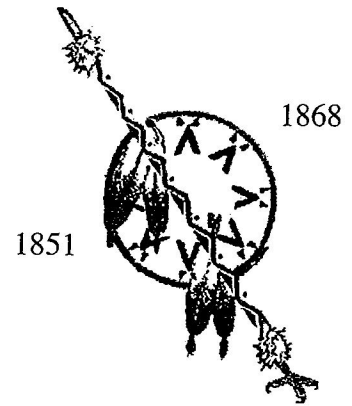


Oglala Sioux Tribe

Office of the President

PO Box 2070
Pine Ridge, SD 57770
Phone: 605.867.5821
Fax 605.867.6076
E-mail: johns@oglala.org



John Yellow Bird Steele

February 1, 2011

VIA EMAIL ONLY

Chairwoman Tracie L. Stevens
National Indian Gaming Commission
1441 L St. N.W., Suite 9100
Washington D.C. 20005

Re: Commentary on Commission Regulations

Dear Chairwoman Stevens,

The Oglala Sioux Tribe submits the following comments in order to supplement its previous comments on the NIGC regulatory scheme and to address additional concerns of specific interest to the Oglala Sioux Tribe.

The Indian Gaming Regulatory Act allows tribes to engage in class III gaming activities only if such activities are 1) authorized by an ordinance or resolution approved by the Chairwoman of the NIGC, 2) located in a state that permits such gaming for any purpose by any person or entity, and 3) conducted in conformance with a Tribal-State compact. 25 U.S.C. 2710(d)(1). This statute places the economic welfare of Indian tribes largely in the hands, and at the whims, of states. Tribal-State gaming compacts invariably require that a tribe make concessions in order to induce a state to agree to the compact. These concessions may range from application of state gaming regulations on tribal gaming activities, to revenue sharing, to limits on how many class III gaming devices a tribe may operate. The state, on the other hand, need give up nothing more than consent to the compact.

The Senate Commission on Indian Affairs itself recognized the unfair bargaining power IGRA placed in states at the time the bill was passed, noting its struggle, "given this unequal balance," to determine "how best to encourage States to deal fairly with tribes as sovereign governments." S. REP. NO. 100-446, at 3084 (1988). In the end, Congress opted to require states to negotiate with tribes in "good faith." Curiously, however, Congress failed to define "good faith" or provide guidelines or parameters of any kind. As a result, states are taking advantage of their positions by strong-arming tribes into agreeing to provisions that they are not comfortable with – even provisions which violate IGRA – because the only other options tribes have are to either forgo class III gaming altogether or to engage in lengthy and cost-prohibitive litigation in which they might not even prevail, given that the "good faith" standard on which such litigation turns is

vague and ambiguous at best. As an egregious example of this behavior, some states have required tribes to consent to provisions which purportedly vest state courts with jurisdiction over private causes of action which are not related to gaming activities. This transfer of jurisdiction is prohibited by federal common law and is not a permissible allocation of jurisdiction under IGRA. In addition, some states have withheld consent to a proposed Tribal-State compact on the grounds that Indian gaming, or an increase in Indian gaming, would have economic consequences on non-Indian gaming within that state. States pay no mind to the purpose of IGRA, to promote tribal economic development, self-sufficiency, and strong tribal governments, or to the fact that the Committee responsible for IGRA's enactment explicitly stated that their intent is that the compact requirement for class III gaming not be used "for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." S. REP. NO. 100-446, at 3083 (1988).

This lose-lose scenario, in which tribes must choose between unfair (and potentially illegal) compact terms, costly and risky litigation, or forfeiture of the right to engage in class III gaming, is particularly damaging to the tribes who stand to gain the most by gaming, as those tribes generally cannot afford the expense of enforcing their own rights. In order to ameliorate this situation, it is necessary to give some clarity to the "good faith" standard imposed on states during the compact negotiation process. As the drafters of IGRA intended, legal doctrine requires courts to "interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests." S. REP. NO. 100-446, at 3085 (1988). Unfortunately, this legal standard is all-too-often overlooked at tribes' expense. We have therefore proposed a new regulation creating parameters for state conduct in accordance with states' IGRA-imposed duties in order to better achieve the stated purpose of IGRA.

Congress's goals in passing IGRA, to provide a statutory basis for Indian gaming as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments, is also thwarted by the inclusion of impermissible provisions in Tribal-State compacts at the insistence of states. 25 U.S.C. § 2710(d)(3)(C) limits the topics of permissible compact provisions to an enumerated list which includes "subjects that are directly related to the operation of gaming activities." As asserted by the Senate Commission on Indian Affairs at the time IGRA was enacted, that section "describes the issues that may be the subject of negotiations between a tribe and a [s]tate in reaching a compact." S. REP. NO. 100-446, at 3084 (1988). In spite of these limits, states have taken broad liberties with the compacting process and required tribes to make concessions that are not **directly** related to the **operation of gaming activities**, which limit tribes' abilities to make their own business decisions and which limit tribal sovereignty – in direct contravention of Congress's findings and the purpose of IGRA. We therefore propose the promulgation of new regulations to clarify what is and is not a permissible provision of a Tribal-State compact pursuant to 25 U.S.C. § 2710(d)(3)(C).

While at first blush it seems that regulations affecting the class III tribal-state compact process fall under the purview of the Department of Interior, we believe that the NIGC is the appropriate federal agency to issue these proposed regulations. These proposed regulations do not relate to secretarial procedures, which are discussed in 25 CFR Part 291, the procedures for submission of a Tribal-State compact to the Secretary of the Interior, which are discussed in 25 CFR Part 293, or any other matters addressed by the DOI gaming regulations. Those parts implement

provisions of IGRA which specifically refer to the Secretary of Interior and authorize the Secretary to take certain actions, justifying the establishment of rules regarding those provisions by that office. These proposed regulations, however, instead implement the Indian Gaming Regulatory Act, which is the stated purpose of Title 25 (Indians), Chapter III (National Indian Gaming Commission) of the Code of Federal Regulations, and therefore are appropriate provisions to include in Subchapter A (General Provisions) as “Part 504 (Tribal-State Gaming Compacts and Negotiations).” They are within the scope of the NIGC’s power under IGRA, pursuant to Section 2706 (b)(10), to promulgate such regulations and guidelines as it deems appropriate to implement IGRA, and they do not fall under any grant of authority to the Secretary contained in IGRA.

The Oglala Sioux Tribe proposes that the NIGC enact the following:

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission 25 CFR Part 504

Tribal-State Gaming Compacts and Negotiations

AGENCY: National Indian Gaming Commission (“NIGC” or “Commission”).

SUMMARY: The proposed rules add a new part to the Commission’s regulations clarifying what types of criminal and civil laws and regulations may be addressed in a Tribal-State compact, what types of criminal and civil jurisdiction can be allocated by a Tribal-State compact, what types of provisions are permissible provisions of a Tribal-State gaming compact, and defining the term “good faith” as used by Congress to require that states conduct negotiations fairly when negotiation with a tribe for the purpose of entering into a Tribal-State compact.

Text of the Proposed Rules

PART 504—TRIBAL-STATE GAMING COMPACTS AND NEGOTIATIONS

Authority: 25 U.S.C. 2706, 2710

SECTIONS

- 504.1 Scope.
- 504.2 Provisions relating to the application of criminal and civil laws and regulations.
- 504.3 Provisions allocating criminal and civil jurisdiction between the State and the Indian tribe.
- 504.4 Other permissible compact provisions.
- 504.5 Obligation that States respond and negotiate in good faith.

§ 504.1 SCOPE.

This part applies to the contents of a Tribal-State compact for class III gaming entered into pursuant to 25 U.S.C. 2710(d) and the conduct of states upon the request by a tribe to negotiate such a compact.

§ 504.2 Provisions relating to the application of criminal and civil laws and regulations.

A compact may contain provisions identifying whether tribal or State laws and regulations (or a combination of tribal and State laws and regulations) apply to the licensing and regulation of gaming activity.

Laws and regulations applicable to the licensing and regulation of gaming are laws and regulations which dictate and ensure compliance with:

- (a) the standards and/or licensing procedures for gaming devices and equipment,
- (b) the standards and/or procedures for the handling and accounting of money, chips, or vouchers used in the play of games, or
- (c) the standards and/or licensing procedures for primary management officials and key employees.

§ 504.3 Provisions allocating criminal and civil jurisdiction between the State and the Indian tribe.

A compact may contain provisions allocating jurisdictional responsibility only for the enforcement of criminal and civil laws and regulations described in § 504.2. Such jurisdiction may be allocated to the tribe, the State, or a combination of the two. The only type of jurisdiction which may be allocated by compact is jurisdiction over the licensing and regulation of gaming activity as defined in § 504.2. No other provisions to allocate jurisdiction are permissible.

§ 504.4 Other permissible compact provisions.

A state may not insist on, or make its consent to a compact or to a compact provision contingent upon a tribe agreeing to, any provision other than those relating to the items outlined in 25 U.S.C. 2710(d)(3)(C). For purposes of this section, subjects that are “directly related to the operation of gaming activities” shall be narrowly construed and constitute only those subjects which bear a direct relationship to actual gaming. Subjects which relate to activities that a tribe may engage in without a class III Tribal-State compact, and subjects which are tangential to a gaming operation but which do not relate to the class III games themselves, are not “directly related to the operation of gaming activities.”

§ 504.5 Obligation that States respond and negotiate in good faith.

(a) Good Faith Generally:

The requirement that states conduct negotiations in good faith means that states have a duty to enter into negotiations with tribes with an open mind and sincere intention to reach a compact consistent with tribes’ rights and the purpose of IGRA. A state fails to act in good faith when it refuses to respond to a request to negotiate, or negotiates but fails to agree to a compact, without a valid and reasonable justification based on objectively established facts. A state fails to act in good faith when it makes its consent to a compact contingent on a tribe agreeing to a provision which is not permissible pursuant to this Part. A state fails to act in good faith when it withholds its consent to a compact for the purpose of protecting state-licensed gaming enterprises from free market competition with Indian tribes.

(b) Bad Faith:

A showing of bad faith is not required in order to show that a state failed to act in good faith.

(c) Requirements of Good Faith with which a State Must Comply:

The duty of states to negotiate in good faith requires:

1. Claims, statements, and assertions made by a state in support of its position must be honest and factually supported.
2. The person negotiating on behalf of the state must have authority to negotiate and make decisions.
3. The state must explain its positions, and a state's position cannot be arbitrary.

(d) Factors a Court MUST Consider:

In an action initiated pursuant to 25 U.S.C. 2710(d)(7)(A), the court shall consider the following as evidence that a state has failed to negotiate in good faith (when the lack of good faith is not otherwise shown):

1. Lengthy delays in holding negotiation sessions
2. Lack of cooperation
3. Lack of preparation
4. Unreasonable demand(s)
5. Submitting proposed compacts on a "take it or leave it basis"
6. Numerous negotiation sessions involving regressive negotiation
7. Any demand for direct taxation

If a tribe submits evidence of any of these factors, the submission of such evidence shall be deemed to satisfy the burden of proof placed on the tribe by 25 U.S.C. 2710(d)(7)(B)(ii) and shift the burden of proof onto the state. These factors, however, are not an exhaustive or exclusive list of items which evidence a lack of good faith.

(e) Factors a Court MAY Consider:

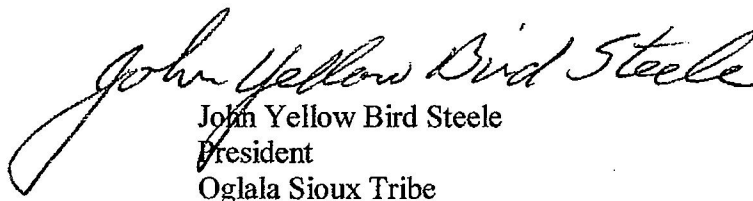
In an action initiated pursuant to 25 U.S.C. 2710(d)(7)(A), the court may consider the following in determining whether a state has negotiated in good faith:

1. Public interest
2. Public safety
3. Criminality
4. Financial integrity
5. Adverse economic impacts on existing gaming activities (however, this is not an adequate justification for a state's failure to agree to a compact, and a state cannot withhold its consent solely on the grounds of adverse economic impacts on existing gaming activities)

However, these considerations must be supported by factual evidence and cannot be used to justify the failure of a state to comply with its good faith duty as described in (a) and (c) of this Section.

Thank you for your consideration. The importance of these issues cannot be overstated.

Sincerely,



John Yellow Bird Steele
President
Oglala Sioux Tribe