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A BILL TO AMEND THE INDIAN GAMING REGULATORY ACT TO INCLUDE PROVISIONS RELATING TO THE PAYMENT AND ADMINISTRATION OF GAMING FEES, AND FOR OTHER PURPOSES

SEPTEMBER 28, 2004.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs;
submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 1529]

The Committee on Indian Affairs, to which was referred the bill (S. 1529) to amend the Indian Gaming Regulatory Act to include provisions relating to the payment and administration of gaming fees, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The primary purpose of S. 1529, the Indian Gaming Regulatory Act Amendments of 2004, is to clarify and amend the provisions of the Indian Gaming Regulatory Act of 1988, Pub. L. 100–497, 25 U.S.C. §2501 et seq. ("IGRA"), applicable to the Department of Interior ("DoI"), the National Indian Gaming Commission, and the Indian tribes. This legislation is necessary to make amendments to the IGRA so that Indian tribes may continue to be the primary beneficiaries of gaming operations conducted on Indian lands, and to reaffirm and further the original goals of the IGRA.

BACKGROUND

1. Indian Gaming Pre-IGRA

Indian gaming began in earnest in the late 1970s with several tribes, from New York to Florida conducting "high-stakes" bingo operations. Other tribes quickly followed suit, and by the mid-1980s over 100 tribes were conducting bingo operations, which generated more than $100 million in annual revenues. Some states, particularly Florida and California, attempted to assert jurisdiction over these tribes. The tribes resisted strenuously, citing long-standing Federal law and policy which provided for Federal and tribal jurisdiction over Indian lands, instead of state jurisdiction.

2. Supreme Court Cabazon Decision

These legal disputes culminated in a ruling by the Supreme Court in *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987) ("Cabazon"). In that decision, the Supreme Court, using a balancing test between Federal, state, and tribal interests, found that tribes, in states that otherwise allow gaming, had a right to conduct gaming activities on Indian lands largely unhindered by state regulation. Specifically, the *Cabazon* Court held that Pub. L. 83–280 states that laws that regulated, but did not criminally prohibit all forms of gaming within their borders, could not regulate gaming conducted by Indian tribes on Indian lands in those states. In reaching this decision, the Court also emphasized the Federal government's policy of Indian tribal self-governance, including the policy of encouraging tribal self-sufficiency and economic development.

3. IGRA

The *Cabazon* decision engendered a great deal of discussion regarding the need for Federal legislation to address Indian gaming and its regulation. Tribes, satisfied with the *Cabazon* decision, saw no need for Federal legislation. States sought Federal legislation overruling *Cabazon* and providing an extension of state jurisdiction over Indian lands for gaming regulation. Some in Congress, including current and past members of this Committee, saw wisdom in creating a comprehensive regulatory framework under Federal law, that would bring some order to the complex relationship between the Federal government, tribes and states as it related to the conduct and regulation of Indian gaming.

The result of those discussions was the IGRA, enacted a year after the *Cabazon* decision, which established a comprehensive framework for the operation of Indian tribal gaming across the United States. The primary purpose of the IGRA, as stated by Congress 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." [1] The secondary purpose was "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to as-

[1] Pub. L. 100–497, 102 Stat. 2467, § 3 (1988).

sure that gaming is conducted fairly and honestly by both the operator and players."[2]

In enacting the IGRA, Congress expressly rejected arguments by states for abrogating tribal sovereignty and imposing state regulation of tribal gaming. Instead, the IGRA established three different categories of gaming and a regulatory system applicable to each. The IGRA also established a Federal regulatory commission, the National Indian Gaming Commission ("NIGC"), to provide Federal oversight over certain forms of tribal gaming.

The three categories of gaming established by the IGRA, and the regulatory system for each, are:

- Class I, which refers to traditional and ceremonial games conducted by tribes, and for which the IGRA provides exclusive regulatory jurisdiction by the tribes;
- Class II, which refers primarily to bingo, games like bingo, pulltabs, and some non-banked card games, and for which the IGRA provides primary regulatory jurisdiction by the tribes and secondary regulatory jurisdiction by the NIGC; and
- Class III, which refers to all other types of gaming, and for which the IGRA provides a unique method of shared jurisdiction between tribes and states through mutually agreed upon compacts, and over which the NIGC exercises oversight.

The IGRA created the NIGC, a 3-member independent Federal regulatory agency charged with secondary regulation of Class II gaming and oversight of Class III gaming. Under its mandate, the NIGC is charged with approving management contracts;[3] conducting background investigations;[4] approving tribal gaming ordinances;[5] reviewing and conducting audits of the books and records of Indian gaming operations;[6] and enforcing violations of the IGRA, its own regulations, and approved tribal gaming ordinances.[7]

With regard to Class III gaming, it should be noted that many Indian tribes, working in tandem with the states where they are located, have developed sophisticated regulatory frameworks for their operations. Pursuant to joint tribal-state compacts, these tribes have put in place effective standards for the conduct of their games, as well as financial and accounting standards for their operations. The need for intrusive oversight in these instances is lessened because tribal regulatory bodies and those of their respective states have created effective oversight for tribal gaming operations.

4. The Seminole Decision

Unfortunately, the compacting process, originally envisioned as an opportunity for tribes and states to enter into mutually beneficial agreements addressing legitimate issues of concern to each, became an area of significant discord. Several states, including Florida, refused to enter into negotiations with tribes, choosing instead to assert legal challenges to the IGRA. These challenges culminated in a decision by the U.S. Supreme Court in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996) ("*Seminole*"). In that decision, the

[2] See id.
[3] See id., § 6(a)(4).
[4] See id., § 11(b)(2)(F).
[5] See id., § 6(a)(3).
[6] See id., § 7(b) (4) and § 11(b)(2)(C).
[7] See id., § 14.

Court held that provisions in the IGRA which authorized tribes to bring suit in Federal court for "bad faith refusal to negotiate" were unconstitutional infringements on the State of Florida's 11th Amendment immunity to suit.

Following the *Seminole* decision, the Secretary of the Interior, using authority provided by IGRA, promulgated regulations pursuant to which a tribe can request "procedures" for regulation of Class III gaming. Despite requests from several tribes, to date the Secretary has not issued such "procedures" for any tribe.

5. The Indian Gaming Industry in 2004: A Snapshot

At the time the IGRA was enacted, Indian gaming was a relatively modest industry consisting mainly of what are now known as "class II" high-stakes bingo operations. At that time, virtually no one contemplated that gaming would become the $16.7 billion[8] industry that exists today. Indian gaming is providing tribes with much-needed capital for development and employment opportunities where few previously existed.

Though gaming revenues have grown exponentially in the last sixteen years, the IGRA has been amended only one time. In 1997, Committee on Indian Affairs Chairman Campbell introduced an amendment that authorized the NIGC to collect increased fees which would fund the Commission's regulatory efforts in Indian Country.[9] Before the change in the fees structure, the NIGC was funded almost exclusively with Federal appropriations, and was barely able to keep up with the ever-growing number of tribal gaming operations and its statutorily mandated duties under the IGRA.

Since 1997, the NIGC has made significant strides in its role as the Federal regulatory body charged with oversight in the field of Indian gaming, having opened five field offices and employing additional necessary staff to oversee tribal gaming operations across the country and fulfill the NIGC's monitoring responsibilities.[10]

STATEMENT OF POLICY

The regulation of gaming activities has been the subject of much controversy since the formation of the United States. Policies at the Federal and state level have swung widely between outright bans, to encouragement and expansion of gaming by individual states. Many states now participate in gaming through lotteries, which provide significant revenues for state coffers. A number of states have legalized commercial gaming, from full-scale "Las Vegas"-style casinos, to slot machines at horse racing tracks, called "racinos".

When enacting the IGRA, Congress acknowledged the "long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized

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[8] See National Indian Gaming Commission, July 13, 2004.

[9] Prior to the 1997 amendment, the NIGC budget was limited to Federal appropriations which could match fees collected from the tribes based on their "class II" gaming revenues. The cap on those class II fees was set at $3,000,000.

[10] See e.g. Hearing to Provide Information on the Activities of the National Indian Gaming Commission, Before the Senate Committee on Indian Affairs, S. Hrg. 106–730, 106th Cong., at p. 3 (2000) (Testimony of Montie Deer, Chairman, National Indian Gaming Commission). See also Hearing on Indian Gaming Regulatory Act: Role and Funding of the National Indian Gaming Commission, Before the Senate Committee on Indian Affairs, S. Hrg. 108–67, Pt. 1, 108th Cong., at p. 3–4 (2003) (Testimony of Phil Hogen, Chairman, National Indian Gaming Commission).

by an act of Congress, the jurisdiction of State [sic] governments and the application of state laws do not extend to Indian lands." [11] Indeed, this Committee expressly "recognize[d] and affirm[ed] the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished." [12] For over half-a-century, this principle has only been modified in those instances where the limited application of state law on Indian lands was conditioned upon the consent of tribal governments.

The IGRA, is one such instance. Only through the mutual negotiation of a "tribal-state compact" for Class III gaming, can the tribe and state agree upon a division of regulatory jurisdiction between their governments. The division of jurisdiction authorized by the IGRA was strictly limited to the regulation of gaming activities, and did not open the door to a broad invasion of tribal jurisdiction. This Committee noted the unusual nature of the tripartite division of gaming regulation between tribes, states and the Federal government, and expressed its intent that the IGRA "provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied." [13]

Through the IGRA, it was also the express intent of Congress that Indian tribes be the primary beneficiaries of gaming activities on Indian lands.[14] First and foremost, Indian gaming was intended to benefit Indian tribes by promoting economic development, self-sufficiency, and strong tribal governments.[15]

The Committee views these original purposes of the IGRA to continue to be the guiding principles of Federal policy dealing with Indian gaming. It is the intent of this Committee that these original purposes guide the reading and interpretation of the amendments to the IGRA embodied in S. 1529.

AN OVERVIEW OF THE PROVISIONS OF S. 1529

On May 14, 2003, and July 9, 2003, the Committee held oversight hearings on the IGRA, receiving testimony from the DoI, NIGC, and Indian tribes engaged in gaming. S. 1529 was introduced on July 31, 2003, by Senator Campbell, for himself and Senator Inouye. On March 24, 2004, the Committee held a legislative hearing on S. 1529.

The hearings held in 2003 provided the Committee with significant information on much-needed updates and necessary improvements to the IGRA. S. 1529 was drafted based upon that information, and additional information received from other parties. The legislative hearing held on S. 1529, provided critical feedback on the bill language.

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[11] S. Rep. 100–446, at p. 5 (1988).
[12] Id.
[13] Id., at p. 6.
[14] See supra note 1, § 3.
[15] Id.

As approved by the Committee, 5.1529 provides several amendments to the IGRA, including additional resources and accountability for the NIGC, parameters and guidance for revenue sharing discussions, and several technical clarifications.

1. AMENDMENTS IMPACTING THE NATIONAL INDIAN GAMING COMMISSION

Funding and the Role of the NIGC

Since Fiscal Year 1998, no Federal funds have been appropriated for the operation of the NIGC. Rather, the agency has been funded solely with fees assessed against tribal gaming operations. The IGRA currently caps those fees at $8 million annually. According to the NIGC, the growth of the Indian gaming industry is such that fees paid will be reduced over time, and will continue to be reduced if growth continues at the current rate.[16]

The Fiscal Year 2003 Omnibus Appropriation Act, Pub. L. 108–7, provided no Federal funds for the NIGC, but did provide a 50% increase in assessable fees—from $8 million to $12 million—and authorized the NIGC to levy $12 million in fees on tribal gaming operations. The fee hike is effective in Fiscal Year 2004. Similarly, the Fiscal Year 2004 Interior Appropriations Act, Pub. L. 108–108, authorized the NIGC to levy $12 million in fees effective in Fiscal Year 2005.

S. 1529 makes permanent increases in fees assessable by the NIGC, and raises the statutory fee cap from the current $8 million to $13 million over five years. The Committee takes this action with some trepidation, however. Since the fee structure was changed in 1997, the Committee has held a number of legislative and oversight hearings on the issue of regulation, fees for the NIGC, and related matters. During the last several years, several themes have emerged.

Tribes have expressed increasing alarm with what they perceive as the explosive growth and activity of the Commission since the fee increase was enacted in late 1997. In hearings before this Committee during the 106th Congress, the National Indian Gaming Association ("NIGA") testified that—

> NIGA remains supportive of a respected, independent, objective and efficient NIGC, yet no communications have been shared with us regarding how the NIGC plans to meet those goals. Instead we face a number of new regulatory initiatives that infringe upon Indian nations' governmental authority and are duplicative of existing regulatory structures.[17]

Tribes have also raised concerns regarding new regulatory initiatives pursued by the NIGC since the 1997 fee increase. The Committee notes that no new regulatory powers are granted to the NIGC by S. 1529. While it encourages the NIGC to fulfill its statutory duties and regulatory responsibilities, the Committee also strongly encourages the NIGC to respect the primary regulatory role of tribes and states through tribal-state compacts.

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[16] See National Indian Gaming Commission, Press Release, August 17, 2004.

[17] "See Hearing on the Indian Gaming Regulatory Act, Before the Senate Committee on Indian Affairs, 106th Cong., S. HrG. 106–730 at p. 49 (2000) (Testimony of Richard G. Hill, Chairman, National Indian Gaming Association).

In response to these concerns, S. 1529 places a formal consultation responsibility on the NIGC with new IGRA § 19. The Committee is encouraged by the NIGC's recent action to promulgate a formal government-to-government consultation policy. The Committee strongly believes that justification for the activities of the NIGC should be more transparent to the tribes to whom they are charged with providing services and regulation and to the public. It is the considered opinion of the Committee that public trust is best achieved through the development of strategic and performance plans by the NIGC, consistent with § 19, reported to Congress and made available to the regulated industry and the public, even when prepared no less often than biennially.

S. 1529 requires that the fees assessed by the NIGC be related to the statutory authorities and duties delegated to the NIGC under the IGRA.This limitation is designed to address tribal concerns that fees paid to the NIGC be used only for the purposes of the IGRA, and not for other Federal purposes.

In establishing this fee structure, and in conjunction with the consultation requirements in S. 1529, adding a new § 19 to the IGRA, it is the Committee's intent that the Commission consult with tribes on a government-to-government basis in setting fees each year.

Expanding the Reporting Requirements of the NIGC

S. 1529 makes the NIGC responsible for the submission of additional information not currently required by the IGRA. Specifically, § 2(c) of the bill requires the NIGC to submit strategic and performance plans to Congress biennially. It is the Committee's belief and intent that this provision will provide the transparency and accountability needed between the regulator, the NIGC, and the regulated, the tribal gaming operations.

This Committee has previously proposed that the NIGC be subject to the requirements of the Government Performance and Results Act of 1993 ("GPRA"),[18] a position supported by
the General Accounting Office.[19] Further consultation with the NIGC, however, has led the Committee to believe that the detailed annual reporting required by GPRA may be too onerous for the NIGC, a relative small Federal agency. The Committee believes strongly, however, that the planning and operations of the NIGC should be more accessible to the Congress and the regulated community.

In striking a delicate balance on this score, the language in S. 1529 has been changed to require the Commission to prepare and submit biennial reports to Congress and incorporate its strategic and performance plans into each report. The language of GPRA has been used as a model for the requirements of the strategic plan, which is to include a performance plan similar to performance plans under GPRA.

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[18] See Pub. L. 103–62, 107 Stat. 285 (1993).

[19] See Letter from General Accounting Office to Rep. Dick Armey, Rep. Dan Burton, and Sen. Fred Thompson, p. 10 (July 20, 1999) ("While this may not be a major activity within Interior, the sensitivities of Indian gaming issues and the potential for criminal activities related to Indian gaming, would seem to indicate that Indian gaming is an important area in which to develop performance goals and measures to explain what it [NIGC] plans to accomplish with these funds.").

The Committee is strongly encouraged by the support of the Administration for strategic planning by the NIGC, as evidenced by S. 2232, a bill introduced on behalf of the Administration by Chairman Campbell on March 25, 2004. This position is a welcome change from prior opposition to such reporting requirements by the NIGC.[20]

2. THE USE OF TECHNOLOGICAL AIDS IN "CLASS II" GAMING

A major concern, especially to tribes that do not offer Class III, "casino-style" gaming, is the continued conflict between the Gambling Devices Act, also known as the Johnson Act,[21] and the use of technological aids in the operation of Class II gaming. The language of the IGRA is unambiguous in that technological aids may be used by a tribe to conduct Class II gaming and not run afoul of the Johnson Act. Similarly, report language accompanying the IGRA provides clear Congressional intent to authorize Indian tribes to maximize Class II operations through the use of technological advances. The report states in pertinent part that,

> [t]he Committee intends that tribes should be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility.[22]

Additionally, the Committee specifically stated its intent with regard to the application of the Johnson Act

> The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175 [the Johnson Act]. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid or conjunction with bingo or lotto or other such gaming on or off Indian lands.[23]

Despite clear Congressional intent, the United States Department of Justice ("DoJ") has taken a different view and has embarked on a series of actions in the Federal courts against tribes who use technological aids in the conduct of Class II gaming.[24] These lawsuits allege that tribes operating Class II games which use technological aids are violating the Johnson Act. All of these actions have been unsuccessful at the Federal District Courts, Courts of Appeal, and recently at the Supreme Court.[25]

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[20] See Letter from National Indian Gaming Commission Chairman Montie Deer to Sen. Ben Nighthorse Campbell, p. 4 (Sept. 14, 2000) ("The resources of a small agency that would be directed to development of performance plans outweigh the benefits to be achieved.").

[21] See 15 U.S.C. §§ 1171–1178 (2004).

[22] See supra note 10 at p. 9.

[23] See supra note 10 at p. 12 (emphasis added).

[24] See e.g. *United States of America* v. *103 Electronic Gambling Devices,* 223 F.3d. 1091 (9th Cir. 2000), and *United States* v. *162 Megamania Gambling Devices,* 231 F.3d 713 (10th Cir. 2000) (Where the game at issue was a bingo game played at an electronic terminal that connected the player with other players at other terminals, all playing against one another for the first "bingo", both circuit courts unequivocally found that the terminal was not a Johnson Act device or a Class III game.). See also *Diamond Game Enterprises, Inc.* v. *Reno,* 230 F.3d 365 (D.C. Cir. 2000).

[25] See *Ashcroft, et al.* v. *Seneca-Cayuga Tribe of Oklahoma, et al.,* 72 U.S.L.W. 3550, 72 U.S.L.W. 3551, 72 U.S.L.W. 3372, 124 S.Ct. 1505, 158 L. Ed. 2d. 153 (U.S. Mar. 1, 2004), cert.

The Committee, a number of whose members either actively sponsored or were involved in the consideration of the original legislation that was enacted as the IGRA, intends to clarify what it already believes to be the law—that the Johnson Act does not apply to technological aids used in connection with Class II games.

It is the intent of the Committee to affirm its position with regard to Class II games and express its agreement with the Federal courts' interpretation of the IGRA in the cases cited above. Indeed, it is the considered opinion of this Committee that further litigation of the applicability of the Johnson Act to Class II games and technologic aids is not an efficient use of tribal and Federal resources.

The Committee does acknowledge, however, legitimate concerns raised by the NIGC and the DoJ regarding gaming devices that are not legally considered Class II technologic aids. To assist the NIGC in its enforcement efforts 2(d)(2) of S. 1529 adds a new subsection (d) to § 7 of the IGRA which provides for registration and tracking of Class II technologic aids manufacturers and transporters similar to the regime provided by the Johnson Act.[26]

Under this new subsection, manufacturers and dealers of technologic aids must annually register with the NIGC. The scope of persons and entities subject to this provision is intentionally broad, excluding only Indian tribes. It is the Committee's belief that every person or entity making, repairing, or dealing with tribes in Class II gaming aids should be able and required to register and keep records of such technologic aids. The new subsection also requires that every Class II technologic aid handled by a registrant will be required to have a serial number attached to it.

S. 1529 places on the NIGC the responsibility to regulate and enforce these new requirements. It is the considered opinion of the Committee that the NIGC, not the DoJ, has developed the necessary regulatory expertise to most effectively implement this provision, and has informally acknowledged its capacity to assume these new responsibilities.

To better implement these provisions, the Committee encourages the NIGC, consistent with new § 19, to develop effective guidelines to aid tribal regulatory agencies in regulating the manufacture and use of Class II technologic aids. Ideally, such regulations will provide a consensus on industry guidelines that will provide for uniform and consistent application by tribal regulatory agencies. In so doing, the Committee reaffirms its intent that tribal governments have the primary regulatory responsibility for Class II gaming.

3. LICENSING OF TRIBAL GAMING COMMISSIONERS

S. 1529 requires that tribes must address, in addition to key employees and primary management officials, the background checks

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denied 327 F.3d 1019 (10th Cir. 2003) (In its opinion, the 10th Circuit held "that if a piece of equipment is a technologic aid to an IGRA Class II game, its use, sale possession or transportation within Indian country is then necessarily not proscribed as a gambling device' under the Johnson Act . . . [and] a court need not assess whether, independently of IGRA, that piece of equipment is a 'gambling device, proscribed by the Johnson Act." Id. at 1035). See also related case *U.S.* v. *Santee Sioux Tribe,* 324 F.3d 607 (8th Cir. 2003) (In its opinion, the 8th Circuit found "that nothing in the statute proscribes the use of technological aids for any games, so long as the resulting exercise falls short of being a fascimile." Id at 613).

[26] See 15 U.S.C. § 1173.

of tribal gaming commissioners and tribal gaming commission employees.

The specific language of § 2(f) of S. 1529 requires tribes to address the background checks of tribal gaming commissioners and their employees on a regular basis. This language does not require a tribe to have a tribal gaming commission, nor does it prohibit a tribe from determining the makeup of those commissions. It merely requires that, where tribal gaming commissions have been established, that those commission members and commission employees meet the standards applicable to the employees they are responsible for licensing so that the appearance of impropriety is avoided.

A number of comments have been received from tribes disputing the necessity of background checks for these individuals and the possible negative effects of this new requirement on tribal sovereignty.

Indian tribal gaming has come under increasingly virulent attacks in recent years, and it has become a prime target for accusations that it is not sufficiently regulated. This section is designed to address a key concern regarding the operation of tribal gaming commissions—that the regulators themselves meet the criteria imposed on the individuals they regulate.

The Committee believes that this section provides an appropriate balance between respect for tribal sovereignty and the Congress' trust responsibility to tribes. This provision does not mandate the use of tribal gaming commissions, nor does it allow the NIGC to mandate the makeup of those commissions, but provides a guideline for tribal gaming commissions, much the same as the background check language currently provides for primary management and key employees.

Since IGRA has been enacted, the Committee has not received any testimony from tribes showing that the required background checks for primary management and key officials have hindered tribal sovereignty by dictating who a tribe may hire. The section simply provides guidance where a tribe has determined to operate Class II or Class III gaming and to operate a tribal gaming commission. It is the Committee's belief that a similar provision related to tribal gaming commissions will be similarly useful.

The Committee does note that this provision of S. 1529 does not delegate to either the NIGC or the Secretary of the Interior any authority to set standards regarding tribal gaming commissioners. The specific amendment to the IGRA made by § 2(f) requires that a tribe address the issue of background checks for tribal gaming commissioners and employees in its gaming ordinance. The standard a tribe adopts for the tribal gaming commission is within the sovereign jurisdiction of the tribe.

4. REVENUE SHARING

Revenue sharing does not have a statutory basis in the IGRA. Indeed, one of the primary purposes of the IGRA is "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."[27] Additionally, the IGRA expressly prohibits any attempts by the states to impose "any tax, fee,

[27] See supra note 10, § 3(1).

charge, or other assessment" on the revenues generated by tribal governments from their gaming operations.[28]

However, pursuant to the IGRA, in order to conduct Class III gaming, tribes must enter into compacts with states within which their gaming operations are located.[29] The Secretary of Interior is required to review the compacts for compliance with Federal law, including the IGRA.[30] The Secretary has 45 days within which to approve or disapprove the compacts or the compacts are deemed approved, but only to the extent that the compact is consistent with the IGRA.[31]

Despite the lack of a statutory basis for revenue sharing, the DoI has repeatedly found justification for revenue sharing in the notion of a "bargained-for-exchange" between the respective state and tribe. Essentially, if a state had something of value to offer in the compact negotiations, the tribe could "purchase" that value without the exchange violating the IGRA's prohibition on state taxation of tribal gaming revenues.[32]

Following the Supreme Court decision in *Seminole*, some states began refusing to negotiate tribal-state compacts, unless the tribe agreed to pay substantial amounts—some would say usurious amounts—of their gaming revenues to their state negotiating counterparts. Most tribes, uncertain of their legal remedies in light of the 11th Amendment bar imposed after Seminole, have reluctantly agreed to these demands.

July 9, 2003, Hearing: On July 9, 2003, the Committee held an oversight hearing on the IGRA, focusing on tribal-state gaming compacts and "revenue sharing".

The DoI testified regarding the difficulties encountered by tribes seeking compacts in the wake of the Seminole decision, which held as unconstitutional certain provisions in the IGRA that authorized tribes to bring lawsuits against states in Federal court. One of the most significant impacts in the wake of *Seminole* noted by the DoI was the sharp spike in demands by states for revenue sharing and the dollar amounts sought in their compact negotiations with tribes.[33]

The DoI's testimony made clear that many states now view revenue sharing as the most important topic when negotiating compacts. Conversely, most tribes are loathe to share more than minimal amounts, as every dollar shared with the state is one less dollar available to dedicate to the provision of tribal government services.

S. 1529 was drafted, in part, to amend § 11 of the IGRA and address the impacts of the *Seminole* decision on state demands for revenue sharing. These amendments to the IGRA are consistent with and meant to further the original intent of the IGRA to provide strong tribal governments and improve reservation economies. S. 1529 accomplishes this goal by providing a statutory framework

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[28] See supra note 10, § 11(d)(4).
[29] See supra note 10, § 11(d)(1).
[30] See supra note 10, § 11(d)(8)(A).
[31] See supra note 10, § 11(d)(8)(C).
[32] See Letter from Ada E. Deer, Assistant Secretary, Indian Affairs, Dept. of Interior, to Ralph Sturges, Chief Mohegan Tribe of Indians of Connecticut (Dec. 5, 1994).
[33] See Hearing on the Indian Gaming Regulatory Act, Before the Senate Committee on Indian Affairs, S. Hrg. 108–67, 108th Cong. at p. 3 (2003) (Testimony of Aurene M. Martin, Acting Assistant Secretary, Indian Affairs, Department of the Interior).

for revenue sharing, and placing limitations on unreasonable demands by states for a sharing of tribal revenues.

March 24, 2004 Hearing: On March 24, 2004, the Committee held a legislative hearing on S. 1529. At that hearing the DoI testified regarding § 2(f) of S. 1529, which amends § 11 of the IGRA, to deal with revenue sharing.

In its testimony, the DoI again expressed its concern about the lack of statutory guidance for revenue sharing, and support for the proposal in S. 1529 to provide a statutory framework. The DoI restated its view that state demands for revenue sharing have significantly increased in dollar amount since the *Seminole* decision.[34]

To deal with the unfair pressure placed on tribes to agree to substantial revenue sharing, the DoI strongly expressed its agreement with the principles espoused in S. 1529:

- That gaming revenues should primarily benefit Indian tribes; and
- That substantial economic benefits should be conferred from states to tribes before revenue sharing is allowed.

The DoI did state its preference for a "hard cap" on the percentage of revenue that a state could negotiate in return for substantial economic benefits. It also expressed its preference for a statutory list of "substantial economic benefits" that would be acceptable. In expressing these preferences the DoI stated that it anticipated some difficulties in measuring tribal needs and determining which economic benefits would be acceptable.

The DoI also restated its concerns regarding attempts by tribes to be approved for "far-flung off-reservation" gaming lands, meaning lands not on or near current tribal reservation lands. The DoI also noted increased attempts by tribes to carve out anti-competitive geographic zones, preventing other tribes from gaming in such zone. Although both of these recent developments raise policy concerns, and appear to be inconsistent with the original intent of the IGRA, the DoI indicated that it does not believe either of these issues are prohibited by the statutory language of the IGRA.

The Substitute Amendment: § 2(f)(2)(A) of S. 1529, as amended by the substitute, strengthens § 11 of the IGRA by essentially requiring that gaming revenues first meet the most pressing needs of the tribe which has generated that revenue by investing in and operating a gaming facility. Over the past several years, testimony before this Committee by tribes has shown that the most pressing needs usually relate to the provision of tribal government programs and services, and funding for new economic ventures, particularly non-gaming ventures. If revenue sharing provisions in a compact do not meet the parameters provided in S. 1529, those revenue sharing provisions may not be approved by the Secretary.

The Committee acknowledges that local communities are often the governments most significantly impacted by a tribal gaming operation. Therefore, S. 1529 provides that, after the need for tribal government programs and services are adequately addressed with tribal gaming revenues, a tribal-state compact can provide for pay-

[34] See Legislative Hearing on S. 1529, the Indian Gaming Regulatory Act Amendments of 2003, Before the Senate Committee on Indian Affairs, S. Hrg. 108–67, 108th Cong. at p. 33 (2004) (Testimony of George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, Indian Affairs, Department of the Interior).

ments to local governments to offset actual costs incurred by local governments impacted by tribal gaming activities.

The Committee also recognizes that some tribal reservations are in geographic locations near large urban centers that can provide significant potential consumer markets. For those tribes, it may be appropriate to provide a state with whom its compacts a share of revenue in return for "substantial economic benefits". Thus, S. 81529 provides that, after any payments to local governments, and provided that tribal governments needs are met, including the provision of programs and services and other non-gaming economic development, a tribal-state compact may provide for revenue sharing in return for "substantial economic benefits".

With regard to "substantial economic benefits", the Committee declines to define that term, but rather it is the Committee's intent that this requirement be the subject of negotiations between tribes and states, so long as the Secretary determines that the economic benefit is real and measurable. Certainly, substantial exclusivity from competition by non-Indian gaming, long term tribal-state compacts, and expanded gaming opportunities are but three examples that would likely meet this requirement.

The Committee also declined to establish a maximum percentage cap on revenue sharing, a preference expressed by the DoI. The Committee's primary concern is that such a cap does not prevent a state from seeking revenue sharing that is small in terms of percentage of revenue, but may still prevent the tribal government from adequately funding its programs and services. It is the unwavering intent of this Committee that tribal gaming revenues must primarily benefit Indian tribes.

Concerns have been raised by some tribes regarding the limitations placed on revenue sharing, anticipating a refusal by states to negotiate compacts. It is the Committee's intent that the amendment made by § 2(f)(2)(B) of S. 1529 address this concern. This amendment provides a reasonable timeframe for the Secretary to act. The Committee strongly encourages the Secretary to exercise the authority granted by § 11(d)(7)(B)(vii) of the IGRA in those instances in which a state refuses to negotiate a compact unless it contains revenue sharing that exceeds the parameters prescribed in § (2)(f)(2)(A) of S. 1529.

It is also the Committee's belief that § 2(f)(2)(C) will provide additional flexibility to tribes and states that are in the process of renegotiating compacts. The substitute amendment changed the original language of this provision to address constitutional concerns raised by the DoI.

LEGISLATIVE HISTORY

S. 1529 was introduced on July 31, 2003, by Senator Campbell for himself and for Senator Inouye, and was referred to the Committee on Indian Affairs.

On March 24, 2004, the Committee held a legislative hearing on S. 1529. Witnesses at the hearing included the Deputy Assistant Secretary-Indian Affairs, on behalf of the DoI, the Chairman of the NIGC, and the Chairman of the National Indian Gaming Association, on behalf of its various Indian tribes and tribal organizations. While each of the witnesses expressed either suggestions for different legislative language or concerns over particular provisions in

the bill, all of the witnesses were supportive of the overall purposes and intent of S. 1529. Many of those suggestions and concerns were addressed in the substitute amendment to the bill.

On July 14, 2004, at a business meeting duly noticed, the Committee adopted a substitute amendment to S. 1529 and, as amended, favorably reported the bill for consideration by the full Senate, with a recommendation that the Senate pass the bill.

SECTION-BY-SECTION ANALYSIS OF THE SUBSTITUTE AMENDMENT TO S. 1529

Section 1. Short Title. The act may be cited as the "Indian Gaming Regulatory Act Amendments of 2004".

Section 2. Payment and Administration of Gaming Fees.

(a) Definitions. The bill amends § 4(7) of the Indian Gaming Regulatory Act ("IGRA") clarifying the definition of "Technological Aids" to correspond with the original intent of Congress in the IGRA, making the Johnson Act inapplicable to technological aids used to operate class II games. This interpretation has been universally supported by Federal court decisions, and the bill contains very clear language that guarantees this clarification cannot be used or construed to apply to any game that is categorized as class III.

(b) National Indian Gaming Commission. The bill makes technical amendments to § 5 of the IGRA to clarify how National Indian Gaming Commission ("NIGC") vacancies and successors are filled.

(c) Powers of Chairman. The bill makes technical amendments to § 6 of the IGRA to clarify how the NIGC Chairman may delegate authorities to individual Commissioners.

(d) Powers of Commission. The bill makes amendments to § 7 of the IGRA to expand the reporting requirements for the NIGC by requiring it to provide a biennial report to Congress similar to the Executive Agency reporting mandated by the Federal Government Performance and Results Act. The bill also requires manufacturers and dealers of class II technologic aids to register with the NIGC and maintain records of the technologic aids.

(e) Commission Staffing. The bill makes technical amendments to § 8 of the IGRA and updates the statutory rates of pay for NIGC Commissioners, staff and temporary services to comport with the current Federal Executive and General Schedule pay rates.

(f) Tribal Gaming Ordinances. The bill makes technical amendments to § 11, subsection (b)(2)(F) of the IGRA to clarify that background investigations must be conducted for tribal gaming commissioners and commission employees, as well as key management and employees of the gaming enterprise.

The bill amends § 11, subsection (d)(4) to clarify that states may not tax tribal gaming operations, and to codify "revenue sharing" and the limited conditions under which it may be appropriate. The amendment also requires the Secretary of Interior to promulgate regulations within 18 months providing guidance to tribes and states in implementing this provision.

The bill further amends § 11, subsection (d) (dealing with gaming procedures issued by the Secretary in lieu of a compact), by amending (d)(7)(B)(vii) to add a requirement that the Secretary act within 180 days. Subsection (d) is further amended by deleting paragraph (9) at the end of the subsection, and replacing it with a new para-

graph. The replacement paragraph provides for an additional 180 day extension of negotiating time, if a new tribal-state compact cannot be negotiated prior to the official expiration date of the current compact, during which time tribal gaming activities may legally continue.

(g) Management Contracts. The bill makes technical amendments to § 12 of the IGRA by clarifying that the oversight responsibilities of the NIGC include conducting background information reviews on outside "managers" of class III facilities.

(h) Commission Funding. The bill makes technical amendments to § 18 of the IGRA by raising the cap on aggregate fees imposed on class II and III gaming operations from the current $8 million to $11.5 million in FY2005, to $12,000,000 in FY2006–7, and to $13 million in FY2008–9. The amendments further provide for the NIGC to promulgate regulations to carry out the new provisions.

(i) Additional Amendments. The bill amends the IGRA by deleting current § 19. A new "Section 19. Tribal Consultation" requires the Secretary of Interior, the Secretary of Treasury and the Chairman of the NIGC to consult with Indian tribes, to the maximum extent practicable, and in a manner consistent with the government to government relationship that exists between Indian tribes and the Federal government.

Section 23 is amended by combining that section with the language of the current Section 24.

Section 24 is then amended by inserting a new "Section 24. Authorization of Appropriations", which provides for appropriations to be authorized in an amount equal to the amount of funds derived from fees collected. It also provides for additional amounts to be appropriated as necessary to fund the operations of the NIGC. Currently, the NIGC is not funded by any federal appropriations and the enactment of this section is not expected to have an effect on the federal budget.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On July 14, 2004, the Committee, in an open business session, considered S. 1529 and approved a substitute amendment to the bill, and ordered S. 1529, as amended, favorably reported to the full Senate with a recommendation that the bill do pass. Senator Reid was recorded as a nay vote.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 1529 as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 10, 2004.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1529, the Indian Gaming Regulatory Act Amendments of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

ELIZABETH ROBINSON
(For Douglas Holtz-Eakin, Director).

Enclosure.

S. 1529—Indian Gaming Regulatory Act Amendments of 2004

S. 1529 would amend the Indian Gaming Regulatory Act (IGRA) to change the operations of the National Indian Gaming Commission (NIGC) and the regulation of gambling on Indian reservations. The legislation would increase the fees paid to the commission by tribal gambling operators; require the commission to prepare a strategic planning report; revise the salary schedules, procedures, and authorities of the commission; expand the use of background checks for personnel involved in tribal gambling; and require manufacturers and dealers of electronic gambling aids to register with the NIGC. The legislation also would impose new requirements on certain tribal and state compacts.

CBO estimates that implementing S. 1529 would cost $10 million over the 2005–2009 period, assuming appropriation of the amounts authorized by the bill. In addition, S. 1529 would increase the current limitation ($8 million) on the NIGC's annual assessment on Indian gambling operations. Because the NIGC has authority to spend such assessments without further appropriation, however, any increase in fee collections would not have a significant net impact on the federal budget.

S. 1529 contains intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA), but CBO cannot determine whether the total cost of these mandates would exceed the annual threshold established in that act ($60 million in 2004, adjusted annually for inflation). The bill would impose new requirements for compacts between tribes and states, which must be approved by the Department of the Interior (DOI) before tribes can open casinos. CBO has no basis for estimating the impact of this mandate on state, local, and tribal governments. The bill also would place some additional administrative duties on tribes with gaming operations and would increase the fees they must pay to the NIGC, and CBO estimates that the cost of those mandates would be about $5 million per year.

S. 1529 also contains private-sector mandates as defined in UMRA. The bill would impose private-sector mandates on individuals selling or leasing certain gambling devices to Indian casinos and on private-sector entities that operate those gambling devices under tribal management contracts. CBO estimates that the direct cost of mandates in the bill would fall well below the annual threshold established by UMRA for private-sector mandates ($120 million in 2004, adjusted annually for inflation).

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1529 is shown in the following table. The costs of this legislation fall within budget function 800 (general government).

	By fiscal year, in millions of dollars—				
	2005	2006	2007	2008	2009
CHANGES IN SPENDING SUBJECT TO APPROPRIATION [1]					
Authorization Level	2	2	2	2	2
Estimated Outlays	2	2	2	2	2

[1] Enacting this bill also would increase revenues and direct spending, however, CBO expects the net budgetary impact of these increases would be negligible in each year.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2005, that the authorized amounts will be provided for each year, and that spending will follow historical patterns for the NIGC and its programs.

The bill would authorize the appropriation of $2 million annually for the operations of the NIGC. There was no appropriation for the NIGC in fiscal year 2004. Appropriation of the authorized amounts would cost a total of $10 million over the 2005–2009 period.

Estimated impact on state, local, and tribal governments: S. 1529 contains several intergovernmental mandates as defined in UMRA. Because of uncertainty about the cost of one mandate affecting state and tribal gaming compacts, CBO cannot determine whether the total cost of these mandates exceeds the annual threshold established in that act ($60 million in 2004, adjusted annually for inflation). We estimate that the total cost of other mandates in the bill would be about $5 million per year.

STATE-TRIBAL COMPACTS

S. 1529 would add new requirements for compacts between states and tribes that govern gaming activities on tribal land. Such compacts must be approved by DOI before tribes can operate casinos. The new requirements would limit the extent to which tribal gaming revenues could be shared with affected state and local governments. This change would not affect existing compacts. Under current law, tribes and states are under a mandate to negotiate these compacts before tribes may operate casinos, and a change in the standards governing those compacts could alter the cost of that mandate. However, because of great uncertainty about how those changes would be interpreted and implemented by DOI and because of the complex nature of negotiations between states and tribes, CBO cannot estimate how the new requirements would affect either total revenues from tribal gaming or the distribution of those revenues between tribes and other governments.

NIGC FEES

IGRA currently imposes a mandate on tribes with gaming operations to pay fees to the NIGC. This bill would require NIGC to establish a new rate structure and would increase the annual cap on total fees. By increasing the cap, the bill would increase the cost of the mandate by about $5 million a year over the next five years. The new fee schedule would result in a reallocation of the burden of this mandate among gaming tribes.

OTHER ADMINISTRATIVE MANDATES

S. 1529 would require tribes to conduct background investigations of tribal gaming commissioners and employees of tribal gaming commissions and to register with the NIGC if they use certain

types of electronic gambling machines—both are mandates as defined by UMRA. Under current law, tribes must conduct background investigations of a large number of gaming officials and employees. Based on information provided from the NIGC, CBO estimates that the additional number of investigations required as a result of this bill would be small. The cost of each investigation would be no more than $50, so the cost of complying with the first mandate would not be significant. The registration requirement would primarily apply to electronic bingo machines. Based on information from the NIGC and the National Indian Gaming Association, CBO estimates that this mandate also would impose no significant costs on the tribes.

Estimated impact on the private sector: S. 1529 contains private-sector mandates as defined in UMRA. The bill would require sellers, dealers, buyers, and lessors to register class II gambling devices with the National Indian Gaming Commission. Class II gambling devices include devices used to play games such as electronic bingo. The bill would impose mandates on individuals selling or leasing class II gambling devices to Indian casinos and on private-sector entities that enter into contracts with tribes to manage those casinos. CBO estimates that the direct cost of mandates in the bill would fall well below the annual threshold established by UMRA for private-sector mandates ($120 million in 2004, adjusted annually for inflation).

S. 1529 would require sellers, dealers, buyers, and lessors of class II gambling devices to number and label the devices and maintain monthly records for the devices. The monthly records must include the number of the device, the manufacturer's legal and trade name, the date of manufacture, and, in the case of transfer, the name of the person to whom the device is transferred and the date of transfer. According to the NIGC, the gaming companies that currently provide class II gambling devices to Indian casinos already have the infrastructure necessary for this. Under current law, those companies are subject to similar registration requirements for class III gambling devices, and thus, the costs for registering the class II gambling devices are estimated to be minimal. Some gaming companies already may be registering class II devices.

Private-sector entities managing Indian casinos that operate class II devices also would be subject to the registration requirements of S. 1529. The cost for registration and recordkeeping for class II gambling devices is expected to be minimal for tribes that operate casinos. Since a smaller number of Indian casinos are run by private contractors, CBO expects that the cost of this mandate would be minimal for those entities, as well.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Marjorie Miller; and Impact on the Private Sector: Selena Caledera.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

REGULATORY AND PAPERWORK IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in car-

rying out the bill. The Committee has concluded that S. 1529 will reduce regulatory or paperwork requirements and impacts.

EXECUTIVE COMMUNICATIONS

The Committee has received no communications from the Executive Branch regarding S. 1529.

COMMITTEE CORRESPONDENCE

DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, June 15, 2004.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This presents the views of the Department of Justice on S. 1529, the "Indian Gaming Regulatory Act Amendments of 2003." We generally defer to other, more directly concerned parties regarding the need for, or desirability of, enactment of this legislation. We do, however, oppose enactment of section 2(a) of S. 1529.

Section 2(a) of S. 1529 would amend section 4(7) of the Indian Gambling Regulatory Act (IGRA) (25 U.S.C. § 2703(7)) to provide that no provision of the Gambling Devices Act, 15 U.S.C. §§ 1171–1177, shall apply to "any gambling described in subparagraph (A)(i) [Class gaming] for which an electronic aid, computer, or other technological aid is used in connection with gaming." The Department of Justice enforces the Gambling Devices Act.

The issue of the application of the Gambling Devices Act to Class II gaming under IGRA was the subject of two recent appellate court decisions, *United States* v. *Santee Sioux Tribe of Nebraska* and *Ashcroft* v. *Seneca-Cayuga Tribe of Oklahoma,* that reached differing conclusions. In both of these cases, the United States argued that under existing law the Gambling Devices Act does apply to Class II gaming with technological aids. The Supreme Court recently denied certiorari in these cases. The denial of certiorari, however, does not clarify the issue, and a conflict still exists between the Circuit Courts of Appeal. The Department of Justice believes that clarification of this issue is needed, but would favor an amendment clarifying that the Gambling Devices Act does apply to Class II gambling, rather than the approach taken in S. 1529.

The approach to clarifying this issue taken by S. 1529 provides that the Gambling Devices Act does not apply to Class II gambling. Section 2(a) of S. 1529 thus authorizes the use of gambling devices, as that term is defined in 15 U.S.C. § 1171 of the Gambling Devices Act, for Class II gaming. The Department believes that this amendment may well result in more lucrative Class II gaming with the use of high speed machines that are virtually indistinguishable to a player from machines used in Class III gaming. When IGRA was first enacted, Class III gaming was viewed as including more lucrative forms of gambling, including high-speed machine gaming. In order to avoid criminal influences and corruption, Congress required increased regulation over Class III gaming. Included in the enhanced regulatory scheme was the necessity of a tribal-state compact that balanced the interests of the affected tribe and state

and required the approval of the Secretary of the Interior. Since IGRA's enactment, the technology has changed substantially, so that machines used in Class II gaming can be as fast and as lucrative as Class III machines and, from a player's perspective, may be virtually indistinguishable. Because the machines used in Class II and Class III gaming are becoming increasingly indistinguishable in their play, they should be subject to the same or similar levels of regulation and approval.

The Department of Justice cannot support this amendment to IGRA, as it removes the current restrictions on the use of gambling devices in Class II gambling without substituting an increased level of regulation and approval that at least approximates that surrounding the use of similar machines in the Class III context. As noted above, in examining the alternative ways in which the issue of the application of the Gambling Devices Act to Class II gaming can be clarified, the Department of Justice favors amending IGRA to clarify that the Gambling Devices Act does apply, and that, therefore, gambling devices could only be used in conjunction with gaming authorized pursuant to a valid tribal-state compact. That being said, the Department of Justice might support an amendment that removes the Gambling Devices Act's prohibition on the use of gambling devices in Class II gaming, if that prohibition were replaced with adequate approval and regulation that recognizes the concerns raised by the high speed and lucrative nature of the gambling. The Department of Justice would be happy to work with the Committee in order to devise appropriate regulation.

In addition, S. 1529 would create a blanket repeal of the Gambling Devices Act's prohibitions pertaining to Class II gaming. We oppose the blanket repeal of all of the provisions of the Gambling Devices Act for "technological aids" for Class II gaming. As drafted, Section 2(a) would go further in its repeal of the Gambling Devices Act than what IGRA currently provides for Class III gaming. IGRA currently provides repeal of Section 1172's transportation prohibition and Section 1175's prohibition on possession and use of gambling devices for Class III gaming. The other provisions of the Gambling Devices Act, such as Section 1173's requirement to register annually with the Attorney General and Section 1174's shipping requirements, remain in effect for Class III gaming under IGRA. S. 1529 should not provide a broader repeal of the Gambling Devices Act for Class II gaming with technological aids than what IGRA currently provides for Class III gaming.

Finally, S. 1529 creates additional confusion as to which machines should be considered Class II gaming and which should not be. Section 2703(7) of IGRA states that Class II gaming does not include "a slot machine of any kind" while another provision will state that the prohibition against the use of gambling devices, including slot machines, does not apply to Class II gaming "for which an electronic aid, computer, or other technological aid is used with the gaming." Class II gaming with technological aids, in some cases, falls within the term "a slot machine of any kind." Enacting S. 1529 with this provision will not help clarify what Congress intends to constitute Class II gaming. Instead, it will add to the confusion by creating conflicting provisions within the same statute.

Thank you for the opportunity to comment on this legislation. Please do not hesitate to call on us to answer any questions you

might have regarding the suggestions discussed in this letter, or if you would like the Department of Justice to provide any additional assistance. We look forward to discussing this matter with you further. The Office of Management and Budget has advised us that there is no objection from the standpoint of the Administration's program to the presentation of this report.

Sincerely,

WILLIAM E. MOSCHELLA,
Assistant Attorney General.

MINORITY VIEWS OF SENATOR REID

As one of the original authors of the Indian Gaming Regulatory Act of 1988 (IGRA), Pub. L. 100–497, 25 U.S.C. § 2501 et seq., I was proud of the balance we achieved among the different interests in Indian gaming. Tribes, local, State and the federal governments all have legitimate interest in this subject, and the concerns of each were accounted for in that original legislation. The Indian Gaming Regulatory Act Amendments of 2004 (S. 1529), however, fundamentally upsets that balance and fails to account for the significant State and local concerns that have arisen as Indian gaming has grown dramatically in the years since IGRA's passage. For the reasons explained below, I oppose S. 1529. I hope to work with my colleagues to address the concerns I raise in this report before further action.

It should be noted at the outset that while the Committee report characterizes the changes to IGRA's Class II and Class III regulatory structure as "technical" and portrays federal court cases on the subject as settled, that is not the case. In fact, there is a split in federal circuit court cases on the Class II/Class III issue addressed by S. 1529, and no Supreme Court disposition has been rendered on that subject. In addition, while the report notes that no Executive Branch communications were received on S. 1529, I have included a letter from the U.S. Department of Justice to the Chairman expressing the Department's opposition to this legislation. Finally, the Committee's characterization of Congressional intent regarding the Johnson Act is not accurate. A plain reading of IGRA confirms that Congress did not waive the Johnson Act for Class II games.

CONCERNS WITH S. 1529

There are three main problems with S. 1529 and each are explained in turn below. First, S. 1529 makes it easier to conduct Class II gaming that is effectively the same as Class III. This enables the evasion of Class III compacting and thereby the prime vehicle for the consideration and satisfaction of State and local concerns. Second, S. 1529 would make it difficult, if not impossible, for State and local governments to recover costs associated with Class III gaming as provided for under current law. Third, S. 1529 does nothing to deal with the increasing propensity of some Tribes to seek far-flung, non-reservation lands on which to conduct gaming free of regulation to the detriment of State and local governments and established Tribes in those areas.

I. Class II and Class III Gaming

As the Committee report notes, IGRA created a fundamental legal distinction between Class II and Class III games. Under the law, Tribes were permitted to engage in Class II gaming, defined

as bingo and like games, with modest oversight. Class III gaming, defined as fast-paced games like slots and other casino games, would be more heavily regulated by permitting their use only when the subject of a Tribal-State compact. This process was intended to provide the State with the opportunity to regulate Tribal enterprises that were functionally equivalent to casinos. It was also intended to provide an even playing field, prevent organized crime, ensure consumer protection, and guarantee the consideration of State and local impacts of full-fledged gaming operations.

The greater rigor of Class III regulation, however, provided a strong incentive to design and characterize bingo and similar machines which fundamentally played like slot machines as Class II machines so as to avoid such regulation. The financial incentive to do so is great. Slot machines and games made to play like them represent roughly 70% of an average casino's profit.

One disincentive to blurring the lines between Class II and Class III is the Johnson Act. Enacted in the 1950s, the Johnson Act prohibits the use of "gambling devices" on Tribal lands.[1] While IGRA lifted this Johnson Act limitation for Class III games, it did not do so for Class II games. The statute itself, the Senate Report accompanying IGRA, and my colloquy with Senator Inouye at the time IGRA was debated all confirm that IGRA only repealed the Johnson Act prohibition for Class III games. For example, the Senate Report confirms that IGRA only permitted the use of Class II games on reservations if those games were "not otherwise prohibited by federal law" and specifically cited "15 U.S.C. 1175" (the Johnson Act) as such a restriction. S. Rept. No. 100–446.

In the colloquy on the topic, Senator Inouye responds to my question asking the Senator to confirm the understanding that the Johnson Act would still apply to limit Class II gaming by saying: "The bill as reported by the Committee would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact with the state in which the tribe is located [i.e., class III]. The bill is not intended to amend or otherwise alter the Johnson Act in any way." Cong. Rec. 24024 (September 15, 1988).

Accordingly, the Committee's assertion that Congress intended to waive the Johnson Act for Class II games is both inconsistent with the statute and its legislative history.

As interpreted by the Department of Justice, the Johnson Act interacts and may be harmonized with IGRA's authorization of Class II games by prohibiting the use of electronic slot-machine equivalents, but enabling Tribes to use technological aids like telecommunications technology to enable bingo players to play bingo against one and other at different locations. The Committee Report on IGRA lends credence to this view.[2]

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[1] A "gambling device" under Johnson Act is "any so-called 'slot machine' or any other machine or mechanical device an essential part of which is a drum or reel with an insignia thereon and . . . which when operated may deliver, as the result of the application of an element of chance, any money or property, or . . . by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property. . . ."

[2] "The Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, televison or satellite may be a reasonable approach for tribes to take.

Continued

Despite this clarity, the Committee is correct that federal courts have found that Congress must have meant to waive the Johnson Act for Class II games. What the report fails to note is that another federal circuit court has decided the issue the other way, finding that the Johnson Act does indeed apply.[3] The Supreme Court has not stepped in to resolve the conflict between circuits.

S. 1529's repeal of the Johnson Act's limitation on Class II games is the source of the Department of Justice's opposition to the bill. In the Department's June 15, 2004 letter to the Chairman, they put it this way: "[Justice] cannot support this amendment to IGRA, as it removes the current restrictions on the use of gambling devices in class II gambling without substituting an increased level of regulation an approval that at least approximates that surrounding the use of similar machines in the class III context."

That is, the bill removes regulation of Class II machines and doesn't replace it with anything. It breaks down the fundamental policy trade off in IGRA between Class II and Class III to the detriment of State and local governments.

II. State and local impacts in Class III Compacting

After liberalizing the definition of Class II gaming, S. 1529 weakens the requirements for Class III compacting. IGRA provides that compacts may provide for revenue sharing agreements between the Tribe and the compacting State. Such agreements allow for the consideration and resolution of State and local cost and other impacts. As Tribal gaming has dramatically increased over the last twenty years, the need for these agreements is greater, not smaller.

Accordingly, S. 1529 goes in the wrong direction by placing new restrictions on revenue sharing agreements, making it more difficult for State and local governments to form these agreements. More specifically, S. 1529 provides that the Secretary "shall not" approve a compact providing for such assessments unless a number of Tribal fiscal considerations are met first, including a catchall that the "general welfare" of the tribe is first satisfied.

III. Reservation Shopping

While S. 1529's repeal of the Johnson Act and weakening of Class III compacting would greatly ease the requirements on Indian gaming to the detriment of State and local governments, the bill is silent on one of their most significant concerns: reservation shopping. Over the last decade, the propensity for reservation shopping has grown in tandem with the profitability of certain Indian gaming enterprises.

Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games. . . . S. Rept. No. 100–446 at 9.

[3] The U.S. Federal Court of Appeals for the Eighth Circuit—after a review of the express text of IGRA and the legislative history—determined that the Johnson Act prohibition on gambling devices and IGRA's sanctioning of Class II devices could be read together. In this court's view, IGRA did not impliedly repeal the Johnson Act. The court determined that you could have a bingo-type class II device that did not fall within the gambling device definition (and prohibition) of the Johnson Act. *U.S.* v. *Santee Sioux Tribe of Nebraska,* 324 F. 3d 607 (8th Cir. 2003). *See also Cabazon Band of Mission Indians,* 14 F.3d 633, 635, n. 3 (D.C. Cir. 1994) (IGRA did not repeal the Johnson Act for class II games). For example, the use of telecommunications equipment to connect electronic bingo players could be both a permissible Class II game and not fall within the Johnson Act.

Tribes seeking lands with speculative connection in areas where a casino might be profitably run have increased dramatically. One of the most notable current disputes involves and Oklahoma Tribe seeking land in Denver for the operation of a casino. That effort is strongly opposed by State and local officials. In addition, many Tribes oppose these efforts, as reservation shopping threatens to bring gaming enterprises near well-established Tribes and their reservations.

Any amendment to IGRA must deal with this new phenomena to address significant Tribal, State, Federal and local concerns.

IV. Conclusion

Since the passage of IGRA almost twenty years ago, the explosion of Indian gaming has benefitted Tribes throughout the nation, providing a critical avenue for economic development which should be supported. With this great growth, however, have come concerns with how and where such gaming is conducted. I look forward to working with the Committee to ensure that S. 1529 is amended to follow in the example of its predecessor by carefully balancing the important Tribal, local, State and federal concerns at issue here.

HARRY REID.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill S. 1529, as ordered reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Public Law 100–497

AN ACT To regulate gaming on Indian lands

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * * * * * *

DEFINITIONS

SEC. 4. For purposes of this Act—* * *

(7) * * *

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this subparagraph [enacted Dec. 17, 1991], any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 11(d)(3) [of the Indian Gaming Regulatory Act (25 U.S.C. 2710(d)(3))].

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the

gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(G) TECHNOLOGICAL AIDS.—Notwithstanding any other provision of law, sections 1 through 7 of the Act of January 2, 1951 (commonly known as the "Gambling Devices Transportation Act") (15 U.S.C. 1171 et seq.), shall not apply to any gaming described in subparagraph (A)(i) for which an electronic aid, computer, or other technological aid is used in connection with the gaming.

* * * * * * *

NATIONAL INDIAN GAMING COMMISSION

SEC. 5. * * *

[(c) Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6).**]**

(C) VACANCIES.—

(1) IN GENERAL.—A vacancy on the Commission shall be filled in the same manner as the original appointment.

(2) SUCCESSORS.—Unless a member of the Commission is removed for cause under subsection (b)(6), the member may—

(A) be reappointed; and

*(B) serve after the expiration of the term of the member until a successor is appointed. * * **

(e) The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence or *disability* of the Chairman.

* * * * * * *

POWERS OF THE CHAIRMAN

SEC. 6. * * *

(c) DELEGATION.—The Chairman may delegate to an individual Commissioner any of the authorities described in subsection (a).

(d) APPLICABLE AUTHORITY.—In carrying out any function under this section, a Commissioner serving in the capacity of the Chairman shall be governed by—

(1) such general policies as are formally adopted by the Commission; and

(2) such regulatory decisions, findings, and determinations as are made by the Commission.

POWERS OF THE COMMISSION

SEC. 7. * * *

(c) STRATEGIC PLAN.—

(1) IN GENERAL.—The Commission shall develop a strategic plan for use in carrying out activities of the Commission.

(2) REQUIREMENTS.—The strategic plan shall include—

(A) a comprehensive mission statement describing the major functions and operations of the Commission;

(B) a description of the goals and objectives of the Commission;

(C) a description of the general means by which those goals and objectives are to be achieved, including a description of the operational processes, skills, and technology, and the human resources, capital, information, and other resources required to achieve those goals and objectives;

(D) a performance plan for achievement of those goals and objectives that is consistent with—

(i) other components of the strategic plan; and

(ii) section 1115 of title 31, United States Code;

(E) an identification of the key factors that are external to, or beyond the control of, the Commission that could significantly affect the achievement of those goals and objectives; and

(F) a description of the program evaluations used in establishing or revising those goals and objectives, including a schedule for future program evaluations.

(3) BIENNIAL PLAN.—

(A) PERIOD COVERED.—The strategic plan shall cover a period of not less than 5 fiscal years beginning with the fiscal year in which the plan is submitted.

(B) UPDATES AND REVISIONS.—The strategic plan shall be updated and revised biennially.

(d) REGISTRATION OF TECHNOLOGICAL AIDS.—

(1) IN GENERAL.—The Commission shall require the registration of—

(A) any electronic aid, computer, or other technological aid described in section 4(7)(G) that is intended for use on Indian land, and

(B) any manufacturer, seller, dealer, buyer, lessor, or any other person that is engaged in the business of repairing, reconditioning, or reprogramming such technological aids.

(2) REGISTRATION OF MANUFACTURERS AND DEALERS.—A manufacturer, seller, dealer, buyer, lessor, or any other person that intends to be engaged in the business of repairing, reconditioning, or reprogramming any electronic aid, computer, or other technological aid described in section 4(7)(G) that is intended for use on Indian land in a calendar year shall register with the Commission not later than November 30 of the preceding calendar year.

(3) NUMBERING AND RECORDS FOR TECHNOLOGICAL AIDS.—

(A) MANUFACTURERS.—A manufacturer of an electronic, computer, or other technological aid described in section 4(7)(G) shall—

(i) sequentially number each technological aid; and

(ii) permanently affix to the technological aid, so as to be clearly visible, the serial number, legal and trade name of the manufacturer, and date of manufacture of the technological aid.

(B) PERSONS REQUIRED TO REGISTER.—

(i) NUMBERING.—A person required to register under paragraph (2) shall—

(I) sequentially number each electronic aid, computer, or other technological aid within the physical possession of the person, if a manufacturer's serial number has not been previously affixed pursuant to paragraph (A); and

(II) permanently affix to the technological aid, so as to be clearly visible, the serial number, legal name and trade name of the registrant, and the date on which the serial number is affixed.

(ii) RECORDS.—A person required to register under paragraph (2) for any calendar year shall, on and after the date of registration or the first day of that year (whichever occurs later), maintain a record by calendar month, for all periods thereafter in the year, of each electronic aid, computer, or other technological aid within the possession of the registrant that discloses—

(I) the information required by subparagraph (A) and clause (i); and

(II) on transfer of possession of the technological aid, the legal and trade name of the person to which possession is transferred and the date of the transfer.

(4) CIVIL PENALTIES.—A person that fails to comply with this subsection shall be subject to the penalties prescribed in section 14 as if the person were a management contractor engaged in gaming.

[(c)**]** *(e)* The Commission shall submit a report with minority views, if any, to the Congress on December 31, 1989, and every two years thereafter. The report shall include information on—

(1) whether the associate commissioners should continue as full or part-time officials;

(2) funding, including income and expenses, of the Commission;

(3) recommendations for amendments to **[**the Act; and**]** *this Act*;

(4) the strategic plan for activities of the Commission described in subsection (c); and

[(4)**]** *(5)* any other matter considered appropriate by the Commission.

COMMISSION STAFFING

SEC. 8.(a) The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for **[**GS–18 of the General Schedule under section 5332**]** *level IV of the Executive Schedule under section 5318* of title 5, United States Code.

[(b) THE CHAIRMAN**]** *(b) STAFF.—*

(1) IN GENERAL.—The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. **[**Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53

of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS–17 of the General Schedule under section 5332 of that title.]

(2) COMPENSATION.—

(A) IN GENERAL.—Staff appointed under paragraph (1) shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53, of title 5, United States Code, relating to General Schedule pay rates.

(B) MAXIMUM RATE OF PAY.—The rate of pay for an individual appointed under the paragraph (1) shall not exceed the rate payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

[(c) The Chairman may procure temporary and intermittent services under section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS–18 of the General Schedule.]

(c) TEMPORARY SERVICES.—

(1) IN GENERAL.—The Chairman may procure temporary and intermittent services under section 3109 of title 5, United States Code.

(2) MAXIMUM RATE OF PAY.—The rate of pay for an individual for service described in paragraph (1) shall not exceed the daily equivalent of the maximum rate payable for level IV of the Executive Schedule under section 5318 of title 5, United States Code.

* * * * * * *

TRIBAL GAMING ORDINANCES

SEC. 11. * * *

(b) * * *

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that— * * *

(F) there is an adequate system which—

[(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and]

(i) ensures that—

(I) background investigations are conducted on the tribal gaming commissioners, key tribal gaming commission employees, and primary management officials and key employees of the gaming enterprise; and

*(II) oversight of primary management officials and key employees is conducted on an ongoing basis; and * * **

(d) * * *

[(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.]

(4) REVENUE APPORTIONMENT.—

(A) IN GENERAL.—Except for any assessments that may be agreed to under paragraph (3)(C)(iii) , nothing in this section confers on a State or any political subdivision of a State authority to impose any tax, fee, charge, or other assessment on an Indian tribe or on any other person or entity authorized by an Indian tribe to engage in a class III activity.

(B) NEGOTIATIONS.—No State may refuse to enter into the negotiations described in paragraph (3)(A) based on the lack of authority in a State, or political subdivision of a State, to impose such a tax, fee, charge, or other assessment.

(C) APPORTIONMENT OF REVENUES.—The Secretary may not approve any Tribal-State compact or other agreement that includes an apportionment of revenues with a State or local government unless—

(i) in the case of apportionment with local governments, the total amount of net revenues exceeds the amounts necessary to meet the requirements of subsection (b)(2)(B)(i), but only to the extent that the excess revenues reflect the actual costs incurred by affected local governments as a result of the operation of gaming activities; or

(ii) in the case of apportionment with a State—

(I) the total amount of net revenues—

(aa) exceeds the amounts necessary to meet the requirements of clauses (i) and (iii) of subsection (b)(2)(B) and clause (i) of this subparagraph, if applicable; and

(bb) is in accordance with regulations promulgated by the Secretary under subparagraph (D); and

(II) a substantial economic benefit is rendered by the State to the Indian tribe.

(D) REGULATIONS.—Not later than 18 months after the date of enactment of this subparagraph, the Secretary shall promulgate regulations to provide guidance to Indian tribes and States on the scope of allowable assessments negotiated under paragraph (3)(C)(iii) and the apportionment of revenues negotiated in accordance with subparagraph (C).

(E) NO EFFECT ON EXISTING AGREEMENTS.—Nothing in this paragraph affects any existing Tribal-State compact or other agreement providing for an apportionment of reve-

nues with a State, local government, or other Indian tribe.
* * *

(7) * * *

(B) * * *

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe *not later than 180 days after notification is made,* in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this Act, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction. * * *

[(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 12.**]**

(9) EXTENSION OF NEGOTIATING TIMEFRAME.—Class III gaming activities conducted by an Indian tribe on Indian land shall be lawful under this Act for up to 180 days after expiration of a Tribal-State compact if the Indian tribe signatory to the compact certifies to the Secretary that—

(A) the Indian tribe requested a new compact not later than 90 days before expiration of the compact; and

(B) a new compact has not been agreed on.

[MANAGEMENT CONTRACTS

[SEC. 12. (a)(1) Subject**]**

SEC. 12. MANAGEMENT CONTRACTS.

(a) CLASS II GAMING AND CLASS III GAMING ACTIVITIES; INFORMATION ON OPERATORS.—

(1) *GAMING ACTIVITIES.—Subject* to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a **[**class II gaming activity that the Indian tribe may engage in under section 11(b)(1)**]** *class II gaming activity in which the Indian tribe may engage under section 11(b)(1), or a class III gaming activity in which the Indian tribe may engage under section 11(d),* but, before approving such contract, the Chairman shall require and obtain the following information—

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corpora-

tion and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

[(2) Any person] *(2) REQUIREMENT TO RESPOND.—Any person* listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

[(3) For purposes] (3) *REFERENCES TO MANAGEMENT CONTRACTS.—For purposes* of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

* * * * * * *

[COMMISSION FUNDING

[SEC. 18. (a)(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each gaming operation that conducts a class II or class III gaming activity that is regulated by this Act.

[(2)(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be—

[(i) no more than 2.5 percent of the first $1,500,000, and

[(ii) no more than 5 percent of amounts in excess of the first $1,500,000, of the gross revenues from each activity regulated by this Act.

[(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $8,000,000.

[(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.]

SEC. 18. COMMISSION FUNDING.

(a) FEES.—

(1) FEE SCHEDULE.—

(A) IN GENERAL.—Except as provided in this section, the Commission shall establish a schedule of fees to be paid annually to the Commission, on a quarterly basis, by each gaming operation that conducts a class II gaming or class III gaming activity that is regulated, in whole or in part, by this Act.

(B) RATES.—The rate of fees under the schedule established under subparagraph (A) that are imposed on the gross revenues from each operation that conducts a class II

gaming or class III gaming activity described in that paragraph shall be (as determined by the Commission)—

(i) a progressive rate structure levied on the gross revenues in excess of $1,500,000 from each operation that conducts a class II gaming or class III gaming activity; or

(ii) a flat fee levied on the gross revenues from each operation that conducts a class II gaming or class III gaming activity.

(C) TOTAL AMOUNT.—Notwithstanding any other provision of law, the total amount of all fees imposed during any fiscal year under the schedule established under subparagraph (A) shall not exceed—

(i) $11,500,000 for fiscal year 2005;

(ii) $12,000,000 for each of fiscal years 2006 and 2007; and

(iii) $13,000,000 for each of fiscal years 2008 and 2009.

[(4)**]** *(2)* Failure to pay the fees imposed under the schedule established under paragraph (1) shall, subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming.

[(5)**]** *(3)* To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

[(6)**]** *(4)* For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b) FEE PROCEDURES.—

(1) IN GENERAL.—By a vote of not less than 2 members of the Commission, the Commission shall adopt the schedule of fees provided for under this section.

(2) FEES ASSESSED.—In assessing and collecting fees under this section, the Commission shall take into account the duties of, and services provided by, the Commission under this Act.

(3) REGULATIONS.—The Commission shall promulgate such regulations as are necessary to carry out this subsection.

[(b)**]** *(c)*(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by **[**section 19**]** *section 24*, in an amount equal the amount of funds derived from assessments authorized by subsection (a) for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be in-

cluded as a part of the budget request of the Department of the Interior.

[AUTHORIZATION OF APPROPRIATIONS

[SEC. 19(a) Subject to section 18, there are authorized to be appropriated, for fiscal year 1998, and for each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 18(a).

[(b) Notwithstanding section 18, there are authorized to be appropriated to fund the operation of the Commission, $2,000,000 for fiscal year 1998, and $2,000,000 for each fiscal year thereafter. The amounts authorized to be appropriated in the preceding sentence shall be in addition to the amounts authorized to be appropriated under subsection (a).]

SEC. 19. TRIBAL CONSULTATION.

In carrying out this Act (including the use of negotiated rulemaking with tribal governments and the use of tribal advisory committees in developing regulatory policies, standards, and definitions), the Secretary, Secretary of the Treasury, and Chairman of the Commission shall involve and consult with Indian tribes to the maximum extent practicable, as appropriate, in a manner that is consistent with the Federal trust and the government-to-government relationship that exists between Indian tribes and the Federal Government.

* * * * * * *

[CRIMINAL PENALTIES

[SEC. 23. Chapter 53]

SEC. 23. CRIMINAL PENALTIES.

(a) IN GENERAL.—Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

* * * * * * *

[CONFORMING AMENDMENT

[SEC. 24. The table]

(b) CONFORMING AMENDMENT.—The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following:

* * * * * * *

SEC. 24. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—Subject to section 18, there is authorized to be appropriated to carry out this Act, for fiscal year 1998 and each fiscal year thereafter, an amount equal to the amount of funds derived from the assessments authorized by section 18(a).

(b) ADDITIONAL AMOUNTS.—Notwithstanding section 18, in addition to amounts authorized to be appropriated by subsection (a), there are authorized to be appropriated $2,000,000 to fund the oper-

ation of the Commission for fiscal year 1998 and each fiscal year thereafter.

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