



# BLACKFEET NATION

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## BLACKFEET TRIBAL BUSINESS COUNCIL

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**RE: Blackfeet Position Paper on National Indian Gaming Commission Proposed Regulations.**

Dear Phil Hogan:

The Blackfeet Tribe respectfully submits this letter to inform the NIGC that it opposes the proposed amendments to the gaming regulations.

### Background

#### 1988 to Present - Class III

- Blackfeet Tribe has never had a compact with the State of Montana
- State of Montana has never negotiated with Blackfeet. The State has told Blackfeet what they offer and Blackfeet has two options: either accept this or leave. Blackfeet has chosen to leave it.
- The real issue has been the question of whether State has authority to regulate within the exterior boundaries of the Blackfeet Reservation. Blackfeet has taken the position that IGRA controls and IGRA says the Blackfeet have exclusive jurisdiction over Indian lands.
- Blackfeet and State of Montana have made three attempts to negotiate a compact. The last attempt started in May of 2006. Very little has changed and Blackfeet does not expect to reach a compact with the State

#### 1988 to Present - Class II

- Blackfeet has always had Bingo. In the last few years Blackfeet undertook a huge project to develop a casino using only Class II machines. This project has so far been very expensive.
- Blackfeet has invested approximately 12 million in a new casino and management.

## Application of Law

Proposed Regulations Illegal as they invalidate IGRA. On October 17, 1988, Congress enacted into law the Indian Gaming Regulatory Act (P. L. 100-497; 102 Stat. 2467; 25 USC 2701 *et seq.*). Among other things, the Act established the National Indian Gaming Commission. Section 3(3) of the Act states that one of the purposes of the Act is—

"(T)o declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission (is) necessary to meeting congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue."

To the Blackfeet Tribe this law is clear, Tribes will regulate Class II gaming not NIGC and if the law is clear there is no need to amend the regulations. Further, the Blackfeet Tribe believes that NIGC has bought into the Department of Justice position, which the Blackfeet tribe believes is wrong. The Tribe also points out that this is not the first time DOJ has been wrong. Further, the case law provides that if the intent of Congress is clear that is the end of the matter.

"If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The law is also clear that the power of an agency to promulgate regulations to implement law is not a source of substantive power and that is what the Commission has done as the Commission has conferred upon itself the right to exercise substantive power beyond what the specific provisions of the Act provide. IGRA says the Tribes regulate or license Class II gaming if allowed by the State and the Tribe has an approved ordinance where does the Act say NIGC preempts tribal jurisdiction.

## Technological Aids - Bingo

NIGC states that machines offered as technological aids to play bingo are often designed to play close to a line by using alternative displays of the game results resemble the experience of a slot machine for the players. This is not inherently wrong, nor does it necessarily make such machines Class III devices. It does make them more difficult to distinguish from Class III devices. These standards are made to clarify the difference between a technological aid from the play of electronic facsimile of a game of chance of slot machines of any kind. Also in the regulations, NIGC makes the statement that IGRA establishes three (3) requirements defining the game of bingo as Class II

gaming activity. The intent of the proposed rules clarify the terms used in the statutory definition when the game is played primarily through an electronic computer or other technological aids. First, essential to the game of bingo is that the participant play the game on bingo space card and compete against other players to win prizes in the game. Then the commission proposes that the screen always display a card that is at least one-half available space of the screen. The interesting thing about the regulations is that the commissions says that it believes that a game using other than 25 spaces placed in a 5'x5' grid would more properly be considered other games other than bingo. But then, the commission goes onto recognize that previous commissions explained that the bingo game would not be limited to a grid of five rows and five columns in giving meaning to the other games in light of bingo, but the commission now believes Congress had in mind a traditional bingo card when it drafted the section on Class II bingo.

The Blackfeet Tribe's position is it is not a correct interpretation of the law for the Commission to say it believes it know what the law says but instead the correct interpretation is what Congress intended the law to say. How to answer this question is to look at the legislative history.

A review of the legislative history shows there were several versions of the bill introduced into Congress. Among other things, the Act established the National Indian Gaming Commission, §3(3) of the Act states that:

One of the purposes of the Act is to declare:

that the establishment of an independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands and the establishment of a National Indian Gaming Commission is necessary to meeting congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

From our review and other individuals review of committee reports, testimony before the committees and statements in the congressional record, the commission created by IGRA was a regulatory agency of limited authority with the assumption that the first line of authority rests with the Tribe themselves. In the current regulations the commission exceeds its authority that Congress intended for the commission.

An in depth review of the legislative history supports this statement. Originally, House Resolution 1920, was introduced as a slightly modified or expanded version of House Resolution 4566. The House interior committees held three (3) hearings. One of those hearings, the solicitor for Interior said that

"this bill would allow bingo to continue as a matter of Federal policy and would be subject to Federal regulation, as a Federal regulatory commission would be established. The commission would be authorized to issue licenses for and to

regulate bingo operations on Indian land. The law would provide a traditional definition of bingo and make it a federal crime to operate without a license."

It should be noticed that this was the Interiors bill. The legislative proposal to specifically confer jurisdiction on a federal commission to regulate Indian gaming and have traditional forms of bingo was rejected.

Further, the commission was created but it was given only the authority to approve Class II gaming ordinances and Class II management contracts. It was the understanding of the committee leadership and the staff that §11(b)(2) provision left the regulation of Class II gaming to the Tribes allowing only minimal commission oversight, guidance and regulation.

Contrary to NIGC's current position, congressional records show us that the individuals in the Senate who knew the most about the Indian Gaming Regulatory Act understood that Class I and II would be regulated by a Tribe and Class III gambling would be regulated by a Tribal State Compact. This made it clear that the understanding of Congress was that the commission would have a limited scope in gaming.

The commission has stated that the Tribes have turned bingo on its head because they have changed the number of players bingo offers significant monetary awards, and the machines, technological aids resemble slot machines. The Tribes position is that the commission has turned the law on its head because Tribes were intended to regulate gaming not the commission. The end result of the proposed regulations is that the commission ends up regulating Class II gaming. That was not the intent of the Indian Gaming Regulatory Act. Further, if one reviews the legislative history, there was anti-Indian sentiment that was occurring in Congress and a number of things the anti-Indian gaming sentiment claimed was that there was a threat of corruption or the threat of organized crime to Indian gaming. This is a scare tactic. Since 1988 the Tribe has not seen any evidence that the mafia or organized crime has infiltrated Indian gaming. This was red herring then and a red herring now. The Blackfeet Tribe definitely opposes these regulations.

As to the question of whether the Takings Clause is applicable to this situation the Tribe believes it is. The Takings Clause is applicable to the proposed regulations as Blackfeet's investment is not minor and the proposed regulations would take away the Tribe's ability to protect this investment. The end result is the regulations effectively amount to a taking. This Commission is likely aware that the United States Supreme Court has applied the Takings Clause to invalidate regulations that deprive property of all of its economic use. *Lucas v. South Carolina Coastal Council* (1992).

The Blackfeet Tribe employees 330 people at its casino. The employees are paid \$9.00 an hour except for the ones who receive tips. Further, the Tribe has spent approximately \$800,000 on surveillance equipment. The fact that the casino provides

employment opportunities cannot be understated as the Blackfeet suffer 80% unemployment. This new regulations would deprive the Tribe of this economic use.

Finally, meaningful consultation is mandatory. The President of the United States issued Executive Order 13175 on November 6, 2000 Consultation and Coordination With Indian Tribal Governments. This Order provides:

"By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes...."

Further, this Order provides that: "agencies shall be guided by the following fundamental principles:

(a) Agencies shall respect Indian tribal self government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal government the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

(1) encourage Indian tribes to develop their own policies to achieve program objectives;

(2) where possible, defer to Indian tribes to establish standards; and

(3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation

(A) consulted with tribal officials early in the process of developing the proposed regulation.

The order contains strong language that must be followed. NIGC states that it established an Indian advisory group. What is notable about the opinion of this group is that NIGC discounted its opinion. This is very unsettling. It appears from this fact along with NIGC's unwillingness to consider the Tribe's opinion that the consultation process has been meaningless.

Finally, it appears that while the Blackfoot Tribe's position is well grounded that NIGC will give little weight to the Tribe's position. Therefore, the Tribe requests NIGC consider grandfathering in the Blackfoot Tribe or establishing a moratorium of four years on the application of the regulations to those Tribes that have invested significant amounts of money and who have provided employment opportunities to its members.

Sincerely,

  
Roger Running Crane  
Vice-Chairman Blackfoot Tribe

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## FAX COVER SHEET

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DATE: 11/15/06

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Representing: NIGOL

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Phone No.: \_\_\_\_\_

RE: \_\_\_\_\_

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MESSAGE: \_\_\_\_\_

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