



# Muscogee (Creek) Nation

PRINCIPAL CHIEF

*A.D. Ellis*

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*Alfred Berryhill*

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November 22, 2004

**Via facsimile (202) 632-7066 and U.S. Certified Mail**

Phil Hogan, Chairman  
National Indian Gaming Commission  
1441 L Street NW  
Suite 9100  
Washington, DC 20005

***Re: Comments and protest of the Office of Public Gaming of the Muscogee (Creek) Nation to the National Indian Gaming Commission proposed technical standards and procedures for the classification and approval of electronic, computer and other technologic Class II gaming machines and aids utilized in Indian gaming operations.***

Dear Chairman Hogan:

The Office of Public Gaming of the Muscogee (Creek) Nation is the primary regulatory body for gaming within the jurisdiction of the Muscogee (Creek) Nation. In 1984 we became the first Indian tribe in Oklahoma to operate and regulate tribal gaming. We were opposed in our efforts by the United States Department of the Interior, the State of Oklahoma Office of the District Attorney of Tulsa County, and the Oklahoma Tax Commission. After years of litigation we were victorious in having our rights reaffirmed by the federal courts and clearly remember that none of our gaming rights were granted to us by the United States Congress or the State of Oklahoma since we were regulating gaming before the United States was even in existence.

The site on which we operated our gaming enterprise was part of our original treaty lands, and the 10<sup>th</sup> Circuit Court of Appeals ruled that this site retained its status as "Indian country" even though the site was not a typical "reservation," nor was fee title held in trust by the federal government for the Muscogee (Creek) Nation. The 10<sup>th</sup>

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GAMING COMMISSION



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Circuit reminded the State of Oklahoma and all others that America was still bound by the Treaty with the Creek Indians, Art. IX, 14 Stat. 785; Act June 16, 1906, § 1 et seq., 34 Stat. 267 as amended, and by Act of Congress, 18 U.S.C.A. § 1151(a). See *Indian Country, U.S.A., Inc v. State of Oklahoma ex Rel. The Oklahoma Tax Commission and the District Attorney of Tulsa County* 829 F.2d 967 (CA 10 1987).

The National Indian Gaming Commission (NIGC) has undertaken a rulemaking that is intended to make more distinctions between class II and class III gaming. Along with other tribes we are concerned that this effort to establish technical standards for electronic aids to the play of class II games goes much further than a rulemaking because these proposed rules also address the *legal* standards for game classification.

In enacting Indian Gaming Regulatory Act (IGRA), Congress placed only three requirements on a game of bingo. Notably, the federal courts have continuously held that these three requirements “constitute the sole *legal* requirements for a game to count as class II bingo.” See *United States v. 103 Electronic Gaming Devices*, 223 F.d 1091, 1097 (9<sup>th</sup> Cir. 2000). The Congress defined class II gaming as:

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technological aids are used in connection therewith)--

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

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

(III) in which 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, . . . .

For some years the NIGC opposed the tribes and their vendors technological advancement by relying on simple clauses in IGRA and ignoring the purpose and policy of the act. Through several legal battles the tribes have sought redress and received vindication by the federal courts and so we are now concerned that the present rulemaking process may be an attempt by the NIGC to overturn ten years of this case law. This current draft of the proposed technical standards and procedures for the classification and approval of electronic, computer and other technologic Class II gaming machines and aids utilized in Indian gaming operations may also be in contradiction with Congress' intent in enacting IGRA, including and most significantly, the status of tribal governments as the primary regulators of Indian gaming.

We note the Congress listed findings in IGRA stating: "...a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government;" and that "...Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701. Congress further stated that IGRA was to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. Congress intended "that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development." The Legislative history of IGRA shows that Congress understood technology would continue to advance and evolve through technological advancement.

We urge you to avoid incursions into our community our sovereign rights. The Muscogee (Creek) Nation has regulated class II gaming for twenty years and will develop its own standards in conformance with the Indian Gaming Regulatory Act (IGRA). In its treatment of the Indian nations, and their property, the United States as trustee must be judged by the most exacting fiduciary standards.

We therefore request that you withdraw from this effort and to instead, assign NIGC staff to provide technical assistance to our gaming commission in the ongoing process of tribal gaming regulation.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. D. Ellis', written in a cursive style.

A. D. Ellis, Principal Chief  
Muscogee (Creek) Nation