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INDIAN GAMING REGULATORY ACT AMENDMENTS OF 2006

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Mr. MCCAIN, from the Committee on Indian Affairs, submitted the following

R E P O R T

[To accompany S. 2078]

The Committee on Indian Affairs, to which was referred the bill, (S. 2078), to amend the Indian Gaming Regulatory Act to clarify the authority of the National Indian Gaming Commission to regulate Class III gaming, to limit the lands eligible for gaming, 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. 2078, the Indian Gaming Regulatory Act Amendments of 2006, is to clarify and amend provisions of the Indian Gaming Regulatory Act of 1988, Public Law 100–497, 25 U.S.C. §2501 et seq. ("IGRA"), applicable to the Department of Interior ("DoI"), the National Indian Gaming Commission ("NIGC"), 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 gen-

erated 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 Public Law 83–280 states with 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. A 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] Another 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 assure 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

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

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 regulation by the tribes;
- Class II, which refers to bingo, games similar to bingo, pulltabs, and some non-banked card games, and for which the IGRA provides primary day-to-day regulation by the tribes and regulatory oversight and enforcement 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 regulation between tribes and states through mutually agreed upon compacts, and over which the NIGC exercises oversight and enforcement.

The IGRA created the NIGC, a 3-member independent Federal regulatory agency charged with oversight of Indian 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 approving tribal gaming ordinances.[7]

Pursuant to the compact provisions of the IGRA, many Indian tribes and states developed sophisticated regulatory frameworks to oversee tribal gaming operations. These tribes and states have put in place effective standards for the conduct of Class III games, as well as financial and accounting standards for their operations.

4. The Seminole decision

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 soon after enactment of the IGRA. Several states, including Florida, asserted legal challenges to the IGRA rather than enter into good faith negotiations for compacts. 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 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"[8] for the regulation of Class III gaming in states where such gaming is permissible. Several states have challenged the constitutionality of the Secretary's authority to issue

[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.
[8] *See* infra Note 1, § 11(d)(7)(B)(vii).

such procedures. To date the Secretary has not issued procedures for any tribe.

5. The Indian Gaming industry in 2006: 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 Indian gaming would become the nearly $20 billion[9] 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 eighteen years, the IGRA has been amended only once. In 1997, Committee on Indian Affairs Chairman Campbell introduced an amendment that authorized the NIGC to collect increased fees including, for the first time, fees from Class III operations, which would fund the Commission's regulatory efforts in Indian Country.[10] 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. It has opened five field offices and employed additional staff to oversee tribal gaming operations across the country and fulfill the NIGC's monitoring responsibilities.[11]

Most recently, on May 12, 2006, the President signed Public Law 109–221, which contained the operative provisions of S. 1295, the National Indian Gaming Commission Accountability Act of 2005. S. 1295 was introduced by Senator McCain on June 23, 2005, to amend Section 18 of the IGRA to authorize the NIGC to collect fees from all Class II and Class III operations at a rate not to exceed .08 percent of the gross revenues from each such operation. As a result, for a year in which the Indian gaming industry has gross revenues of $20 billion, the new fee structure provides the NIGC with potential funding of $16 million.

AN OVERVIEW OF THE PROVISIONS OF S. 2078

On April 27, 2005, Chairman John McCain held an oversight hearing on Indian gaming. At that hearing, Senator McCain stated that the IGRA had not been substantively amended since its enactment in 1988, nearly 17 years before, and expressed his intention to conduct a series of oversight hearings into the IGRA, its implementation and the status of the Indian gaming industry. Subsequently, on May 18, July 27, and September 21, 2005, the Committee held additional oversight hearings on the IGRA, receiving

[9] *See* National Indian Gaming Commission, Press Release, July 13, 2005.

[10] 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.

[11] *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 pp. 3–4 (2003) (Testimony of Philip Hogen, Chairman, National Indian Gaming Commission).

testimony from the DoI, NIGC, local government officials, local community groups, and Indian tribes engaged in gaming.

On November 18, 2005, S. 2078 was introduced by Senator McCain. Following introduction of the bill, the Committee held additional oversight hearings on February 1, and February 28, 2006. On March 8, 2006, the Committee held a legislative hearing on S. 2078.

The hearings held in 2005 provided the Committee with significant information on much-needed updates and necessary improvements to the IGRA. S. 2078 was drafted based upon that information and information received from other parties. The legislative hearing held on S. 2078 provided additional critical feedback on the bill language. Based on this feedback, on March 29, 2006, the Committee approved a substitute amendment which addressed concerns raised about the bill's language by Committee Members.

As approved by the Committee, S. 2078 provides several amendments to the IGRA, including clarifications of the authorities and responsibilities of the NIGC, additional oversight over significant gaming contracts (and parties to those contracts), and several clarifications and amendments to the provisions providing eligibility for gaming under the IGRA on lands acquired after 1988.

1. Amendments impacting the National Indian Gaming Commission

A. Minimum Internal Control Standards. S. 2078 amends § 7 of the IGRA to provide express authority for the NIGC to promulgate and enforce Minimum Internal Control Standards ("MICS") as to Class III gaming. These standards regulate the day-to-day operations of gaming facilities, including the rules that designate requirements for cash handling, surveillance over game play, and auditing procedures, among other things. Essentially these standards insure the fairness of play for gaming customers and the integrity of operations for the casino owner.

The wisdom of implementing MICS in Indian gaming has long been accepted by Indian tribes. However, consensus on what the actual minimum standards should be was not universal. Therefore, in 1999 the NIGC began the process of promulgating regulations establishing MICS. A tribal advisory committee assisted the NIGC in drafting the MICS, which were published as final regulations in 2000. To fulfill its oversight responsibilities the NIGC began auditing tribal gaming facilities for effective implementation of the MICS.

Despite agreeing substantively on the advisability of MICS, some Indian tribes disagreed with the NIGC promulgating the standards as regulations. They felt that establishing internal control standards should be a regulatory role left to tribal and state regulation through compacts and tribal law. This disagreement came to a head when NIGC officials sought access to the Class III gaming operations of the Colorado River Indian Tribes to review and audit the Tribe's conformity with MICS. The Tribe filed for an injunction in the United States District Court for the District of Columbia (the "District Court"), claiming that the IGRA did not grant to the NIGC the authority to enforce MICS on its Class III gaming operations. In an August 24, 2005, decision the Court ruled that the

Commission did not have authority to audit the tribe for compliance with Class III MICS.

On September 21, 2005, shortly after the District Court's ruling, the Committee held a hearing addressing the need for oversight of Class III gaming. Testimony at that hearing made clear that the District Court's ruling could create a large hole in the regulatory structure of Indian gaming. While some states actively enforce internal control standards over Class III, many have not exercised this authority. In fact, many states rely on the NIGC both to issue and enforce MICS in order to assure that, in addition to tribes, there is governmental oversight over the flow of money in Indian casinos. Subsequent to the hearing, the NIGC has presented evidence that some tribes are invoking the court decision as a basis for prohibiting NIGC from conducting oversight of their Class III facilities. In the opinion of the Committee, these actions will seriously detract from the strong regulatory structure created when the IGRA was enacted and that is necessary for the industry today.

Therefore, it is the intent of the Committee that S. 2078 clarify the IGRA to assure that the NIGC has authority to issue and enforce Class III MICS. Section 5 of the bill amends the authorities of the NIGC contained in § 7 of IGRA to expressly provide oversight and auditing responsibilities with regard to Class II and III gaming operations, including promulgation of MICS. The Committee encourages NIGC to exercise this authority both actively and judiciously. Where tribes and states are adequately enforcing appropriate internal control standards, NIGC may not need to engage as actively in enforcement. The Committee intends that the Commission will focus its oversight energies where they are most necessary.

The Committee acknowledges that some tribes and states have raised concerns from time to time regarding new regulatory initiatives pursued by the NIGC that may infringe on tribal regulatory powers or tribal-state compacts. In the opinion of the Committee the amendments to § 7 of the IGRA do not infringe on tribal-state compacts, nor do the amendments authorize the NIGC to regulate as to any matters within tribal government jurisdiction that are not gaming-related activities. While the Committee encourages the NIGC to fulfill its statutory duties and regulatory responsibilities, including oversight of MICS, the Committee also strongly encourages the NIGC to respect the primary day-to-day regulatory role of tribes and states through tribal-state compacts for Class III gaming. It is the intent of the Committee that the NIGC, in implementing these amendments, interpret S. 2078 consistent with the IGRA's fundamental purpose to encourage strong tribal governments, while protecting the integrity of the industry.

B. Requiring Consultation by the NIGC. S. 2078, through the substitute amendment approved by the Committee, requires that the NIGC maintain a formal consultation policy. It is the Committee's belief and intent that this provision will encourage a level of cooperation and engagement between the regulator, the NIGC, and the regulated, the tribal gaming operations, that will provide the best environment for insuring the continuing effectiveness of regulation and success for the industry.

It is the considered opinion of the Committee that regulatory matters affecting the industry nationwide, such as minimum inter-

nal control standards and background checks on major investors, should reflect consideration of the impact on the regulated community. Consultation is the most effective means of achieving that goal. While consultation does not mean capitulation by the NIGC to every demand by tribes or even necessarily agreement between the agency and tribes, opinions, views and proposals by tribes should receive significant consideration by the NIGC, particularly in the area of rulemaking. Therefore, the agency must balance those considerations with its responsibilities as the Federal regulator in order to protect the integrity of the industry and maintain public trust in it.

While previous Commissioners disagreed with this Committee's views that a consultation policy was needed, the Committee is strongly encouraged by the commitment of the current Commissioners to consulting with affected Indian tribes, including adoption of a Commission consultation policy. Therefore, it is not the Committee's intent that the Commission rewrite its current policy, only that a policy be maintained and effectuated by future Commissioners and their administrations.

C. Revenue Allocation Plan Enforcement. Section 7 of the substitute amendment to S. 2078 amends § 11 of IGRA by adding a new subsection (f) requiring the DoI to provide to the NIGC notice of approval of a revenue allocation plan ("RAP"), including any amendments or revisions, and copies of the plan and information used to approve the plan. The DoI Inspector General reported to the Committee that there has been a lack of enforcement of RAPs by DoI or NIGC.[12] The NIGC has testified before the Committee that it cannot effectively enforce RAPs due to a lack of information. S. 2078 addresses this technical challenge by requiring the DoI to provide relevant information to the NIGC, the agency with enforcement responsibility, and expects that the NIGC will henceforth enforce those provisions of IGRA dealing with RAPs.

2. Background checks on tribal gaming commissioners

Section 7 of S. 2078, as amended by the substitute amendment, requires that tribes must conduct background checks on tribal gaming commissioners and tribal gaming commission employees on a regular basis, in addition to key employees and primary management officials as required by the IGRA. This amendment to § 11 of IGRA is designed to address a key concern regarding the operation of tribal gaming commissions: that the regulators themselves meet substantially the same criteria imposed on the individuals they regulate.

The Committee notes that this provision does not delegate to either the NIGC or the Secretary of the Interior any authority to set standards regarding tribal gaming commissioners. This amendment requires that a tribe address the issue of background checks for tribal gaming commissioners and employees in its gaming ordinance. The actual standards a tribe adopts for its tribal gaming commission remain within the sovereign jurisdiction of the tribe. The Committee believes that this section provides an appropriate balance between respect for tribal sovereignty and the Congress'

[12] *See* Oversight Hearing on the Regulation of Indian Gaming. Before the Senate Committee on Indian Affairs, S. Hrg. 109–50, Pt. 1, 109th Cong., at p. 9 (2005) (Testimony of Earl E. Devaney, Inspector General, Department of the Interior).

desire to protect the integrity of Indian gaming. Since IGRA has been enacted, the Committee has not received any testimony from tribes indicating that the required background checks for primary management and key officials have hindered tribal sovereignty by dictating who a tribe may hire. Like that provision, the provision in S. 2078 does not give NIGC authority over who the tribe hires or appoints. It does not mandate the use of tribal gaming commissions, nor does it allow the NIGC to mandate the makeup of those commissions. The section simply requires that tribes collect appropriate information so that—as with primary management officials and key employees—they know the background of potential tribal regulators and, thus, are able to make informed decisions about who should occupy those positions.

3. Gaming-related contracts and contractors

A. In the Beginning. When Congress enacted the IGRA in 1988, among the stated purposes of the law were to provide for tribal economic development and create strong tribal governments. These purposes were accomplished by providing within the IGRA several provisions that would ensure that tribes were the primary beneficiaries of their gaming operations.

At the same time, in 1988, a number of Indian gaming operations were managed by non-Indian "management contractors." Many of these management contractors were entrepreneurs willing to accept the risks of investing in a very uncertain venture. For many Indian tribes, this opened a positive avenue for capital investment. However, in some instances, this Committee found that the contract terms were clearly unconscionable, and given Congress' plenary power over Indian affairs, statutory protections were needed to ensure that Indian tribes received the primary economic benefit from the gaming activity.[13] These statutory protections included mandatory management contract terms, review of the management contracts by the NIGC, and background checks on the principal officers and shareholders of the management contractors.

For several years, these statutory provisions had the desired result. Eventually, however, enterprising investors sought to avoid the scrutiny required of management contracts and contractors by engaging in so-called consulting agreements, development agreements or financing agreements. While these contracts did not contain indicia of management contracts, they still exerted significant influence over the operation of tribal gaming facilities and provided for compensation that equaled or exceeded that allowed for management contracts; yet they legally escaped review by the NIGC.

B. The Need for Expanded Contract Review. During discussions with gaming tribes and gaming industry officials, including the NIGC, the Committee has been made aware of two primary reasons that gaming investors have sought to avoid having their gaming contracts reviewed by the NIGC. The first, and most obvious reason, is that some individuals do not want to disclose their business dealings and associations. While reluctance to disclose private business matters does not of itself connote criminal associations, the unique history of the casino industry has led to the conclusion that regulatory review and oversight of the individuals engaged in

[13] *See* Senate Report 100–446, pg. 15.

the gaming business is the most effective manner of preventing infiltration by organized crime and other unwanted elements.

The Committee has been informed by the Department of Justice that, since the enactment of the IGRA, it has discovered no evidence of systematic infiltration of organized crime into the Indian gaming industry.[14] The ability of tribes to protect their gaming operations from organized crime, in the opinion of the Committee, has been due in no small part to the unique tripartite regulatory structure enacted in the IGRA, including review and approval of management contracts by the NIGC. This rigorous regime has ensured that Indian tribes are the primary beneficiaries of their gaming operations. It has also protected both Indian gaming customers, by ensuring the fairness and integrity of games, and the general public, by preventing criminal syndicates from using gaming revenues to fund other criminal endeavors. It is the express intent of the Committee that this rigorous protection be continued and strengthened by S. 2078.

The Committee has also been made aware, however, that there is another, purely economic reason that gaming contractors often seek to avoid the review of the NIGC: the significant review period allowed under the IGRA, and the even longer review timeframes often demanded by the NIGC. The IGRA provides for an initial 180 day review period, with an extension allowed for up to an additional 90 days. This minimum of six to nine months for approval of a contract, on top of the time spent negotiating a deal, would be unacceptable in most business environments. The Committee has been informed that some approvals have taken as long as two years or more. A significant number of tribes have informed the Committee that these extremely long time frames have resulted in greatly inflated costs for them, including higher interest rates, increased material costs, and delays in opening facilities.

In amending Section 12 of the IGRA, the Committee has sought to balance these two competing, but not mutually exclusive goals: to provide the tools for the NIGC and tribes to continue to effectively monitor the industry and exclude unwanted elements; and to smooth or streamline the contract review and approval process to allow for more efficient business dealings. To effectuate these goals the Committee has amended the definitions of contracts requiring review and approval, and the actual review and approval process through stricter timelines.

C. Definitions. The substitute amendment to S. 2078 approved by the Committee expands the types of contracts requiring approval to include consulting, development, financing, and participation contracts, as well as management contracts. Each definition provides authority for the NIGC to establish by regulation, categorical exclusions for contracts that fall within the definition but do not involve either subject matters or dollar amounts that are of significance to the NIGC's oversight. The Committee does not believe that such NIGC authority impairs in any way the authority of Indian tribes, or states through compacts, to review contracts or background checks, or to license persons doing business with tribal gaming operations.

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[14] *See* Letter from William E. Moschella, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, to the Hon. John S. McCain, Chairman, Committee on Indian Affairs, U.S. Senate (July 18, 2005), attachment p. 3.

Management Contracts: It is the intent of the Committee that the NIGC, upon passage of S. 2078, continue to interpret the term "management contract" consistent with the use of the term within NIGC administrative rulings, guidelines, and regulations, as well as any federal court precedent that may be relevant. Consistent with that intent, the definition categorically excludes employment contracts, except those that provide for compensation based on a share or percentage of profits from the casino.

Consulting Contracts: In oversight hearings held by the Committee over multiple congresses, testimony has been provided by the NIGC regarding a growing practice by non-Indian investors of avoiding the review and scrutiny of the NIGC by entering into so-called "consulting" contracts.[15] While the investor would be involved in the planning, financing, development or operation of an Indian gaming facility, and compensated handsomely therefor, no contract would be submitted to the NIGC because this involvement was purported to be merely for "consulting" services. The NIGC would only be made aware of such agreements after the fact, often after the gaming facility was operational. It is the intent of the Committee that these contracts be subjected to review by the NIGC, and the non-tribal parties to such contracts be subjected to the background checks required by IGRA.

Development Contracts: The Committee has also been informed that, with increasing frequency, non-Indian investors have also sought to avoid the review and scrutiny of the NIGC by entering into so-called "development" contracts. Many of these "development" contracts provide for the planning, financing and construction of Indian gaming facilities. These types of contracts may not formally involve management or consulting on management of operations; however, compensation for these investors is usually taken from later operations, and that compensation is often far in excess of the market value of the services provided. Additionally, the Committee has been made aware that some developers, who would not be able to survive the scrutiny of background checks, actively market their development of "turnkey" facilities to other investors, for often exorbitant compensation. While the Committee is concerned with the involvement of these "unsuitable" investors in the Indian gaming industry, it is primarily concerned that the true loser in these scenarios are the tribes who are not receiving the full benefit of their gaming operations.

The Committee recognizes that there are many types of construction and other contracts that might be considered "development" contracts, but are tangential to gaming activities and do not need scrutiny by the NIGC, including professional services contracts such as the architectural and engineering services integral to any construction project. It is the considered opinion of the Committee that only contracts for major gaming or gaming-related projects should be covered by this definition, particularly those for which compensation will be contingent upon gaming revenues derived from the new development.

Financing Contracts. The Committee has been informed, through media reports and various government agencies, of concerns re-

[15] *See,* e.g., Senate Committee on Indian Affairs Oversight Hearing on Indian Gaming, April 27, 2005, pg. 14.

garding the backgrounds and associations of some persons that have financed the building or expansion of Indian gaming facilities or operations. While the Committee does not intend to restrict the ability of tribes to access investment capital, it is concerned that tribes may unknowingly receive funding from organized crime or other unsuitable sources. Consistent with those concerns, the definition of financing contract approved by the Committee in the substitute amendment to S. 2078 is narrowly drafted to exclude contracts with entities regulated by other arms of the Federal government, including federally-chartered banks and companies regulated by the Securities and Exchange Commission. Also excluded are intergovernmental financial arrangements, either between tribes, or between tribes and states as is provided in some compacts. It is the intent of the Committee that the NIGC exercise its authority to approve finance contracts primarily with regard to private, unregulated sources of capital.

Participation Contracts. The NIGC has long raised concerns regarding contracts for various services related to gaming operations or facilities where the compensation is based on receipt of a significant percentage of revenues, not on the actual value of the services performed. While the opportunity to participate in the success of a gaming operation via a percentage of revenues provides increased incentives for investors to commit capital to developing tribal casinos, it has also long been an area easily open to exploitation. It is the intent of the Committee that the NIGC rigorously review contracts and background checks on investors seeking participation contracts. The Committee expects that such increased scrutiny will likely discourage those seeking to obtain exorbitant profits at the expense of tribes. The Committee does not intend that the NIGC unnecessarily seek review of participation contracts that reflect common gaming industry practice, so long as such agreements provide services commensurate with the compensation provided and are in keeping with common industry standards or practices.

D. Categorical Exclusions and Timelines. For each of the defined gaming-related contracts, the substitute amendment to S. 2078 provides authority to the NIGC to promulgate regulations, in consultation with tribes, that will categorically exclude contracts that fall within the broad statutory definitions provided, yet do not involve either subject matters or dollar amounts that are of significance to the NIGC's oversight. It is the express intent of the Committee that, in expanding the authority of the NIGC to review and approve a broader range of gaming-related contracts, the increased regulatory oversight necessarily accompanying such expansion shall not overburden the industry and thereby artificially inflate otherwise routine business expenses or economic costs.

In order to fulfill the intent of the Committee, the substitute amendment to S. 2078 amends § 12 of IGRA by adding a new paragraph (b)(5) which provides strict timelines for approval by the NIGC of gaming-related contracts. The Committee strongly encourages the NIGC to efficiently allocate personnel and resources needed to meet these new responsibilities and mandated deadlines. The Committee expressly intends that the NIGC not waste its resources unnecessarily on reviewing gaming-related contracts for which there is no danger of exploitation by unwanted or criminal persons, and that the NIGC, in consultation with tribes, exercise the author-

ity given to promulgate regulations that will categorically exclude the more mundane types of gaming-related contracts.

E. Review and Approval of Gaming-Related Contracts. Section 8 of the substitute amendment to S. 2078 replaces § 12 of IGRA which currently governs the review and approval of management contracts. In updating and amending § 12 to conform to the expanded definition of gaming-related contracts which will require review and approval by the NIGC, the basic statutory contract requirements needed for approval in the current law were carried forward. Similarly, the basic standards whereby the NIGC will review the backgrounds of the gaming-related contractors remain the same as currently provided in IGRA. It is the intent of the Committee that the basic procedures required of gaming-related contractors and the NIGC under § 12 will continue to be utilized, consistent with the new timelines imposed by paragraph (b)(5) of amended § 12.

The Committee has provided the NIGC with additional flexibility under amended § 12 to better balance the twin goals of rigorous regulatory enforcement and efficient business practices. In particular, the Committee strongly encourages the NIGC to utilize the authority given in new paragraphs (c)(3) and (c)(4) of § 12 to contract with Indian tribes or establish alternative methods of determining suitability and categorical exclusions to process background checks and approve gaming-related contracts in a more timely and efficient manner than past history has indicated. The Committee also encourages the NIGC to make clear to tribes and gaming-related contractors the information which, when provided at the beginning of the review process, will constitute a complete submission and thus make approval a more efficient process.

F. New Regulatory Authority for Additional Gaming-Related Contracts. Section 5 of the substitute amendment to S. 2078 approved by the Committee provides amendments to § 7(b)(10) of IGRA granting new substantive regulatory authority to the NIGC to identify by regulation gaming-related contracts that do not fall within the statutory definitions but are of concern. The Committee determined this provision was needed to guard against the ingenuity of gaming contractors in seeking ways to avoid the scrutiny of NIGC regulators in the future.

The Committee expressly intends that this authority be forward-looking, and only be exercised after regulations have been duly promulgated for the defined gaming-related contracts pursuant to new § 26 of IGRA, as mandated by § 12 of the substitute amendment to S. 2078. The Committee further acknowledges that this authority is far-reaching, and thus mandated that this authority only be exercised through the NIGC's promulgation of regulations, in consultation with tribes.

G. Implementation. Recognizing that substantial new responsibilities are placed on the NIGC by the expanded definitions of gaming-related contracts contained in the substitute amendment to S. 2078 approved by the Committee, a second degree amendment to the substitute amendment was also approved by the Committee during markup of the bill which added a new § 26 to IGRA which would delay enforcement of the new gaming-related contract definitions until implementing regulations are promulgated.

The provision provides a two-year timeframe for the NIGC to promulgate regulations, in consultation with tribes, which will provide needed categorical exclusions for the gaming-related contracts definitions and persons subjected to suitability determinations. The NIGC is required to provide a status report back to the Committee and the House Committee on Resources within one year of enactment on the progress in promulgating the regulations.

The provisions express the Committee's intent that the NIGC shall continue to review and approve or disapprove management contracts using their current regulations until new regulations are developed. The Committee further intends that within the two-year timeframe, gaming-related contracts that are not management contracts may be entered into by tribes and contractors and will not be considered void or invalid by reason of not being approved by the NIGC. Conversely, the Committee does not intend to validate an otherwise void or invalid contract by reason of paragraph (c)(2) of § 26.

In addition, the Committee encourages the NIGC to carefully consider any current regulations that do not conflict with the amendments to IGRA embodied in the substitute amendment to S. 2078, and, where appropriate, maintain those regulations in effect.

4. Indian lands eligible for gaming

The IGRA generally prohibits gaming on lands acquired in trust outside of reservations after October 17, 1988, the date of enactment. However, § 20 of the IGRA contains several exceptions to this general rule, some of which have engendered debate and controversy. S. 2078 addresses these exceptions by eliminating one of them, the two-part determination, and amending three others dealing with land claims, initial reservations and restored lands.

A. The Two-part Determination. When enacted, the IGRA § 20 included in subsection (b)(1)(A) an economic opportunity exception to the general ban on gaming on lands outside of reservations. This so-called "two-part determination" allows gaming on land acquired after October 17, 1988, that is, on "after-acquired lands" if: (1) the Secretary finds that gaming would benefit the tribe and not be to the detriment of the surrounding community; and (2) the Governor of the state in which the land is located concurs. This provision is unique in that it allows a tribe and a state to essentially create a new reservation solely for gaming purposes, even on lands to which the tribe may not have an historical connection.

While the general purposes of the IGRA were to create economic development on reservations and strong tribal governments, this provision provided an avenue through which tribes, unable to engage in viable gaming on their current reservations, might have the opportunity to receive the economic benefits of gaming off their reservations. Unfortunately, this well-intentioned provision has caused a great deal of controversy between tribes and states and local communities, and even among tribes.

During the 109th Congress, this Committee held four hearings during which witnesses raised concerns about the two-part determination. In testimony presented at these hearings, local governments, tribes and grassroots organizations expressed intense frustration with the process through which the Secretary and governors make decisions that allow tribes to site casinos off their res-

ervations on lands to which they have no historical ties and that local communities and other impacted tribes did not foresee or do not want. These groups testified that they had insufficient input into the process of making a two-part determination, resulting in a lack of confidence that there were adequate limits to gaming by Indian tribes on lands far from existing reservations.

Moreover, while the DoI testified that only three tribes have successfully navigated the two-part determination process, an increasing number of written requests for determinations have been filed and even more have been hinted at by tribes and developers. The costs to tribes, local communities, states and the Department of the Interior in investments of time, energy and money into these off-reservation endeavors are extremely high. The mere threat of off-reservation gaming to local communities and tribes that conduct gaming on their own nearby reservations engenders its own anxiety and consequent intangible costs.

Based on the hearing record, and substantial information provided formally and informally from many interested parties, the Committee concludes that, as a matter of Federal Indian policy, there must be limits on where tribes can conduct gaming pursuant to the IGRA. Therefore, the Committee has determined that elimination of the two-part determination is the wisest policy choice among several. Consistent with the Committee's determination, S. 2078 eliminates the Secretary's authority to make the determinations contained in existing subsection 20(b)(1)(A). This provision is not intended to affect the ability of a tribe to conduct commercial gaming activities off Indian lands and outside the authority of the IGRA.

While committed to eliminating the two-part determination, the Committee is cognizant that there are some tribes that have already spent significant time, money, and energy into following the letter of the law to meet the two-part determination criteria. It is not the intent of the Committee to unfairly prevent these tribes from continuing through the process in which they are already deeply engaged. In fact, it is not uncommon for significant effort, resources, and time to be spent before an application is even filed. Therefore, § 10 of S. 2078 provides a "grandfather" clause that allows written requests for specific parcels of land submitted to the U.S. Department of the Interior before April 15, 2006, to continue to be considered pursuant to current subsection (b)(1)(A) of §20, and in accordance with the DoI administrative processes implementing that provision.

The Committee does expressly intend, however, that the inclusion of the "grandfather" provision is in no way to be interpreted as encouraging approval of any existing two-part determination request. The Department of the Interior must continue to be as rigorous in evaluating the benefits to the tribe and detriments to the surrounding community as it has been in the past.

B. Land claims. S. 2078 also amends the exception contained in subsection (b)(1)(B)(i) of § 20 of the IGRA addressing land claims. Generically, "land claims" refer to claims by tribes asserting legal title to real property pursuant to the Indian Trade and Intercourse Act.[16] Settlements for such claims require congressional legislation.

[16]*See* 25 U.S.C. § 177.

The amendment specifies that, to be eligible for gaming under the IGRA, lands taken into trust pursuant to a land claim must be within the state in which the tribe's reservation or last recognized reservation is located.

Testimony received by the Committee during hearings on lands taken into trust for gaming purposes through "land claims" raised several concerns. Among those raised was the concern that land claims are not being pursued in order for tribal members to move back to the claimed lands, but solely to establish casinos. Locating casinos out-of-state affects not only in-state tribes, but also land owners in land-claim states who live and work on land that they could not have foreseen would be subject to a claim. Additionally, tribes with in-state reservations raised concerns that out-of-state tribes will negotiate compacts that give away governmental prerogatives and sovereign rights at the expense of in-state tribes. These in-state tribes seek to protect the already existing and sometimes long-standing relationships between states and the tribes already within their borders.

It is the considered opinion of the Committee that clear congressional direction is needed to address many of the concerns raised and to discourage those wishing to exploit ambiguities in the law. Therefore, § 10 of S. 2078 amends clause (b)(1)(B)(i) of § 20 of the IGRA to eliminate land claims that have been asserted by tribes for lands that are outside their current state, sometimes across the country, in order to find more lucrative gaming sites. This provision does not affect a tribe's ability to utilize lands obtained through land claims for purposes other than gaming. S. 2078 also codifies what has heretofore been done in practice but not required by § 20, a mandate that there be Congressional approval of the land claim before gaming can be conducted.

C. Initial reservations and restored lands. S. 2078 further amends clauses (b)(1)(B)(ii) and (iii) of § 20 of the IGRA, which provide exceptions to the general ban on post–1988 lands for newly recognized or restored tribes. Clause (ii) applies to the "initial reservation" of tribes that successfully petitioned for acknowledgment through the DoI's Federal Acknowledgment Process. Clause (iii) applies to "the restoration of lands for an Indian tribe that is restored to Federal recognition."[17]

During hearings before the Committee, significant testimony was provided regarding the potentially high impact that gaming activities had on local communities. In their testimony, impacted communities and other nearby tribes raised concerns about the process whereby the DoI determines whether particular lands should be eligible for gaming for a newly recognized or restored tribe. Serious questions were raised regarding the transparency of the process and whether the Secretary was gathering sufficient information prior to making such a determination.

Based on the hearings, several themes became clear: the fairness exceptions should not unfairly prejudice existing tribes; affected local communities and tribes must have a fair opportunity to

[17]IGRA does not define "restore", "restored" or "restoration", but several courts have provided guidance. These courts have looked to the ordinary dictionary meaning such as "to give back, return, make restitution, reinstatement, renewal and restitution." *See Grand Traverse Band* v.*United States* (III), 369 F.3d 960, 967.

present legitimate concerns; and, significant impacts to affected local communities and tribes should be addressed.

To address these themes, S. 2078 significantly amends subsection (b)(1)(B) of § 20 of the IGRA. First it provides that: (1) for initial reservations the tribe must have a historical and geographical nexus to the land being acquired, and (2) for restored lands for tribes restored to Federal recognition the tribe must have the historical and geographical nexus, plus a temporal connection must exist between the acquisition of the land and the date of the tribe's restoration to Federal recognition. Second, the Secretary must consult with the tribe and local and tribal officials, provide public notice and an opportunity to comment and a public hearing. Third, the Secretary must determine that a gaming establishment on the land would be in the tribe's best interest and not create a significant, unmitigated impact on the surrounding community.

The Committee notes that, for initial reservations, there is no requirement that there be a temporal connection between the land acquisition and tribe's recognition. In the view of the Committee, the timing of that acquisition should not be relevant when a tribe is acquiring its first land following acknowledgment through the Federal Acknowledgment Process. Similarly, while not directly stated in S. 2078, the Committee is of the opinion that the DoI should consider the challenges a tribe may have faced in acquiring land when applying the temporal connection requirement to the tribe's acquisition of its first restored lands following restoration.

It is the intent of the Committee through S. 2078 to codify, for both initial reservations and restored lands exceptions, what has been done in practice, particularly in restored lands analyses, by requiring that tribes have a historical nexus to the land on which the gaming will be conducted. This nexus requirement is derived from case law on IGRA's restored land exception which indicates that restored lands cannot be all lands with which a tribe has had minimal contact. Case law articulates that, for restored lands, a tribe have a historical nexus to the land and that the restoration be sufficiently close in time to the date of recognition.[18] It is the considered opinion of the Committee that codifying the historical nexus requirement, and for restored lands, the temporal connection requirement, will help to clarify to all interested parties the standard that must be met for land to be deemed eligible for gaming pursuant to these exceptions.

S. 2078 also amends subsection 20(b)(1)(B)(ii) and (iii) to require that there be public input into the process of determining whether gaming is an appropriate activity that may be conducted on lands acquired after October 17, 1988, even if there is a historical nexus between the tribe and the lands to be gamed upon. The Committee is very cognizant of the legitimate concerns raised by affected local communities and tribes that they had no input into the determination of whether gaming—a potentially high impact activity—should

[18] *See Grand Traverse Band of Ottawa & Chippewa Indian* v. *United States Atty.*, 198 F. Supp. 2d 920, 937 (D. Mich. 2002) ("The Band has introduced substantial and uncontradicted evidence that the parcel is located in an area of historical and cultural significance to the Band that was previously ceded to the United States. The Band also has introduced uncontradicted evidence of the intent of the Band in acquiring properties between 1988 and 1990. Finally, it has introduced evidence supporting the temporal proximity of restoration of all reservation holdings to the time of acknowledgment and approval of the tribal constitution, together with the absence of any substantial restoration of lands preceding the property at issue."); aff'd 369 F.2d 960 (6th Cir. 2004).

be conducted on nearby land. With these concerns in mind, the amendments in S.2078 require that the Secretary allow public comment and specify that a public hearing must be held. This language reflects the Committee's view that it is imminently fair to the people who may be most affected by a nearby gaming operation to: (1) be informed that a tribe is seeking to conduct gaming on nearby land; (2) have the opportunity to comment on significant impacts that the gaming may have on their community; and, (3) have this input be considered by the Secretary when making a determination that lands are eligible for gaming.

Conversely, it is not the intent of the Committee that the Secretary treat community opposition to a tribal gaming operation as a veto over use of the land for gaming. Thus, opposition to, or controversy over, a proposal to use land for gaming does not constitute an impact. Rather, it is the express intent of the Committee that the Secretary carefully weigh whether the tribe can mitigate identifiable significant impacts that the proposed gaming would have on the affected communities. The Committee notes that this is a different standard than the one used in the past for the two-part determination and expects that the Secretary will interpret this provision accordingly. The Committee intends that, for initial reservations and restored lands, the Secretary evaluate the efficacy of mitigation that is offered by the tribe to lessen the impact of the gaming activity on the surrounding community. If impacted local communities and tribes reach a mutual agreement on mitigation, or, in the Secretary's estimation, the tribe has offered reasonable mitigation to identified significant impacts, the Secretary should determine that the gaming would not "create significant, unmitigated impacts."

D. Determinations Regarding Land Eligibility for Gaming. In the past, both the Secretary and the NIGC have issued lands opinions regarding the eligibility of lands for gaming. Based on testimony presented during hearings on lands eligible for gaming, the Committee is of the considered opinion that the process of determining eligibility and acquiring land into trust should be streamlined at one agency. Therefore S. 2078 provides that, after enactment, the Secretary and not the NIGC is to make initial reservation and restored lands determinations for land that has not been taken into trust or is in the process of being taken into trust. By designating the DoI as the agency responsible for these determinations, the Committee also imposes a responsibility on the agency to make these determinations in a timely manner.

Notwithstanding that S. 2078 clarifies that the Secretary has sole responsibility for making §20 determinations, the Committee is aware that there are instances when the NIGC must make a determination, to meet its regulatory responsibilities, whether a given parcel of land is Indian land such that the agency has jurisdiction over the gaming activity on it. The Committee does not intend to preclude the NIGC from determining whether lands are Indian lands for the purposes of determining its jurisdiction.

E. Prior Determinations. S. 2078 includes a provision stating that the amendments to §20 shall not affect the validity of any determination already made by the Secretary or Chairman. This is intended to preserve already-issued determinations by the Secretary or Chairman regarding eligibility of gaming on trust lands.

The Committee does not intend the Secretary or Chairman to reconsider decisions they have already made. On the other hand, the Committee anticipates that opinions for restored lands and initial reservations that are pending at the time of enactment of S.2078 will in fact be subject to the amended subsection.

LEGISLATIVE HISTORY

S. 2078 was introduced on November 18, 2005, by Senator McCain and was referred to the Committee on Indian Affairs. Subsequent to introduction, hearings were held February 1, 2006; February 28, 2006; and March 8, 2006.

On March 29, 2006, at a business meeting duly noticed, the Committee considered S. 2078. During the business meeting Senator McCain introduced a substitute amendment. In addition to the substitute amendment, Senator McCain and several other Members of the Committee offered stand-alone amendments to the substitute amendment.

By voice vote, the Committee adopted an amendment to the substitute amendment by Senator McCain changing the cut-off date for considering written requests for determinations under the two-part determination set forth in the existing Act at Section 20(b)(1)(A). Senator McCain's amendment changed the date in the substitute amendment from June 1, 2006, to March 29, 2006. After discussion during which several senators expressed concern that tribes have an opportunity after the date of mark-up to submit requests for two-part determinations, Senator Dorgan offered a second degree amendment extending the time to file a request until April 15, 2006. Senator Dorgan's second degree amendment was adopted by a voice vote.

A second amendment to the substitute amendment was offered by Senators McCain and Dorgan to add a new Section 26 to S. 2078 providing that, after consultations with tribes and no later than two (2) years after the section's enactment, the Commission must promulgate regulations implementing the bill's definitions. The amendment also provides that, with respect to gaming-related contracts other than management contracts, the contracts section of the bill will not take effect until the Commission promulgates regulations. New Section 26(c)(2) would additionally provide that nothing in the contracts section of the bill affects the validity or invalidity of contracts already entered into prior to the effective date of this this new section. The amendment was adopted unanimously by voice vote.

An amendment was offered by Senator Inouye which would amend Section 7(2) of Senator McCain's substitute amendment by imposing a time limit of 180 days on the Secretary's duty to prescribe procedures for Class III gaming. Following a discussion among the Members, a roll call vote was taken. With six (6) senators voting aye and six (6) voting nay, the amendment was not adopted.

Senator Coburn offered an amendment inserting into Section 5 of the substitute amendment the requirement that once a year the Commission submit to the Secretary a report, for publication, describing all revenues from Indian gaming for each Indian tribe engaged in gaming. Following discussion among the Members, Senator McCain offered a second degree amendment to clarify that the

disclosures required by the amendment would only be provided to members of such tribe. The second degree amendment was adopted, and then the Coburn amendment was adopted by voice vote.

Having considered all amendments offered to the substitute amendment, the Committee adopted the substitute amendment. The Committee then approved S. 2078, as amended, and agreed that the bill would be forwarded for consideration by the full Senate, with a favorable recommendation that the Senate pass the bill.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The act may be cited as the "Indian Gaming Regulatory Act Amendments of 2006".

Section 2. Definitions

The bill amends Section 4 of the Indian Gaming Regulatory Act ("IGRA") by adding several definitions needed for amendments made to operative sections of the IGRA, including: "Gaming-Related Contract"; "Gaming-Related Contractor"; "Consulting Contract"; "Development Contract"; "Financing Contract"; "Management Contract" and "Participation Contract". The definitions of "Consulting Contract"; "Development Contract"; "Financing Contract"; "Management Contract" and "Participation Contract" expressly authorize the National Indian Gaming Commission (NIGC), by regulation, to provide categorical exclusions of certain contracts from the broader definition.

Section 3. National Indian Gaming Commission

The bill makes technical amendments to Section 5 of the IGRA to clarify how NIGC vacancies are filled, and authorizing the Vice Chairman to act in the absence or disability of the Chairman.

Section 4. Powers of the Chairman

The bill amends Section 6 of the IGRA by adding to the NIGC Chairman's authority the power to approve gaming-related contracts, and to conduct a background investigation and make a suitability determination as to any party to a gaming-related contract. The bill also makes technical amendments to Section 6 of the IGRA to clarify how the NIGC Chairman may delegate authorities to individual Commissioners.

Section 5. Powers of the Commission

The bill amends Section 7 of the IGRA to clarify the NIGC's oversight and auditing responsibilities with regard to Class II and III gaming operations. It also directs the NIGC to promulgate and enforce Minimum Internal Control Standards as to Class III gaming. This authority was recently called into question by a decision of the United States District Court for the District of Columbia.

The NIGC is also directed to develop regulations determining other categories of contracts for goods and services directly related to tribal gaming activities that will require NIGC approval and background checks.

The bill also requires that the NIGC submit to the Secretary of the Interior, at least once each year, a report describing aggregate

revenues of each tribe's gaming activities. The Secretary shall develop regulations governing the provision of this information to individual tribal members.

Section 6. Commission staffing

The bill makes technical amendments to Section 8 of the IGRA to update the statutory rates of pay for NIGC Commissioners, staff and temporary services to comport with the current Federal Executive and General Schedule pay rates.

Section 7. Tribal gaming ordinances.

The bill amends Section 11(b)(2)(F) of the IGRA to require that tribal gaming ordinances provide that background investigations will be conducted for tribal gaming commissioners and key tribal gaming commission employees; primary management officials and other key employees of the gaming enterprise; and persons that provide goods or services directly relating to the tribal gaming activity. The bill clarifies that the background checks required on tribal gaming commissioners will not also require licenses (since the tribal commissioners issue these licenses, and it is unnecessary for them to license themselves).

The bill further amends Section 11 by requiring the Secretary of the Interior to share information relating to approved tribal revenue allocation plans with the NIGC Chairman.

Section 8. Gaming-related contracts

The bill substantially amends section 12 of the IGRA by extending the NIGC Chairman's authority to approve all gaming-related contracts (defined in the bill as management, consulting, development, financing, participation, and other contracts as further defined by NIGC regulation). Gaming-related contracts that are not approved by the NIGC Chairman under the bill would be void ab initio.

The bill further requires that gaming-related contractors must be deemed "suitable" by the Chairman after conducting an appropriate background check. Under the bill, the Chairman is required to make the required suitability and contract determinations within specified timeframes: 30 days for consulting and financing contracts and 90 days for all other gaming-related contracts.

The bill retains the same basic substantive requirements for contract approvals and background checks as are currently provided in IGRA; however, the Chairman is provided new flexibility to utilize alternative licensing or suitability findings, or categorically exclude certain persons or entities that are already licensed by government agencies or professional associations. The bill further requires the Commission to establish and maintain a registry of suitability determinations made by the Chairman and tribes.

The bill also provides the Chairman authority to waive any requirement under this section for reasons of emergencies or imminent danger to the public health and safety.

Section 9. Civil penalties

The bill amends Section 14 of the IGRA, which provides for civil penalties, to give NIGC authority to issue complaints and levy pen-

alties against any individual or entity, not just against tribes or management contractors, that violate IGRA or federal regulations.

Section 10. Gaming on later-acquired land

The bill amends Section 20 of the IGRA to further restrict tribes' ability to game on lands acquired after 1988 and to provide members of the local community more input into the process for allowing gaming on tribal lands.

The bill eliminates the Secretary's authority to take land into trust pursuant to the so-called "two-part determination" contained in subsection 20(b)(1)(A) after the date of enactment of this bill, while "grandfathering" for consideration written requests to have lands deemed eligible for gaming that are submitted by tribes to the Secretary of the Interior by April 15, 2006. The bill further amends subsection 20(b)(1)(B) of IGRA by specifying that, to be eligible for gaming, lands taken into trust as part of a land claim must be approved by congressional action and cannot be outside of the state in which the tribe is located. The bill requires that lands taken into trust as part of an initial reservation have a historic and geographical nexus to the tribe, and that the Secretary of the Interior determine, after consultation with the tribe and appropriate local and tribal officials, and after providing public notice and an opportunity to comment, that a gaming establishment on that land would be in the best interest of the tribe and would not create significant, unmitigated impacts on the surrounding community.

Lands taken into trust as part of a restoration of lands would, under the bill, have to meet the same requirements as lands taken into trust as part of an initial reservation, and there would have to be a temporal connection between the acquisition of the land and the date of restoration of the tribe.

The bill does not affect the validity of any determinations made by the Secretary of the Interior or NIGC Chairman prior to enactment of the bill regarding the eligibility of land for gaming.

Section 11. Consultation policy

The bill requires the NIGC to establish and maintain a consultation policy in accordance with the Federal trust responsibility and the government-to-government relationship with Indian tribes.

Section 12. Implementation

The bill requires the NIGC to develop, no later than 2 years from the date of enactment, rules and regulations implementing the definitions, authorities, responsibilities and restrictions set forth in the bill. The regulations are required to be developed in consultation with Indian tribes, and the NIGC must provide the Senate Committee on Indian Affairs and the House Committee on Resources with a report on the status of the regulations no later than one year after the date of enactment of the bill. The bill delays the effective date of the new provisions relating to gaming-related contracts until the date on which the NIGC promulgates rules and regulations implementing those provisions. The bill makes clear that current law regarding management contracts remains in effect until the NIGC promulgates rules and regulations implementing the new provisions relating to gaming-related contracts.

The bill also validates otherwise legal gaming-related contracts entered into before the date of enactment of the bill.

Section 13. Conforming amendments

The bill will amend Public Law 105–83, the Department of the Interior and Related Agencies Appropriations Act of 1998, by striking subparagraph (C). It also clarifies that all tribes are subject to the NIGC's fee structure if they conduct gaming.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

On March 29, 2006, the Committee, in an open business session, considered S. 2078, approved a substitute amendment and three additional amendments to the bill, and ordered S. 2078, as amended, favorably reported to the full Senate with a recommendation that the bill do pass.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 2078 as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 17, 2006.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed estimate for S. 2078, the Indian Gaming Regulatory Act Amendments of 2006.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Matthew Pickford (for federal costs), Marjorie Miller (for the impact on state, local, and tribal governments), and Craig Cammarata (for the impact on the private sector).

Sincerely,

DONALD B. MARRON,
Acting Director.

Enclosure.

S. 2078—the Indian Gaming Regulatory Act Amendments of 2006

Summary: S. 2078 would amend provisions of the Indian Gaming Regulatory Act (IGRA) to clarify and expand the authority of the National Indian Gaming Commission (NIGC) to regulate and oversee Indian gaming. In addition, S. 2078 would restrict off-reservation gambling. CBO estimates that implementing S. 2078 would not have a significant impact on the budget. Enacting the bill could affect revenues, but CBO estimates that any such effects would not be significant. Enacting the bill would not affect direct spending.

S. 2078 contains intergovernmental mandates as denied in the Unfunded Mandates Reform Act (UMRA) because it would limit the ability of tribes to operate gaming on land put in trust after 1988 and increase federal regulation of tribal gaming operations. While the impact of these changes on tribes with such operations is very uncertain, CBO estimates that the aggregate costs probably

would not exceed the annual threshold established in UMRA ($64 million in 2006, adjusted annually for inflation) in the next five years. Enacting this bill would impose no other significant costs on state, local, or tribal governments.

S. 2078 would impose a private-sector mandate, as defined in UMRA, on certain contractors in the Indian gaming industry by making them subject to federal regulation of Class II and Class III gaming-related contracts. Based on information from industry and government sources, CBO estimates that the aggregate direct costs associated with complying with the mandate would fall below the annual threshold established by UMRA for private-sector mandates ($128 million in 2006, adjusted annually for inflation).

Estimated cost to the Federal Government: The NIGC is authorized to collect and spend annual assessments on the revenues of tribal gaming operators. The NIGC is currently authorized to collect and spend up to 0.080 percent (80 cents per $1,000) of all tribal gaming revenues subject to NIGC regulation. Based on information from NIGC, CBO estimates that the agency's current collection and spending authority would be sufficient to accommodate the additional costs under the bill.

Enacting S. 2087 could affect federal revenues because the legislation would amend civil penalties related to Indian gaming. Collections of the civil penalties are recorded in the budget as revenues. CBO estimates, however, that any change in revenues that would result from enacting the bill would not be significant.

Estimated impact on state, local, and tribal governments: S. 2078 contains intergovernmental mandates as defined in UMRA because it would limit the ability of tribes to operate gaming on land put in trust after 1988 and increase federal regulation of tribal gaming operations. While the impact of these changes on tribes with gaming operations is very uncertain, CBO estimates that the aggregate costs probably would not exceed the annual threshold established in UMRA ($64 million in 2006, adjusted annually for inflation) in any of the next five years. Enacting this bill would impose no other significant costs on state, local, or tribal governments.

Off-Reservation gaming

The bill would amend section 20 of the Indian Gaming Regulatory Act to further restrict the ability of tribes to establish gaming operations on lands taken into trust after the IGRA was enacted. That section generally prohibits gaming on lands placed into trust after October 17, 1988. It includes a number of exceptions to that rule, but this bill would further narrow those exceptions. First, the bill would eliminate the exception for a tribe that receives a special determination from the Department of the Interior and approval of the state's governor (referred to as two-part determinations) for all but those tribes that had an application pending before April 15, 2006. Second, it would add new conditions to the exceptions for newly created or restored tribes.

These changes would have limited impact on the ability of tribes to open gaming operations. Eliminating two-part determinations probably would affect few, if any, tribes in the next few years because, according to government officials, most tribes that had any plans to seek such a determination filed applications before the April 15 deadline. Further, the Department of the Interior has ap-

proved only three applications for two-part determinations since IGRA was enacted. The new conditions affecting newly created or restored tribes generally reflect those already imposed administratively by the Department of the Interior.

Additional oversight of tribal gaming

Several provisions in S. 2078 would increase the National Indian Gaming Commission's role in regulating tribal gaming operations and so would impose further mandates on tribes. The bill would broaden existing requirements for NIGC review of tribal contracts and would require additional background checks of tribal gaming commissioners and contractors. It also would clarify the Commission's authority to oversee tribal gaming establishments that fall within Class III (generally, slot machines and other casino games) and to establish minimum standards for internal controls exerted by tribes over such operations. The impact of these new mandates is very uncertain and would depend to a great extent on the NIGC's implementing regulations.

Some of the new requirements in this bill focus on oversight of gaming-related contracts and contractors. The law already requires that NIGC review contracts for managing tribal gaming operations, but S. 2078 would broaden the existing requirement to cover other types of gaming-related contracts and would make these additional contractors subject to NIGC background investigations. While these new requirements fall on both the tribes and businesses as parties to the covered contracts, the direct cost of these changes would fall initially on the businesses that contract with tribes. The direct costs incurred by tribes could include legal costs and delays in implementing new contracts. The tribes could also bear a substantial part of the costs initially incurred by contractors, however, if those costs are passed through under the terms of these contracts.

Other requirements would fall entirely on the tribes with gaming operations. For example, the bill would require tribes to conduct background investigations of tribal gaming commissioners and key commission employees. CBO estimates that, even if tribes conduct relatively extensive background checks, the total cost of this mandate would not exceed $5 million per year, and the costs could be much less. The bill also includes explicit authority for NIGC to establish minimum standards for tribes' internal controls. Such standards have already been established by the NIGC under current law, but its authority to do so is currently under litigation. This provision would settle those legal challenges. While CBO cannot predict the outcome of the current litigation, we would not expect the cost of this provision to be significant in any case because most tribes have substantially adopted the standards. Finally, the bill would require all tribes with gang operations to pay fees to the NIGC, and remove an existing exception for certain tribes. This would not change the total amount of fees paid by tribes but would slightly reallocate the burden of those fees.

Impact on the private sector: S. 2078 would impose a private-sector mandate, as defined in UMRA, on certain contractors in the Indian gaming industry by making them subject to federal regulation of Class II and Class III gaming-related contracts. Based on information from industry and government sources, CBO estimates that the aggregate direct costs associated with complying with the man-

date would fall below the annual threshold established by UMRA for private-sector mandates ($128 million in 2006, adjusted annually for inflation).

S. 2078 would clarify and broaden the National Indian Gaming Commission's authority to regulate all Class II and Class III gaming-related contracts. Currently, the Commission regulates all management contracts for Class II and Class III Indian gaming. The bill would expand the Commission's authority to regulate additional types of Class II and Class III contracts, including, but not be limited to: consulting contracts; development contracts; financing contracts; and participation contracts. By regulating the terms of such contract, the bill would impose a mandate on certain private contractors.

The bill would require new gaming-related contracts and any changes in existing contracts to be approved by NIGC. Such gaming-related contracts would have to meet certain minimum standards outlined in the bill to be eligible for approval by the Commission. In approving such contracts, NIGC would have to determine if contractors or subcontractors are suitable to engage in business with Indian tribes. In addition, in the case of a change in a contract, the bill would require contractors to provide a notice to the NIGC if there is any change in the information they reported during a suitability determination. The bill would exclude from the suitability determinations any contractor that is either regulated, by the Securities and Exchange Commission (SEC) or wholly or partially owned by an entity regulated by the SEC.

The cost of the mandate would be the incremental expenditures incurred in meeting the new requirements on gaming-related contracts. The bill would require that gaming-related contractors pay the costs of any investigation activities carried out during the suitability determination. According to government sources, such activities would include, but may not be limited to, FBI background checks and fingerprinting procedures. Currently, NIGC only requires management officials and other key employees of gaming enterprises of Class II and Class III Indian gaming to be subject to background checks and fingerprinting. CBO estimates that the incremental costs associated with the additional background checks and fingerprinting for those entities would be minimal.

Estimate prepared by: Federal Costs: Matthew Pickford. Impact on State, Local, and Tribal Governments: Marjorie Miller. Impact on the Private Sector: Craig Cammarata and Tyler Kruzich.

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 evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill.

S. 2078 would require additional parties seeking to do business with Indian gaming operations to submit their gaming-related contracts to the NIGC for approval, and requires the parties to these contracts to undergo background investigations. The bill would also require tribal gaming commissioners and key commission employ-

ees to undergo background checks. These reviews could impose paperwork requirements on these parties to gaming-related contracts.

S. 2078 provides that gaming-related contractors are to pay the cost of their background investigations. As for the cost to NIGC of reviewing additional contracts, the Committee anticipates that the NIGC will recover this through fees assessed on all Class II and III tribal gaming operations. Because of the fast turn-around times for reviews specified in the substitute amendment adopted by the Committee, the Committee does not expect the new regulatory requirements to result in significant indirect costs, such as loss of contract opportunities or increased costs of capital.

The Committee believes that the regulation of additional parties seeking to do business in Indian gaming, and the attendant paperwork burden, is necessary, consistent with IGRA, to protect the integrity of Indian gaming operations and ensure that tribes are the principal beneficiaries of them.

EXECUTIVE COMMUNICATIONS

The Committee has received the following communications from the Executive Branch regarding S. 2078.

NATIONAL INDIAN GAMING COMMISSION,
Washington, DC, March 28, 2006.

Re Regulation of Indian Gaming.

Hon. JOHN MCCAIN, *Chairman,*
Hon. BYRON DORGAN, *Vice-Chairman,*
Committee on Indian Affairs, U.S. Senate, Hart Office Building, Washington, DC.

DEAR SENATORS: As the Senate Indian Affairs Committee prepares to mark up S. 2078 the NIGC observes that much of the information in the public and some in the testimony before the Committee does not portray a complete picture of Indian gaming. This letter is an attempt to give facts and examples, some of which has been previously provided to the Committee, that will help create a more comprehensive view of the opportunities and challenges facing Indian gaming.

IGRA, in effect, anticipated the wide range of regulatory structures in the various Tribal-state compacts through the establishment of the NIGC as an independent federal regulatory authority for gaming on Indian lands. With respect to NIGC's regulatory oversight responsibilities, IGRA authorized the Commission to penalize violations of the Act, violations of the Commission's own regulations, and violations of the Commission-approved tribal gaming ordinances by the way of imposition of civil fines and orders for closure of tribal gaming facilities.

IGRA mandates that Tribes may conduct Class III gaming only in states where such activity is permissible under state law, and where the tribes enter into compacts with states relating to this activity, which compacts require approval of the Secretary of the Interior. Compacts might include specific regulatory structures and give regulatory responsibility to the tribe, to the state, or to both in some combination of responsibilities. Since the passage of IGRA, 232 tribes have executed 249 Class III compacts with 22 states,

and the allocation of regulatory responsibility, if addressed at all, is as diverse as the states and Tribes that have negotiated them.

Typically, the regulatory role a particular state undertakes in its compact was taken from and modeled on that state's experience with the regulation of its own legalized gaming at the time the compact was negotiated. Where such states develop effective regulatory programs, the need for NIGC oversight is greatly reduced. For example, in states where the tribal-state compacts call for regular state oversight, institute technical standards and testing protocols for gaming machines and establish internal control requirements, the NIGC's oversight role will be limited; such as in the case of Arizona. Some states, however, have assumed a minimal regulatory role, such as Michigan and North Dakota. In some cases compacts have become little more than a revenue sharing agreement between the state and the Tribe. Further, some compacts establish ineffective remedies for major violations. Consequently, under circumstances where the states do not have a significant regulatory presence, the NIGC must undertake a range of oversight activities.

The oversight responsibilities of the NIGC give it a unique view from which to report the variety of challenges confronting Indian gaming in terms of regulatory violations and enforcement actions taken. It must be said that the primary responsibility for meeting these challenges ought to be on the shoulders of the Tribes. The NIGC encourages strong Tribal regulation and applauds the resources that Indian gaming currently applies to regulation and other oversight activities. As Indian gaming continues to grow and the sophistication of operations expands and as the levels of the revenues increase accordingly, regulation must stay ahead of this growth if the integrity of the industry is to be protected. It is in this context that the following examples of the numbers and types of violations the NIGC has uncovered are offered.

MINIMUM INTERNAL CONTROL STANDARDS

The NIGC has compiled the following review of Minimum Internal Control Standards ("MICS") Compliance Audits—January 2001 to February 2006. The number of tribal gaming operations is taken from those reporting financial information to NIGC.

Gaming Operations	367
Number of NIGC Audits	37
Total MICS Violations	2,355
Average MICS Violations	64

- In the past year the NIGC has completed 11 MICS audits with 559 violations.
- Findings common to most compliance audits:
  - Lack of statistical game analysis;
  - Ineffective key control procedures;
  - Failure to secure gaming machine jackpot/fill system;
  - Failure to effectively investigate cash variances/missing supporting documentation for the cage accountability/failure to reconcile cage accountability to general ledger on a monthly basis;
  - Inadequate segregation of duties and authorization of players tracking system account adjustments;

Ineffective internal audit department audit programs, testing procedures, report writing and/or follow-up;

Deficient surveillance coverage and recordings;

Noncompliance with Internal Revenue Service Regulation 31 CFR Part 103;

Failure to exercise technical oversight or control over the computerized gaming machine systems, including the maintenance requirements for personnel access;

Failure to properly document receipt and withdrawal transactions involving pari-mutuel patrons' funds and a lack of a comprehensive audit procedure of all pari-mutuel transactions;

Failure to adequately secure and account for sensitive inventory items, including playing cards, dice, bingo paper and keno/bingo balls; and

Failure to adopt appropriate overall information technology controls specific to hardware and software access to ensure gambling games and related functions are adequately protected.

Although the NIGC identified the above violations, it is impossible to accurately determine the financial losses the tribes incurred because of not maintaining the minimum internal controls required by the NIGC standards. These violations show that certain tribes are not adequately protecting their gaming assets.

SUITABILITY OF KEY EMPLOYEE AND PRIMARY MANAGEMENT OFFICIALS

Since the inception of the NIGC we have encountered 178 instances where Tribes licensed key employees or primary management officials over NIGC objections.

REGULATORY VIOLATIONS

In the year the NIGC has identified the following violations:

Fee Submissions	92
Audit Submissions	30
MICs Report Submissions	24
Background Violations	20
Managing Without an Approved Contract—Investigations Pending	10
Misuse of Gaming Revenues—Investigations Pending	6
Health and Safety Violations	16
Referrals of Possible Illegal Activity	25
Total	207

BREAKDOWN IN TRIBAL REGULATION

The NIGC oversight regularly uncovers serious breakdowns in regulation at Class II and Class III tribal gaming operations throughout the country. This is true even where there is apparent adequate tribal regulation and control is in place.

- *Examples* of instances where tribal gaming operational and regulatory efforts have been found deficient include the following:

During the course of investigations and MICS compliance audits, NIGC investigators and auditors discovered that an extraordinary amount of money was flowing through two off track betting (OTB) operations on two reservations. The amount of money was so high in comparison to the amount that could reasonably flow through such OTB operations that

our investigators immediately *suspected money laundering* or similar activities. These two operations were the first referrals to the FBI's working group in which we participate. The FBI investigations found they were part of a wide spread network of such operations with organized crime links and several federal criminal law violations. Unfortunately, the tribes' gaming management allowed them to gain access and operate as part of their Class III tribal gaming operations, and the tribes' gaming regulators completely failed to take any action against these illegal OTB operations.

There are also examples where tribes continued to operate, without modification or correction, a gaming facility that had long been *identified as a serious fire hazard;* permitted gaming activities to be conducted by companies owned by individuals with known criminal associations; distributed large amounts of gaming revenues without requisite approved revenue allocation plans or the financial controls necessary to account for them; knowingly operated gaming machines that were plainly illegal; and appointed gaming commissioners and regulatory employees and licensed and employed gaming employees whose criminal histories indicated that they were unsuitable and serious risks to the tribes' gaming enterprise. An accurate assessment of Indian gaming regulation must also reflect the unfortunate examples of tribes that are so politically divided that they are unable to adequately regulate their gaming activities, as well as instances where tribal officials have personally benefited from gaming revenues at the expense of the tribe itself. In addition, there have been many instances where apparent conflicts of interest have undermined the integrity and effectiveness of tribal gaming regulation. In all of these troubling situations it was necessary for the NIGC to step in to address the problems.

The above examples illustrate that Indian gaming has many regulatory challenges that without comprehensive well informed oversight and enforcement the integrity of the industry would be in jeopardy.

The NIGC has compiled a list of potential risks to Indian gaming if strong oversight is not maintained:

Risk of not catching misuse of gaming revenues by tribal officials;

Risk of not catching employee embezz1ement;

Risk of not catching manipulations and/or theft from gaming machines;

Less direct ways to investigate allegations of criminal activity or the presence of organized crime influence;

Unable to determine whether third parties are managing the gaming facility without an approved contract;

Unable to determine whether imminent jeopardy exists with regard to the safety of employees and patrons of the gaming establishment;

Unable to determine whether individuals other than the recognized tribal government are asserting authority over the gaming operation;

Unable to determine whether outside investors have unduly influenced tribal decision-making or made improper payments to tribal officials;

Unable to perform operational audits, which track the movement of money throughout the casino;

Risk that tribal surveillance and gaming commission funding could decrease rapidly, as these are expensive and are not seen as increasing the casino bottom line.

POTENTIAL IMPACT OF CRIT DECISION

Tribes argue that the CRIT decision should be read broadly. This interpretation may impact on the ability of the NIGC to enforce its regulations as follows:

Activity	*Impact*
Bingo	Unchanged.
Pull-Tabs	Unchanged.
Card Games	Unchanged.
Keno	No enforcement.
Pari-Mutuel Wagering	No enforcement.
Table Games	No enforcement.
Gaming Machines	No enforcement.
Cage	Scope limited—Bingo/Pull-Tab/Card Game Inventory Items.
Credit	Scope limited—Bingo/Pull-Tab/Card Game Inventory Items.
Information Technology	Scope limited—Bingo/Pull-Tab/Card Game Related Software and Hardware.
Complimentary Services and Items.	Scope limited—Bingo/Pull-Tab/Card Transactions.
Drop and Count	Scope limited—Bingo/Pull-Tab/Card Game Cash, Cash Equivalents and Documents.
Surveillance	Scope limited—Bingo/Pull-Tab/Card Game Areas.
Internal Audit	Scope limited—Bingo/Pull-Tab/Card Game Transactions.

The above examples illustrate that the regulation of Indian gaming is.. a complicated matter. At the Tribal level it can often be impacted by internal politics that may lead to uneven enforcement or at times little effect regulation regardless of overall intention. It is nevertheless clear that Tribes have a very strong interest in assuring that their operations are adequately regulated.

LACK OF INDEPENDENT TRIBAL REGULATIONS

Some gaming commissions are not sufficiently independent of the tribal governments or the managers that operate the gaming operation. In this connection the history of Nevada's regulatory structure may be instructive. Effective gaming regulatory authority in Nevada was a process that evolved over a forty year period and is continuing to improve and respond to change today. Only after creation of a separate gaming regulatory authority did oversight of the industry have an effective champion. Beginning in the late 70's, significant progress was made into the identification and removal of individuals and entities intent upon exploitation and corruption. Although many factors contributed to corruptive influences in Nevada, one aspect was key. At the time gaming was legalized in Nevada, the state and local governments were in a rather deprived financial position therefore the governmental agencies charged with regulatory oversight were also dependent, albeit desperate, for the potential revenues this growing industry could provide. The Nevada experience demonstrates a critical policy question when gaming regulations are considered: that as the government charged

with regulation becomes increasingly dependent upon the profitability of the industry being regulated; the effectiveness of the regulatory effort may diminish.

Generally, in tribal gaming, the tribal council is the ultimate governmental authority responsible for ensuring the gaming operation generates the greatest return on investment and that, in doing so, is effectively regulated. Such an organizational structure has challenges because the motivations lack congruity. Inevitably, from time to time, one objective may be foregone in pursuit of the other and, many times it is the oversight function. Although some tribes have recognized the organizational weakness and have installed procedures to counteract its effect, others have not and, as a result, the effectiveness of their regulatory processes is significantly diminished.

In conclusion, for the many reasons stated above and the continued dramatic growth in Indian gaming (see Attachment #1), it seems to be abundantly clear that Indian gaming needs broad and effective oversight in order to continue growing and benefiting Indian communities.

We appreciate your consideration of the above information and hope you find it helpful as the Committee marks up S. 2078 preparing it for further consideration. We wish to thank you for your considerable hard work and leadership on all of these issues. We will remain available to you and your staffs regarding Indian gaming.

Sincerely,

PHILIP N. HOGEN,
Chairman.

ATTACHMENT #1

Overview of Indian gaming

Indian gaming has been the most effective economic development tool ever brought to Indian country. It is recognized that since the passage of the Indian Gaming Regulatory Act in 1988 the diversity and dramatic growth of Indian gaming is unprecedence. Indian gaming has grown from revenues $5.4 billion in 1995 to today over $20 billion in gross gaming revenues today.

Revenue generation, of course, is not the only objective or benefit for tribes. In many instances, even small, rural tribal gaming operations have brought employment opportunities to tribal members where none existed before. For many, these employment opportunities were the first long-term jobs they ever held or had the prospect to hold.

This gaming is conducted on Indian lands throughout the country by approximately 225 tribes. The diversity among these operations is dramatic. With this diversity in mind, it is instructive to examine how gaming revenue is distributed among the 367 tribal gaming operations reporting financial information to NIGC. The following chart gives the complete picture.

Gross gaming revenue ranges	Number of operations	Percent of total operations	Gross gaming revenues (billion)	Percent of total gross gaming revenues	Median gross gaming revenues (million)
Over $100 million	55	15.0	$13.47	69.5	$178.7

Gross gaming revenue ranges	Number of operations	Percent of total operations	Gross gaming revenues (billion)	Percent of total gross gaming revenues	Median gross gaming revenues (million)
$25 million to $100	93	25.3	$4.38	22.6	$43.5
$5 million to $25 million	103	28.1	$1.37	7.1	$1.32
Under $5 million	116	31.6	0.17	0.9	$.98
Total	367	100.0	$19.41	100.0	

As this demonstrates, a relatively small number of Tribes have very large gaming revenues, while a large number of Tribes have relatively small gaming revenues.

At the time of IGRA's passage, the primary Indian gaming activity was bingo generally and high stakes bingo in particular, it would not be surprising if those in Congress that supported IGRA envisioned such Class II gaming to remain the dominant activity that would be conducted under IGRA. As we all know this has not been the case—over 80% of Indian gaming is now Class III.

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. 2078, 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—]

SEC. 4. DEFINITIONS.

In this Act:

* * * * * * *

[(6)] *(3)* The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

[(7)] *(4)* (A) The term "class II gaming" means—

* * * * * * *

(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))].

* * * * * * *

[(8)] *(5)* The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

[(3)] *(6)* The term "Commission" means the National Indian Gaming Commission established pursuant to section 5 of this Act.

(7) CONSULTING CONTRACT.—The term 'consulting contract' means any contract or subcontract between an Indian tribe and a gaming-related contractor, or between a gaming-related contractor and a subcontractor, that provides for advising or consulting with a person that exercises management over all or a significant part of a gaming operation, subject to such categorical exclusions as the Commission may establish, by regulation.

(8) DEVELOPMENT CONTRACT.—The term 'development contract' means any contract or subcontract between an Indian tribe and a gaming-related contractor, or between a gaming-related contractor and a subcontractor, that provides for the development or construction of a facility to be used for an Indian gaming activity, subject to such categorical exclusions as the Commission may establish, by regulation.

(9) FINANCING CONTRACT.—

(A) IN GENERAL.—The term 'financing contract' means any contract or subcontract between an Indian tribe and a gaming-related contractor, or between a gaming-related contractor and a subcontractor—

(i) that is not a management contract, a consulting contract, a development contract, or a participation contract;

(ii) pursuant to which a gaming-related contractor or subcontractor provides services or property of any kind, or financing of any nature, to be used for an Indian gaming activity; and

(iii) for compensation (including interest and fees), denominated in any manner—

(I) of more than $250,000 during the term of the contract or subcontract (as periodically adjusted for inflation in accordance with rules adopted by the Commission); and

(II) that is provided by—

(aa) loan;

(bb) lease; or

(cc) deferred payments.

(B) EXCLUSIONS.—The term 'financing contract' does not include—

(i) a contract or agreement between an Indian tribe and—

(I) a federally-chartered or State-chartered bank;

(II) another Indian tribe;

(III) another Indian tribe, or a State, pursuant to a Tribal-State compact; or

(IV) an entity that is—

(aa) regulated by the Securities and Exchange Commission; or

(bb) wholly owned, directly or indirectly, by an entity that is regulated by the Securities and Exchange Commission;

(ii) a contract or agreement that is subject to the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.); or

(iii) any other agreement or contract that the Commission, by regulation, determines should be categorically excluded from consideration as a financing contract.

(10) GAMING-RELATED CONTRACT.—The term 'gaming-related contract' means any management contract, consulting contract, development contract, financing contract, participation contract, or other agreement determined by the Commission pursuant to a rulemaking under section 7 to be subject to the requirements of section 12, and any collateral agreement related to any of the foregoing.

(11) GAMING-RELATED CONTRACTOR.—The term 'gaming-related contractor' means an entity of person, including an individual who is an officer, or who serves on the board of directors, of an entity, or a stockholder that directly or indirectly holds at least 5 percent of the issued and outstanding stock of an entity, that enters into a gaming-related contract with—

(A) an Indian tribe; or

(B) an agent of an Indian tribe.

[(4)**]** *(12)* The term "Indian lands" means—

* * * * * * *

[(5)**]** *(13)* The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which—

* * * * * * *

(14) MANAGEMENT CONTRACT.—

(A) IN GENERAL.—The term 'management contract' means any contract or subcontract between an Indian tribe and a gaming-related contractor, or between a gaming-related contractor and a subcontractor, that provides for the management of all or a part of a gaming operation, subject to such categorical exclusions as the Commission may establish, by regulation.

(B) EXCLUSIONS.—The term 'management contract' does not include a personal employment contract under which compensation is not based on a percentage of the revenues or profit increases of an Indian gaming activity or a prospective Indian gaming activity.

[(9)**]** *(15)* The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(16) PARTICIPATION CONTRACT.—The term 'participation contract' means any contract or subcontract between an Indian tribe and a gaming-related contractor, or between a gaming-related contractor and a subcontractor, under which compensa-

tion to the gaming-related contractor or subcontractor is based, in whole or in part, on a percentage of the revenues or profit increases of an Indian gaming activity or a prospective Indian gaming activity, subject to such categorical exclusions as the Commission may establish, by regulation.

[(10)] *(17)* The term "Secretary" means the Secretary of the Interior.

* * * * * * *

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.—Except as provided in paragraph (2), a vacancy on the Commission shall be filled in the same manner as the original appointment.

(2) VICE CHAIRMAN.—The Vice Chairman shall act as Chairman in the absence or disability of the Chairman.

(3) EXPIRATION OF TERM.—Unless a member of the Commission is removed for cause under subsection (b)(6), the member may—

(A) serve after the expiration of the term of office of the member until a successor is appointed; or

(B) be reappointed to serve on the Commission.

* * * * * * *

(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. (a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to—

* * * * * * *

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 11; [and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 11(d)(9) and 12]

(4) approve gaming-related contracts for class II gaming and class III gaming under section 12; and

(5) conduct a background investigation and make a determination with respect to the suitability of a gaming-related contractor, as the Chairman determines to be appropriate.

* * * * * * *

(c) DELEGATION OF AUTHORITY.—

(1) IN GENERAL.—The Chairman may delegate any authority under this section to any member of the Commission, as the Chairman determines to be appropriate.

(2) REQUIREMENT.—In carrying out an activity pursuant to a delegation under paragraph (1), a member of the Commission shall be subject to, and act in accordance with—

(A) the general policies formally adopted by the Commission; and

(B) the regulatory decisions, findings, and determinations of the Commission pursuant to Federal law.

POWERS OF THE COMMISSION

SEC. 7. * * *

(b) The Commission—

(1) shall monitor class II gaming *and class III gaming* conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming *or class III gaming* is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming *and class III gaming* conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this Act;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

[(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this Act.**]**

(10) shall promulgate such regulations and guidelines as the Commission determines to be appropriate to implement this Act, including—

(A) regulations addressing minimum internal control standards for class II gaming and class III gaming activities; and

(B) regulations determining categories of contracts for goods and services directly relating to tribal gaming activities that shall be—

(i) considered to be gaming-related contracts; and

(ii) subject to the requirements of section 12.

* * * * * * *

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 of title 5, United States Code] *pay payable for level IV of the Executive Schedule under chapter 11 of title 2, United States Code, as adjusted by section 5318 of title 5, United States Code.*

(b) 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] *pay payable for level IV of the Executive Schedule under chapter 11 of title 2, United States Code, as adjusted by section 5318 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] *pay payable for level IV of the Executive Schedule under chapter 11 of title 2, United States Code, as adjusted by section 5318 of title 5, United States Code.*

* * * * * * *

TRIBAL GAMING ORDINANCES

SEC. 11. * * *

(b)(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)[, and] ; *and*

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(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 background investigations and ongoing oversight activities are conducted with respect to—

(I) tribal gaming commissioners and key tribal gaming commission employees, as determined by the Chairman;

(II) primary management officials and other key employees of the gaming enterprise, as determined by the Chairman; and

(III) persons that provide goods or services directly relating to the tribal gaming activity; and

(ii) includes—

(I) tribal licenses for **[**primary management officials and key employees of the gaming enterprise with**]** *the individuals and entities described in subclauses (II) and (III) of clause (i), including* prompt notification to the Commission of the issuance of such licenses; * * *

(4) * * *

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 **[**of the Act,**]***;*

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) **[**of this subsection,**]***;*

(III) not less than 60 percent of the net revenues is income to the Indian tribe**[**, and**]***; and*

(IV) the owner of such gaming operation pays an appropriate assessment to the **[**National Indian Gaming**]** Commission under section 18(a)(1) for regulation of such gaming. * * *

(d)(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such **[**lands,**]** *lands;*

(ii) meets the requirements of subsection (b) **[**, and**]***; and*

(iii) is approved by the Chairman**[**,**]***;*

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity**[**, and**]***; and*

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b).

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe**[**, or**]***; or*

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 12(e)(1)(D).

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

* * * * * * *

(D) * * *

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect**[**, and**]***; and*

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

* * * * * * *

(7) * * *

(B) * * *

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3)**[**, and**]***; and*

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities**[**, and**]***; and*

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

* * * * * * *

(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, 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**]** *State; and*

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

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this Act**[**,**]***;*

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands**[**, or**]***; or*

(iii) the trust obligations of the United States to Indians.

* * * * * * *

[(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.**]**

* * * * * * *

(f) PROVISION OF INFORMATION TO CHAIRMAN.—Immediately after approving a plan (including any amendment, revision, or rescission of any part of a plan) under subsection (b)(3), the Secretary shall provide to the Chairman—

(1) a notice of the approval; and

(2) the plan, and any information used by the Secretary in approving the plan.

[MANAGEMENT CONTRACTS

SEC. 12(a)(1). 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), 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 corporation 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 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 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.

(b) The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least—

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c)(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projec-

tions, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) The Chairman shall not approve any contract if the Chairman determines that—

(1) any person listed pursuant to subsection (a)(1)(A) of this section—

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

(i) The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.]

SEC. 12. GAMING-RELATED CONTRACTS.

(a) APPROVAL BY CHAIRMAN.—

(1) GAMING-RELATED CONTRACTS.—To be enforceable and valid, a gaming-related contract must be approved by the Chairman under subsection (b).

(2) GAMING-RELATED CONTRACTORS.—Each gaming-related contractor shall be subject to a suitability determination by the Chairman under subsection (c).

(3) FAILURE TO APPROVE.—For any gaming-related contract that is not approved by the Chairman under subsection (b)—

(A) the gaming-related contract shall be void ab initio; and

(B) any party to the gaming-related contract shall be subject to such civil penalties as the Chairman determines to be appropriate under section 14.

(b) CONTRACT REVIEW.—

(1) MINIMUM CONTRACT REQUIREMENTS.—A gaming-related contract under this Act shall provide, at a minimum, provisions relating to—

(A) accounting and reporting procedures, including, as appropriate, provisions relating to verifiable financial reports;

(B) the access required to ensure proper performance of the gaming-related contract, including access to—

(i) the daily operations of the gaming activity;

(ii) real property relating to the gaming activity;

(iii) equipment associated with the gaming activity; and

(iv) any other tangible or intangible property used to carry out the gaming activity;

(C) assurances of performance by each party to the gaming-related contract, as the Chairman determines to be necessary;

(D) the reasons for, and method of, termination of the gaming-related contract; and

(E) such other provisions as the Chairman determines to be necessary to ensure that the Indian tribe will receive the primary benefit as the sole proprietor of the gaming activity.

(2) TERM.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term of a gaming-related contract shall not exceed 5 years.

(B) EXCEPTIONS.—

(i) EXTRAORDINARY CIRCUMSTANCES.—Notwithstanding subparagraph (A), a gaming-related contract may have a term of not more than 7 years if the Chairman determines the term is appropriate, taking into consideration any extraordinary circumstances relating to the gaming-related contract.

(ii) FINANCING CONTRACTS.—The terms described in subparagraph (A) and clause (i) shall not apply to a financing contract.

(3) FEES.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the fee provided pursuant to a gaming-related contract shall not exceed an amount equal to 30 percent of the net revenues of the gaming operation that is the subject of the gaming-related contract.

(B) EXCEPTIONS.—

(i) EXTRAORDINARY CIRCUMSTANCES.—The fee provided pursuant to a gaming-related contract may be in an amount equal to not more than 40 percent of net revenues of the gaming operation that is the subject of the gaming-related contract if the Chairman determines that such a fee is appropriate, taking into consideration any extraordinary circumstances relating to the gaming-related contract.

(ii) FINANCING CONTRACTS.—The limitations described in subparagraph (A) and clause (i) shall not apply to a financing contract.

(4) REQUIREMENTS FOR DISAPPROVAL.—The Chairman shall disapprove a gaming-related contract under this subsection if the Chairman determines that—

(A) the gaming-related contract fails to meet any requirement under paragraph (1), (2), or (3);

(B) a gaming-related contractor that is a party to the gaming-related contract is unsuitable under subsection (c);

(C) a gaming-related contractor or beneficiary of the gaming-related contract—

(i) unduly interfered with or influenced a decision or process of tribal government relating to the gaming activity; or

(ii) deliberately or substantially failed to comply with a tribal gaming ordinance or resolution;

(D) the Indian tribe will not receive the primary benefit as the sole proprietor of the gaming activity;

(E) a trustee would not approve the gaming-related contract because the compensation or fees do not bear a reasonable relationship to the cost of the goods or benefit of the services provided; or

(F) a person or an Indian tribe would violate a provision of this Act—

(i) on approval of the gaming-related contract; or

(ii) in carrying out the gaming-related contract.

(5) TIMELINES.—

(A) SUBMISSION OF GAMING-RELATED CONTRACTS.—To be approved under this subsection, a gaming-related contract shall be submitted to the Chairman by the appropriate Indian tribe by not later than 30 days after the date on which the gaming-related contract is executed.

(B) DETERMINATION OF CHAIRMAN.—

(i) IN GENERAL.—Subject to clause (ii), the Chairman shall approve or disapprove a management contract, a development contract, a participation contract, or other

gaming-related contract designated by the Chairman under section 7 by not later than 90 days after the date on which such a contract is submitted under subparagraph (A).

(ii) FINANCING CONTRACTS AND CONSULTING CONTRACTS.—The Chairman shall approve or disapprove a financing contract or a consulting contract by not later than 30 days after the date on which such a contract is submitted under subparagraph (A).

(iii) EXTENSIONS.—The Chairman may extend a deadline under clause (i) or (ii) on approval of the Indian tribe that is party to the applicable contract.

(6) ADDITIONAL FACTORS FOR CONSIDERATION.—In determining whether to approve a gaming-related contract under this subsection, the Chairman may take into consideration any information relating to the terms, parties, and beneficiaries of—

(A) the gaming-related contract; and

(B) any other agreement relating to the Indian gaming activity, as the Chairman determines to be appropriate.

(7) MODIFICATIONS.—Notwithstanding an approval of a gaming-related contract under this subsection, or a determination of suitability of a gaming-related contractor under subsection (c), if the Chairman determines, based on information that was not disclosed at the time of the approval or determination, that a gaming-related contract violates this Act, or that a determination of suitability should not have been made, the Chairman, after providing notice and an opportunity for a hearing, may—

(A) require any modification of the gaming-related contract that the Chairman determines to be necessary to comply with this Act;

(B) suspend performance under the gaming-related contract;

(C) revoke a determination of suitability under subsection (c); or

(D) void the gaming-related contract.

(c) SUITABILITY DETERMINATIONS.—

(1) IN GENERAL.—Subject to paragraph (4), a gaming-related contract shall not be approved under subsection (b) unless, on receipt of an application for a determination of suitability, the Chairman determines under this subsection that each applicable gaming-related contractor is suitable.

(2) STANDARD.—The Chairman, by regulation, shall establish a suitability standard under which a gaming-related contractor shall not be considered to be suitable under this subsection if, as determined by the Chairman—

(A) the gaming-related contractor—

(i) is an elected member of the governing body of an Indian tribe that is a party to an applicable gaming-related contract;

(ii) at any time, was convicted of any felony or gaming offense; or

(iii) (I) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe under this Act; or

(II) has refused to provide information requested by the Commission under this Act;

(B) the prior activities, criminal record (if any), reputation, habits, or associations of the gaming-related contractor—

(i) pose a threat to—

(I) the public interest; or

(II) the effective regulation of gaming; or

(ii) create or enhance the risk of unsuitable, unfair, or illegal practices, methods, or activities with respect to—

(I) a gaming activity; or

(II) the operation of a gaming facility.

(3) AGREEMENTS WITH INDIAN TRIBES.—In carrying out this subsection, the Chairman may enter into a contract with any Indian tribe—

(A) to conduct a background investigation of a gaming-related contractor;

(B) to assist in determining the suitability of a gaming-related contractor; or

(C) to facilitate tribal licensing of a person that provides goods or services directly relating to the tribal gaming activity or a gaming-related contractor in accordance with the standards established under paragraph (2).

(4) ALTERNATIVE DETERMINATIONS AND EXCLUSIONS.—The Commission, by regulation, may establish, as the Commission determines to be appropriate—

(A) alternative methods of determining suitability; and

(B) categorical exclusions for persons or entities that are subject to licensing or suitability determinations by—

(i) a Federal, State, or tribal agency; or

(ii) a professional association.

(5) REGISTRY.—The Chairman shall establish and maintain a registry of—

(A) each suitability determination made under this subsection; and

(B) each suitability determination of an Indian tribe provided under section 11.

(6) RESPONSIBILITY OF GAMING-RELATED CONTRACTOR.—A gaming-related contractor shall—

(A) pay the costs of any investigation activity of the Chairman in carrying out this subsection; and

(B) provide to the Chairman a notice of any change in information provided during an investigation on discovery of the change.

(d) CONVEYANCE OF REAL PROPERTY.—No gaming-related contract under this Act shall transfer or otherwise convey any interest in land or other real property unless the transfer or conveyance—

(1) is authorized under law; and

(2) is specifically described in the gaming-related contract.

(e) CONTRACT AUTHORITY.—The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81) relating to contracts under this Act is transferred to the Commission.

(f) NO EFFECT ON TRIBAL AUTHORITY.—This section does not expand, limit, or otherwise affect the authority of any Indian tribe or

any party to a Tribe-State compact to investigate, license, or impose a fee on a gaming-related contractor.

(g) APPEALS.—The Chairman, by regulation, shall provide an opportunity for an appeal, conducted through a hearing before the Commission, of any determination of the Chairman under this section by not later than 30 days after the date on which the determination is made.

(h) EMERGENCY WAIVERS.—The Chairman may promulgate regulations providing for a waiver of any requirement under this section because of—

(1) an emergency; or

(2) an imminent threat to the public health or safety.

* * * * * * *

[Civil Penalties

SEC. 14.(a)(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this Act, any regulation prescribed by the Commission pursuant to this Act, or tribal regulations, ordinances, or resolutions approved under section 11 or 13.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this Act, by regulations prescribed under this Act, or by tribal regulations, ordinances, or resolutions, approved under section 11 or 13, that may result in the imposition of a fine under subsection (a)(1), the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.**]**

SEC. 14. CIVIL PENALTIES.

(a) PENALTIES.—

(1) VIOLATION OF ACT.—

(A) IN GENERAL.—Except as provided in subparagraph (B), an Indian tribe, individual, or entity that violates any provision of this Act (including any regulation of the Commission and any Indian tribal regulation, ordinance, or resolution approved under section 11 or 13) may be subject to, as the Chairman determines to be appropriate—

(i) an appropriate civil fine, in an amount not to exceed $25,000 per violation per day; or

(ii) an order of the Chairman for an accounting and disgorgement, including interest.

(B) APPLICATION TO INDIAN TRIBES.—Subparagraph (A)(ii) shall not apply to any Indian tribe.

(2) APPEALS.—The Chairman shall provide, by regulation, an opportunity to appeal a determination relating to a violation under paragraph (1).

(3) WRITTEN COMPLAINTS.—

(A) IN GENERAL.—If the Commission has reason to believe that an Indian tribe or a party to a gaming-related contract may be subject to a penalty under paragraph (1), the final closure of an Indian gaming activity, or a modification or termination order relating to the gaming-related contract, the Chairman shall provide to the Indian tribe or party a written complaint, including—

(i) a description of any act or omission that is the basis of the belief of the Commission; and

(ii) a description of any action being considered by the Commission relating to the act or omission.

(B) REQUIREMENTS.—A written complaint under subparagraph (A)—

(i) shall be written in common and concise language;

(ii) shall identify any statutory or regulatory provision relating to an alleged violation by the Indian tribe or party; and

(iii) shall not be written only in statutory or regulatory language.

[(b)(1) The Chairman**]** *(b) TEMPORARY CLOSURES.—*

(1) IN GENERAL.—The Chairman shall have power to order temporary closure of an **[**Indian game**]** *Indian gaming activity, or any part of such a gaming activity,* for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 **[**of this Act**]**.

[(2) Not later than thirty**]** *(2) HEARINGS.—*

(A) IN GENERAL.—Not later than 30 days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or **[**management contractor**]** *party to a gaming-related contract* involved shall have a right to a hearing before the Commission to determine whether such order should be made **[**permanent**]** *final or* dissolved. **[**Not later than sixty**]**

(B) DETERMINATION OF COMMISSION.—Not later than 60 days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a **[**permanent**]** *final* closure of the gaming operation.

[(c) A decision**]** *(c) APPEAL OF FINAL DETERMINATIONS.*—A determination of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

[(d) Nothing**]** *(d) EFFECT ON REGULATORY AUTHORITY OF INDIAN TRIBES.*—Nothing in this Act precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regula-

tion is not inconsistent with this Act or with any rules or regulations adopted by the Commission.

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[GAMING ON LANDS ACQUIRED AFTER ENACTMENT OF THIS ACT

Sec. 20. * * *

(b)(1) Subsection (a) will not apply when—

[(A) the Secretary, after consultation] *(A)(i) before April 15, 2006 an Indian tribe has submitted to the Secretary a written request to have land deemed eligible for gaming under this subparagraph; and*

(ii) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim[,] *under Federal statutory law, if the land is within a State in which is located—*

(I) the reservation of such Indian tribe; or

(II) the last recognized reservation of such Indian tribe;

[(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or]

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary pursuant to the Federal acknowledgment process, if—

(I) the Indian tribe has an historical and geographical nexus to the land, as determined by the Secretary; and

(II) after consultation with the Indian tribe and appropriate local and tribal officials, and after providing for public notice and an opportunity to comment and a public hearing, the Secretary determines that a gaming establishment on the land—

(aa) would be in the best interests of the Indian tribe and members of the tribe; and

(bb) would not create significant, unmitigated impacts on the surrounding community; or

[(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.]

(iii) the restoration of land for an Indian tribe that is restored to Federal recognition, if—

(I) the Indian tribe has an historical and geographical nexus to the land, as determined by the Secretary;

(II) a temporal connection exists between the acquisition of the land and the date of recognition of the tribe, as determined by the Secretary; and

(III) after consultation with the Indian tribe and appropriate local and tribal officials, and after providing for public notice and an opportunity to comment and a public hearing, the Secretary determines that a gaming establishment on the land—

(aa) would be in the best interests of the Indian tribe and members of the tribe; and

(bb) would not create significant, unmitigated impacts on the surrounding community.

* * * * * * *

(4) EFFECT OF SUBSECTION.—Nothing in this subsection affects the validity of any determination regarding the eligibility of land for gaming made by the Secretary or Chairman before the date of enactment of this paragraph.

* * * * * * *

SEC. 25. CONSULTATION POLICY.

In promulgating rules and regulations pursuant to this Act, the Commission shall establish and maintain a policy of consultation with Indian tribes in accordance with the Federal trust responsibility and the government-to-government relationship that exists between Indian tribes and the Federal Government.

* * * * * * *

Public Law 105–83

Making appropriations for the Department of the Interior and related agencies for the fiscal year ending September 30, 1998, and for other purposes

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

* * * * * * *

SEC. 123. Assessment of Fees. (a) COMMISSION FUNDING.— Section 18(a) of the Indian Gaming Regulatory Act (25 U.S.C. 2717(a)) is amended—

(1) in paragraph (1), by striking "class II gaming activity" and inserting "gaming operation that conducts a class II or class III gaming activity"; and

(2) in paragraph (2)—

(A) in subparagraph (A)(i), by striking "no less than 0.5 percent nor" and inserting "no"; *and*

(B) in subparagraph (B), by striking "$1,500,000" and inserting "$8,000,000"[; *and*]*.*

[(C) nothing in subsection (a) of this section shall apply to self-regulated tribes such as the Mississippi Band of Choctaw.]

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