class II game. A copy of that letter is available on the NIGC's website. To date, the NIGC has not issued an advisory opinion regarding the status of the devices in use at Casino San Pablo. However, we have been advised by NIGC staff that they have examined the devices and expect to issue a letter in the near future. Given the judicial deference routinely granted to agencies charged with administering Congressional acts such as IGRA, an adverse determination by the NIGC staff could create yet another hurdle.

Notwithstanding these facts and the obstacles they present, my office is continuing to review the situation at Casino San Pablo and considering options that might be available. Likewise, we presume that local law enforcement agencies are performing their duties and responsibilities with respect to general law enforcement in and around the casino. As you mention in your letter, we are also aware of pending legislation in Congress that could alter the basic premises upon which the above-mentioned cases were decided, or that make it clear that Casino San Pablo not only is not land acquired in trust after 1988 but is also not restored land or the initial reservation of the Tribe. (See 25 U.S.C. § 2719(b)(1)(B).) Further, the United States Department of Justice recently announced plans to seek legislation that would amend the Johnson Act to make clear what types of gaming devices may be operated without a compact. According to a recent newspaper article, a spokesperson for the NIGC expressed support for such

an amendment. Our understanding is that this legislation would preclude operation of the machines at Casino San Pablo in the absence of a compact.[1] I believe such legislation is appropriate and necessary in order to properly carry out the intent of California voters and federal law in the regulation of tribal gambling and will support a properly crafted federal bill.

If you have any further questions or concerns regarding these issues, please feel free to contact Senior Assistant Attorney General, Robert Mukai of my office at (916) 324-1922.

Sincerely,

BILL LOCKYER
Attorney General

[1] As you are aware, Senator Feinstein's bill, S. 113, which would eliminate the "backdating" of the Lytton Band's entitlement to game on the Casino San Pablo parcel, was recently voted out of the Senate Indian Affairs Committee with strong bipartisan support.