No. COA09-431 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

McCRACKEN AND AMICK, INCORPORATED d/b/a THE NEW VEMCO MUSIC CO. AND RALPH AMICK,	)	
Plaintiffs,	)	
v.	)	**From Wake County**
BEVERLY EAVES PERDUE, in her official capacity as Governor of North Carolina,	)	
Defendant.	)	

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BRIEF OF DEFENDANT-APPELLANT

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BRIEF OF DEFENDANT-APPELLANT

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QUESTION PRESENTED

I. DID THE TRIAL COURT ERR IN RULING THAT THE FEDERAL INDIAN GAMING REGULATORY ACT PROHIBITS THE NORTH CAROLINA GENERAL ASSEMBLY FROM GRANTING PREFERENTIAL GAMING RIGHTS TO THE EASTERN BAND OF CHEROKEE INDIANS?

STATEMENT OF THE CASE

Plaintiffs brought this declaratory judgment action against the Governor of North Carolina (hereafter "the State"), seeking declaratory relief as to several issues relating to the video gaming rights of the Eastern Band of Cherokee Indians (hereafter "the Cherokee Tribe"). (R p. 4) The State filed a motion to dismiss the Complaint pursuant to Rules 12(b)(6) and (7) of the North Carolina Rules of Civil Procedure. (R p. 54)

On 19 February, 2009, the Honorable Howard E. Manning, Jr., entered an order granting judgment on the pleadings in favor of Plaintiffs and denying the State's motion to dismiss. (R p. 59) However, he stayed the effect of his ruling pending a final determination of the State's appeal. (R p. 61) The State subsequently filed a timely notice of appeal. (R p. 63)

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Jurisdiction is vested in this Court to hear this appeal from a final judgment of the Superior Court pursuant to N.C. GEN. STAT. § 7A-27(b).

STATEMENT OF THE FACTS

Plaintiffs own and operate video gaming machines and amusement devices in North Carolina. (R p. 4) In their complaint, they originally sought two forms of declaratory relief. First, Plaintiffs sought a declaration that only the North

Carolina General Assembly - and not the Governor - possesses the authority to execute Tribal/State compacts with Indian tribes in North Carolina. (R pp. 4-11) Because Plaintiffs subsequently took a voluntary dismissal of that claim, it is not currently before this Court. (R p. 57)

Plaintiffs' second claim requested a declaration that 2006 N.C. SESS. LAWS 6 (hereafter "S.L. 2006-6") violates the federal Indian Gaming Regulatory Act (hereafter "IGRA") by permitting video gaming on tribal land despite simultaneously banning such gaming elsewhere in North Carolina. (R pp. 4-11) This is the claim ruled upon by the trial court and which is the subject of this appeal.

STANDARD OF REVIEW

Appellate review of an order granting judgment on the pleadings pursuant to Rule 12(c) is *de novo*. *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, __ N.C. App. __, 659 S.E.2d 442, 454 (2008).

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT THE INDIAN GAMING REGULATORY ACT PROHIBITS NORTH CAROLINA FROM GRANTING PREFERENTIAL GAMING RIGHTS TO THE EASTERN BAND OF CHEROKEE INDIANS.

(Assignments of Error Nos. 1-4) (R p. 69)

A. INTRODUCTION.

The only issue before this Court is one of statutory interpretation regarding a single provision in a federal law. It is undisputed that IGRA forbids States from giving federally recognized Indian tribes located within their borders *less* favorable gaming rights than those given to non-tribal entities. The question presented here is whether IGRA allows States to offer *more* favorable gaming rights to a tribe than those granted to non-tribal entities. Because IGRA permits a State to do so, the General Assembly's policy decision, reflected in S.L. 2006-6, to confer exclusive video gaming rights upon the Cherokee Tribe is lawful and, accordingly, the trial court erred in ruling to the contrary.

This is so for the following reasons: (1) the text of IGRA reflects congressional deference to the policy decisions reflected in gaming laws enacted by state legislatures as long as those laws do not treat tribes less favorably than non-tribal entities; (2) the United States Supreme Court has made clear that ambiguities in federal statutes intended to benefit Indian tribes (like IGRA) should

be interpreted in favor of the tribes; (3) Congress expressly considered and rejected proposed language in IGRA barring tribal gaming where such gaming was illegal elsewhere in the State; and (4) the only two appellate courts ruling on this precise issue have both concluded that IGRA allows States to confer exclusive gaming rights on tribes.[1]

B. LEGAL BACKGROUND.

The present case involves the interplay between principles of tribal sovereignty, federal law, and North Carolina law. Each of these is discussed more fully below.

1. Sovereign Powers of the Cherokee Tribe and Tribal Gaming.

Courts have repeatedly recognized the "unique historical relationship between the United States and Native American nations." *United States v. Garrett*, 122 Fed. Appx. 628, 631 (4th Cir. 2005); *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987) (holding that goals of tribal self-sufficiency and overall economic development serve "important federal interests"); *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (recognizing desire of Congress to

[1] Moreover, it is worth noting that the trial court's order is also at odds with rulings by two different North Carolina superior court judges rendered over the past three years in two prior challenges to S.L. 2006-6 which both raised a similar issue. (S pp. 76, 84-86, 99, 102-04, 112-13, 118, 123-24).

enable Indian tribes to attain higher degree of self-government, both economically and politically).

Before 1835, the Cherokee Tribe was a sovereign nation and currently is subject to the plenary power of the United States government. The Tribe continues to "possess[] the status of a 'domestic dependent nation' with certain retained inherent sovereign powers." *Wildcatt v. Smith*, 69 N.C. App. 1, 4-6, 316 S.E.2d 870, 873-74 (1984). Indeed, the United States Senate Committee - in its report on IGRA - described tribes and States as "two equal sovereigns." S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083. (*See* App. 15)

A commentator has noted that members of Indian tribes living on reservations are - under most economic indicators - "the poorest ethnic group in America." Gatsby Contreras, Note, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. Gender Race & Just. 487, 487 (2002). Tribal gaming, however, has achieved notable success in reducing unemployment and improving the economic status of tribal members. "[B]oth the gaming operations and the Indian Gaming Regulatory Act . . . have created distinct improvements in services and education in Indian Country." *Id*. at 488.

2. Federal Law.

In 1988, Congress passed IGRA in order to establish a statutory framework to balance the respective rights of tribes and States with regard to tribal gaming. *Doe v. Santa Clara Pueblo*, 154 P.3d 644, 654 (N.M. 2007). In order to effectuate this goal, IGRA authorized States to negotiate gaming compacts with tribes located within their borders and established three classes of gaming.[2] *See Texas v. United States*, 497 F.3d 491, 507 (5th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008); 25 U.S.C. § 2703(6)-(8). These compacts set out the terms under which gaming can be conducted on tribal land. *Taxpayers of Mich. Against Casinos v. State*, 732 N.W.2d 487, 493 (2007).

IGRA authorizes a tribe to request that the State in which it is located enter into negotiations with it concerning a gaming compact. Upon receiving such a request, the State is required to enter into good faith negotiations. 25 U.S.C. § 2710(d)(3)(A). IGRA provides that a tribe may sue a State which fails to do so. 25 U.S.C. § 2710(d)(7)(A)(I).

IGRA also provides, however, that in order for Tribal/State compacts to be valid, the conditions set out in 25 U.S.C. § 2710(d)(1) must be satisfied. The present case hinges on the interpretation of one of these conditions - the

[2] The video gaming at issue here is classified as "Class III" gaming. *See* 25 U.S.C. § 2703 (6)-(8).

requirement contained in subpart (B) of § 2710 (d)(1). This provision states that gaming on tribal land pursuant to a compact is permitted only if the gaming is "located in a State that permits such gaming for any purpose by any person, organization, or entity[.]" 25 U.S.C. § 2710 (d)(1)(B).

3. North Carolina Law.

North Carolina General Statute § 71A-8 provides that federally recognized Indian tribes in North Carolina are permitted to conduct gaming activities if those activities are consistent with IGRA and in accordance with a valid Tribal/State compact executed by the Governor pursuant to N.C. GEN. STAT. § 147-12(a)(14). Such a compact is currently in existence between North Carolina and the Cherokee Tribe. (R pp. 12-50)

In 2006, the North Carolina General Assembly enacted S.L. 2006-6 which established a staggered phase-out of video gaming machines on non-tribal lands in North Carolina. Pursuant to S.L. 2006-6, non-tribal video gaming became illegal statewide effective 1 July 2007. (S.L. 2006-6, s. 1-4).[3]

Session Law 2006-6, however, contained clear provisions expressly stating that the ban on video gaming contained therein was not intended to affect the right of the Cherokee Tribe to continue operating video gaming machines pursuant to

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[3] A copy of S.L. 2006-6 is contained in the Appendix to this brief.

the Compact. Specifically, S.L. 2006-6 created a new law - codified at N.C. GEN. STAT. § 14-306.1A - which states in pertinent part as follows:

> (a) Ban on Machines - It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, *except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8*.
>
> * * *
>
> (e) Exemption for Activities Under IGRA. - Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section *may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8*.

N.C. GEN. STAT. § 14-306.1A(a), (e) (2009) (emphasis added).

In addition, in order to express even more clearly the General Assembly's intent that nothing in S.L. 2006-6 alter or diminish the Cherokee Tribe's right to continue conducting gaming activities pursuant to the Compact, the following language was added to the end of S.L. 2006-6:

> If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void.

S.L. 2006-6, s. 12 (hereafter "the Voiding Clause"). (*See* App. 4)

It is important to note that the Voiding Clause itself does not contain any substantive terms. Rather, it merely serves to address the contingency of what would happen if a court were to enter a final order holding that the remainder of S.L. 2006-6 violates IGRA.

As the above-quoted provisions of S.L. 2006-6 demonstrate, the General Assembly was very clear about what it wanted to accomplish - the banning of video gaming statewide except for such gaming permitted under the Tribal/State compact with the Cherokee Tribe. The Legislature was also aware that any gaming laws it enacted affecting tribal gaming were required to comply with IGRA. While the General Assembly believed that S.L. 2006-6 was fully compliant with IGRA, it recognized that the judicial branch would have the final say on this question. As such, it added the Voiding Clause purely out of an abundance of caution to address the contingency that a court might reach a different conclusion on this issue.

4. Plaintiffs' Allegations and the Trial Court's Ruling in the Present Case.

In their complaint, Plaintiffs alleged that the Voiding Clause in S.L. 2006-6 must be invoked on the theory that the remainder of that session law violates 25 U.S.C. § 2710(d)(1)(B) of IGRA. The trial court agreed with this argument, stating, without elaboration, that "IGRA does not permit a state to ban the possession and operation of video gaming machines elsewhere in the state while allowing their possession and operation on tribal lands." (R p. 60) The trial court proceeded to declare N.C. GEN. STAT. § 14-306.1A "null, void and of no effect." (R p. 61)

C. UNDER A PLAIN READING OF IGRA, STATES ARE FREE TO OFFER MORE FAVORABLE GAMING RIGHTS TO TRIBES THAN THOSE EXISTING FOR NON-TRIBAL ENTITIES.

The General Assembly made clear in S.L. 2006-6 its intent that the ban on video gaming contained therein not apply to video gaming which is authorized by North Carolina's compact with the Cherokee Tribe. The only remaining question, therefore, is whether IGRA allows a State to ban video gaming statewide but to carve out an exception for gaming occurring on tribal land pursuant to a Tribal/State compact. The answer is yes. Accordingly, the Voiding Clause has not been triggered, and the statewide ban on non-tribal gaming contained in S.L. 2006-6 remains lawful in all respects.

1. The General Assembly's Policy Decision Set out in S.L. 2006-6 Is Consistent with the Language in § 2710(d)(1)(B) of IGRA.

Section 25 U.S.C. § 2710(d)(1) of IGRA states, in pertinent part, as follows:

> (d) Class III gaming activities; authorization; revocation; Tribal/State compact.
>
> > (1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
> >
> > . . .
> >
> > > (B) located in a State that permits such gaming for *any* purpose by *any* person, organization, or entity[.]

25 U.S.C. § 2710(d)(1)(B) (emphasis added).

The phrase "for any purpose by any person, organization, or entity" is satisfied by North Carolina law. The North Carolina General Statutes allow video gaming activities for at least one "purpose" (the purpose set out in the Cherokee Compact) by at least one "person, organization, or entity" (the Cherokee Tribe). *See* N.C. GEN. STAT. §§ 14-306.1A; 71A-8. Plaintiffs cannot credibly maintain (1) that the Cherokee Tribe does not qualify as a "person, organization, or entity;" or (2) that gaming conducted because of the terms set out in a Tribal/State compact does not qualify as a "purpose."

Section 2710(d)(1)(B) serves to ensure that, before any tribal gaming is allowed to occur, the legislature of that State has first enacted a law authorizing

such gaming in at least one context - even if only for the tribe itself. *See Flynt v. California Gambling Control Comm'n*, 129 Cal. Rptr. 2d 167, 178 (Cal. Ct. App. 2002) (ruling that § 2710 (d)(1)(B) simply requires that a "State must first legalize a game, *even if only for tribes*, before it can become a compact term") (citations and internal quotation marks omitted) (emphasis in original), *disc. rev. denied*, 2003 Cal. LEXIS 2123, *cert. denied*, 540 U.S. 948 (2003).

If, conversely, a state legislature has made clear its intent to ban such gaming *everywhere* (on both tribal and non-tribal land), then § 2710(d)(1)(B) insulates the State from having to negotiate a gaming compact with a tribe against its will. Thus, by virtue of §2710(d)(1)(B), IGRA reflects congressional deference to the gaming policy of the State as articulated by its legislature.[4]

The logic of this interpretation is apparent when one looks at the context in which § 2710(d)(1)(B) exists. IGRA sought not only to encourage tribal gaming as

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[4] The only instance in which IGRA does not defer to a State's gaming policy is where the State has attempted to gives tribes *less* favorable gaming rights than those enjoyed by non-tribal entities - because such an approach would undermine Congress' desire in enacting IGRA to promote the economic self-sufficiency of tribes. If a State attempted to adopt such an approach, the tribe would be entitled to demand that the State negotiate a gaming compact with it and could, if necessary, then sue the State for failure to do so. *See* 25 U.S.C. § 2710(d)(3)(A), (7)(A)(i); *see also Artichoke Joe's Cal. Grand Casino v. Norton*, 216 F. Supp. 2d 1084, 1126 (E.D. Cal. 2002) (emphasis added) (noting that IGRA protects tribes from discrimination by States regarding gaming rights), *aff'd*, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004).

a means of benefitting tribes but also to allow States some measure of control over tribal gaming decisions. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1554 (10th Cir.) ("While preservation of tribal sovereignty was clearly of great concern to Congress, respect for state interests relating to class III gaming was also of great concern."), *cert. denied*, 522 U.S. 807 (1997); *see also Doe*, 154 P.3d at 654 (recognizing that, by authorizing Tribal/State compacts, Congress sought a mechanism to balance the interests of both States and tribes).

This, then, is the balance Congress struck in enacting IGRA. Congress gave States the option of granting tribes either equal or greater gaming rights than those afforded to non-tribal entities. Accordingly, States are free to pass laws conferring exclusive gaming rights on tribes.

In North Carolina, the General Assembly has exercised this legislative discretion by articulating the video gaming policy of this State to be a prohibition of such gaming except on tribal land. It expressed such intent in both N.C. GEN. STAT. §§ 14-306.1A(e) and 71A-8. These laws reflect a policy decision by the General Assembly to extend preferential gaming rights in deference to a separate sovereign entity residing within its borders. Because IGRA in no way prohibits

States from adopting such an approach to gaming, the General Assembly's policy decision must be given effect.[5]

2. The Interpretation of § 2710(d)(1)(B) Advocated by Plaintiffs Would Require this Court to Rewrite a Federal Statute.

In seeking a contrary interpretation of § 2710(d)(1)(B), Plaintiffs essentially seek to have this Court judicially rewrite the key phrase within this statutory provision in one of the following ways - each of which employs wording that Congress did not use.

> - "located in a State that permits such gaming for any purpose by any person, organization, or entity - *other than by the tribe itself*;"
>
> - "located in a State that permits such gaming for any purpose by any person, organization, or entity - *on non-Indian lands*;"
>
> - "located in a State that permits such gaming for any purpose by any *non-tribal* person, organization, or entity;"
>
> - "located in a State that permits such gaming for *every* purpose by *every* person, organization, or entity."

Had Congress wished to achieve the result advocated by Plaintiffs, it could easily have drafted § 2710(d)(1)(B) in one of these ways. However, it did not do

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[5] The Fourth Circuit has recognized the constitutionality of tribal gaming preferences, noting that the United States Supreme Court has "carved-out a legitimate special class for Native American gaming preferences due to the unique historical relationship between the United States and Native American nations . . . ." *United States v. Garrett*, 122 Fed. Appx. 628, 631 (4th Cir. 2005).

so.[6] Rather, it simply used the broad phrase "for any purpose by any person, organization, or entity" - expressly choosing the word "any" rather than the term "every."

To reach the result advocated by Plaintiffs in the present case, this Court would have to read into § 2710 (d)(1)(B) one or more permutations of the alternate wording set out above. In so doing, however, this Court would be impermissibly rewriting the statute. It is a bedrock principle of both North Carolina and federal law that courts cannot rewrite laws in this fashion. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000) ("Whatever merits these and other policy arguments may have, it is not the province of this Court to rewrite the statute to accommodate them."); *Ramsey v. North Carolina Veterans Comm'n*, 261 N.C. 645, 648, 135 S.E.2d 659, 661 (1964) ("Only the General Assembly may amend or rewrite a statute.").

As a court addressing this precise issue under § 2710(d)(1)(B) has observed, courts are not free to disregard Congress' use of the word "any" rather than "every."

> [I]nterpreting "any" in § 2710(d)(1)(B) to mean "every" must be rejected. If IGRA required that a tribe could only enter a compact if located in a state that permitted such activities for *every* purpose by *every* person, organization, or entity, no tribe

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[6] Significantly, as discussed later in this brief, Congress actually considered language allowing tribal gaming only if such gaming was allowed elsewhere in the State but deleted this language from the final version of IGRA.

> would be allowed to enter into a class III gaming compact because all states impose at least some limits on who can offer gaming and for what purpose. Therefore, § 2710(d)(1)(B) is best understood as allowing class III gaming compacts in states that permit that kind of gaming for at least one purpose, by at least one person, organization, or entity. Because California permits class III gaming *by tribes with compacts* . . . the State . . . satisfies § 2710(d)(1)(B)'s "any purpose by any person, organization, or entity" requirement.

Artichoke Joe's, 216 F. Supp. 2d at 1122 (emphasis added).

Moreover, Congress did not distinguish in § 2710(d)(1)(B) between tribal and non-tribal gaming by inserting a phrase such as "other than by the tribe itself," "on non-Indian lands," or "non-tribal."

> Congress did not say that a state had to permit class III gaming activities for any *non*-Indian purpose for any *non*-Indian person, organization, or entity. Instead . . . Congress structured the requirement to provide states and tribes with maximum flexibility to fashion a class III gaming compact.

Id. (emphasis added).

Contrary to Plaintiffs' assertions in the trial court, the State's interpretation of § 2710 (d)(1)(B) - which, as discussed later in this brief, is the same as that of every appellate court having addressed this precise issue - is neither tautological nor circular. Rather, it is a straightforward construction of the language Congress actually used in § 2710(d)(1)(B) as opposed to language that Plaintiffs may wish Congress had used. In addition, the State's interpretation is consistent with

Congress' desire to promote Indian gaming rights while simultaneously giving deference to gaming policy decisions set by state legislatures. Finally, it likewise takes into account the fact that nowhere in IGRA did Congress express an intent to protect the economic interests of non-tribal entities such as Plaintiffs. *See Flynt*, 129 Cal. Rptr. 2d at 178.

3. Plaintiffs' Attempt to Rely on a Prohibitory/Regulatory Distinction Reflects a Misunderstanding of Both North Carolina and Federal Law.

Plaintiffs' brief in the trial court devoted a great deal of space to an argument purporting to address the issue of whether North Carolina's approach to video gaming should be characterized as "prohibitory" or "regulatory." Specifically, Plaintiffs argued that because the General Assembly's approach to gaming is prohibitory, it is somehow precluded from allowing the Cherokee Tribe to conduct such gaming. This argument fails for two reasons.

First, the prohibitory/regulatory distinction is a creation of common law which has been superseded by the enactment of IGRA. These terms arise from *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, a case which predated - and, in fact, led to - the enactment of IGRA. The issue in *Cabazon* was whether California could enforce a state gaming law against a tribe's operation of bingo and card games given the attributes of sovereignty possessed by the tribe.

The Supreme Court held that the answer to this question hinged on whether California's law regarding gambling was properly characterized as prohibitory (illegal in all respects) or, alternatively, regulatory (permitted in some circumstances). Because the Court found that California law allowed various forms of gambling, it concluded that the State's approach was regulatory as opposed to prohibitory and that, consequently, the State could not enforce its gambling laws on tribal land. *Id*. at 209-12.

In response to *Cabazon*, Congress passed IGRA so as to provide a statutory framework governing the regulation of tribal gaming. *Artichoke Joe's*, 353 F.3d at 715. Because IGRA supplanted *Cabazon* by establishing, for the first time, a unified statutory mechanism setting out the respective rights of tribes and States regarding tribal gaming, the present case is controlled by IGRA rather than by *Cabazon's* prohibitory/regulatory distinction.

To the extent this distinction retains any relevance at all post-IGRA, it applies only to the entirely separate inquiry of under what circumstances an *unwilling* State is *required* to negotiate a gaming compact with a tribe. Under IGRA, a State is not forced to negotiate such a compact against its will where the laws of the State do not allow *anyone* - tribes and non-tribal entities alike - to conduct such gaming activities (such that its laws can be characterized as

prohibitory). That principle has no relevance here, however, because the General Assembly has *chosen* to enact laws making video gaming legal for the Cherokee Tribe.

The question of whether IGRA requires an unwilling State to allow tribal gaming is far different from the question of whether IGRA prohibits a State from voluntarily enacting laws permitting such gaming. The latter is the issue presented here and, for the reasons set out herein, nothing in IGRA bars a State from exercising its legislative discretion in this fashion.

Second, Plaintiffs misunderstand the meaning of the term "prohibitory." If North Carolina were truly a prohibitory State regarding video gaming, its laws would prohibit *anyone* (including the Cherokee Tribe) from conducting such gaming. Instead, however, North Carolina law expressly allows one segment of the population - the Cherokee Tribe - to do so. As such, even if the *Cabazon* analysis were somehow deemed relevant, the General Assembly's approach would properly be characterized as regulatory rather than prohibitory.

4. The Federal Cases Relied upon by Plaintiffs in the Trial Court Do Not Address the Issue Currently Before this Court.

In the trial court, Plaintiffs cited several federal decisions addressing various issues arising under IGRA. However, none of those cases involves the issue

presently before this Court - whether IGRA permits a state legislature to voluntarily confer more favorable gaming rights upon a tribe than those which exist for non-tribal entities. Those cases concern, instead, separate and unrealated issues arising in connection with tribal gaming and, therefore, do not in any way diminish the validity of the State's contentions in this appeal.

For example, in *Florida House of Representatives v. Crist*, 990 So. 2d 1035 (Fla. 2008), *cert. denied*, 129 S. Ct. 1526 (2009), the governor of Florida entered into a gaming compact which purported to authorize a tribe to engage in banked card games such as blackjack and baccarat despite the fact that the Florida legislature had made such games illegal statewide - with no exception for the tribe. *Id*. at 1043-49. The issue before the Florida Supreme Court was whether the governor "had constitutional authority to execute the Compact without the Legislature's prior authorization or, at least, subsequent ratification." *Id*. at 1043. The Florida court ruled that such conduct by the Governor violated separation of powers principles. *Id*. at 1050.

Here, conversely, unlike in *Crist*, North Carolina's General Assembly has expressly enacted legislation making it *legal* for the Cherokee Tribe to engage in video gaming. *See* N.C. GEN. STAT. §§ 14-306.1A and 71A-8. Furthermore, the General Assembly has also explicitly conferred upon the Governor the authority to

negotiate and execute Tribal/State compacts on behalf of North Carolina. *See* N.C. GEN. STAT. § 147-12(14). Thus, *Crist* has no relevance here.

The other cases cited by Plaintiffs in the trial court involve the question of how the "such gaming" clause in § 2710(d)(1)(B) - as opposed to the "for any purpose" clause which is at issue in the present case - should be interpreted. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9th Cir. 1995) (determining whether State was required to negotiate compact with tribe allowing banked or percentage card gaming); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (addressing claim by tribe alleging State had failed to engage in good faith negotiations regarding terms of gaming compact); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990) (addressing whether state was required to allow Class III gaming on tribal land), *cert. denied*, 499 U.S. 975 (1991); *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) (holding that tribe's blackjack operations did not have to comply with state law regarding wager and pot limits); *Coeur D'Alene Tribe v. Idaho*, 842 F. Supp. 1268 (D. Idaho 1994) (deciding which specific types of Class III gaming State was required to negotiate with tribe for purposes of gaming compact), *aff'd*, 51 F.3d 876 (9th Cir. 1995); *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991)

(addressing whether State was required to negotiate in good faith regarding tribal operation of casino games, video games, or slot machines).

Plaintiffs similarly contended below that federal courts are "divided" over the question of how broadly the term "such gaming" (as used in § 2710(d)(1)(B)) should be defined. However, because the meaning of the "such gaming" phrase is not at issue here, Plaintiffs are mixing apples and oranges. Courts are *not* divided on the issue currently before this Court - whether the "for any purpose" phrase allows States to voluntarily confer preferential gaming rights on tribes. On this specific issue, as discussed in more detail below, every appellate court that has considered this question has held that a State *is* permitted to do so. *See Flynt*, 129 Cal. Rptr. 2d 167; *Artichoke Joe's,* 353 F.3d 712.

The division among federal courts to which Plaintiffs are apparently referring concerns the entirely separate issue of how to determine - under the "such gaming" phrase - which specific types of gaming an unwilling State is *required* to include in a tribal gaming compact where the State permits some, but not all, types of Class III gaming for non-tribal citizens. That issue is not before this Court.

5. S.L. 2006-6 Is Not Only Consistent with North Carolina Public Policy But, in Fact, Serves as an Articulation of North Carolina Public Policy.

While Plaintiffs also argued in the trial court that S.L. 2006-6 violates North Carolina public policy, this argument is a *non sequitur*. It is well-established that public policy in this State is set *by the General Assembly*. *See In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 230, 436 S.E.2d 828, 830-31 (1993) ("The general rule in North Carolina is that absent constitutional restraint, questions as to public policy are for legislative determination . . . . [T]he statute is the expression of the legislature regarding the public policy . . ."") (internal quotation marks and citations omitted), *cert. denied*, 512 U.S. 1228 (1994).

Here, through its enactment of S.L. 2006-6, the General Assembly has articulated North Carolina's current public policy regarding gaming - which is to allow video gaming to be conducted only on tribal land pursuant to a Tribal/State compact. While Plaintiffs apparently disagree with the wisdom of the Legislature's approach, it is axiomatic that the policy views of litigants and courts cannot be substituted for those of the General Assembly. *See City of Asheville v. State*, __ N.C. App. __, 665 S.E.2d 103, 133 (2008) ("[I]t is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures.").

Indeed, this Court has previously acknowledged and deferred to the General Assembly's policy decision to distinguish between gaming occurring on tribal land as opposed to gaming taking place elsewhere in North Carolina. In *Hatcher v. Harrah's N.C. Casino Co., LLC*, 169 N.C. App. 151, 610 S.E.2d 210 (2005), this Court reviewed an order from a district court dismissing for lack of subject matter jurisdiction a dispute regarding the payment of a prize won at a casino owned by the Cherokee Tribe. While this Court affirmed the result reached by the district court, it took issue with language in the lower court's order stating that the gaming activity engaged in by the plaintiff was inconsistent with North Carolina public policy. *Id*. at 154, 610 S.E.2d at 212.

This Court noted in *Hatcher* that while the North Carolina General Statutes generally made it unlawful to engage in organized gambling activities to receive cash prizes, the General Assembly had carved out an exception for gaming activities conducted by the Cherokee Tribe pursuant to IGRA. For this reason, this Court concluded that the district court "erred by concluding that North Carolina public policy is violated by the video poker machine operated by the Eastern Band of Cherokee Indians." *Id*. at 156, 610 S.E.2d at 213.

D. EVEN IF § 2710(d)(1)(B) WERE DEEMED TO BE AMBIGUOUS, APPLICABLE PRINCIPLES OF STATUTORY INTERPRETATION MANDATE A CONSTRUCTION OF THIS PROVISION AS PERMITTING STATES TO AFFORD PREFERENTIAL GAMING RIGHTS TO TRIBAL ENTITIES.

Even assuming *arguendo* that § 2710(d)(1)(B) was found to be capable of two differing interpretations and therefore ambiguous, the State would still be entitled to prevail. This is so because the United States Supreme Court has emphasized that federal statutes (like IGRA) designed to benefit tribes must be construed in the light most favorable to the tribe.

1. The Stated Purpose of IGRA Shows an Unmistakable Intent to Benefit Indian Tribes.

When interpreting a statute, a court's primary emphasis is to identify the legislature's intent. *Williams v. Williams*, 299 N.C. 174, 179-80, 261 S.E.2d 849, 853 (1980). Therefore, it is appropriate to consider the purposes underlying Congress' enactment of IGRA.

It cannot seriously be denied that IGRA is a statute designed to benefit Indian tribes. Congress set out the intended purposes of IGRA as follows:

> (1) 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;
>
> (2) 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; and
>
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702(1)-(3); *see City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) ("IGRA is designed to promote the economic viability of Indian Tribes."), *cert. denied*, 541 U.S. 974 (2004).

Congress viewed gaming as an important tool in helping to create strong tribal economies. "[T]he only evidence of intent strongly suggests that the thrust of the IGRA is to promote Indian gaming, not to limit it." *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Atty.*, 369 F.3d 960, 971 (6th Cir. 2004); *see Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 469 (D.C. Cir. 2007) ("IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency . . ."); *Grand Traverse*, 369 F.3d at 971 ("[T]he purpose of the IGRA . . . is to encourage gaming."). *See also Artichoke Joe's*, 353 F.3d at 741 (noting that State's provision

of exclusive gaming rights to tribes furthered purposes of IGRA by creating jobs and generating revenue for tribe and its members).

Conspicuously absent from Congress' stated purposes - as set out in 25 U.S.C. § 2702 - is any intent whatsoever to protect the economic rights of *non*-tribal entities. This absence is significant because a necessary predicate to Plaintiffs' proposed interpretation of § 2710(d)(1)(B) is the notion that IGRA was enacted for the benefit of private entities. Nothing in the text or purpose of IGRA supports such a proposition. *See Flynt*, 129 Cal. Rptr. 2d at 178 ("[W]e conclude that there is nothing to indicate that the purpose of section 2710(d)(1)(B) was to achieve economic parity between tribes and commercial gaming establishments, thus leveling the playing field, so to speak, by granting tribes gaming rights only to the extent they are afforded to non-Indian gaming establishments.").

As another court has similarly explained:

> [The State's] decision to 'permit' tribes to operate class III gaming facilities within the context of IGRA and the compacts, while denying those rights to other persons, organizations, and entities, is a policy judgment, which whether one agrees with it or not, does not conflict with IGRA's goal of maintaining state authority while protecting Indian gaming from discrimination. By contrast, to interpret IGRA to require the states to cho[o]se between no class III gaming anywhere and class III gaming everywhere would not further any of IGRA's goals and would limit the states' authority and flexibility without any resulting benefit to the tribes.

Artichoke Joe's, 216 F. Supp. 2d at 1126.

It is illogical to argue (as Plaintiffs are here) that IGRA - a statute designed to benefit Indian tribes - should be interpreted as preventing state legislatures from voluntarily providing economic assistance to tribes. Such a proposition is antithetical to the desire for tribal economic development that lies at the heart of IGRA.

2. The United States Supreme Court Has Ruled That Statutes Intended to Benefit Indian Tribes must Be Interpreted in the Light Most Favorable to the Tribe.

Because IGRA is a federal - rather than a North Carolina - law, rules of statutory construction articulated by the United States Supreme Court governing the interpretation of federal statutes are authoritative. *See R. H. Bouligny, Inc. v. United Steelworkers*, 270 N.C. 160, 173-74, 154 S.E.2d 344, 356 (1967) ("It is . . . well-settled that a decision of the Supreme Court of the United States, construing an act of Congress, is conclusive and binding upon this Court.").

In *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), the Supreme Court set out the applicable rule of statutory construction for laws relating to Indian tribes:

> [T]he standard principles of statutory construction do not have their usual force in cases involving Indian law. . . . [The] canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the

> Indians. . . . *[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit*[.]

Id. at 766 (emphasis added); *see also County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (noting applicability of *Blackfeet* rule of interpretation when faced with two possible constructions of statute affecting Indians).

Accordingly, where any doubt exists as to the correct interpretation of an ambiguous provision of federal law enacted for the benefit of tribes, "the doubt [will] benefit the [t]ribe, for [ambiguities] in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) (internal quotation marks and citations omitted).

As discussed above, IGRA was enacted for the primary purpose of providing economic assistance to tribes. Thus, the *Blackfeet* rule of construction applies. *See Citizens Exposing Truth About Casinos*, 492 F.3d at 471 ("[A]s IGRA is designed to promote the economic viability of Indian Tribes, the Indian canon of statutory construction requires the court to resolve any doubt in favor of the [tribe]."); *City of Roseville v. Norton*, 348 F.3d at 1030-32 (applying *Blackfeet* rule of statutory

interpretation by broadly construing IGRA provision so as to allow approval of tribe's application for gaming site).

Here, the State's interpretation of § 2710(d)(1)(B) permits States to provide more favorable gaming rights to tribes than those available to non-tribal entities. Conversely, Plaintiffs' interpretation of this provision would preclude States from doing so. Therefore, because the State's interpretation is the one that would benefit tribes, *Blackfeet* mandates that its interpretation be given effect. *See Artichoke Joe's*, 353 F.3d at 730 (applying *Blackfeet* by adopting construction of § 2710(d)(1)(B) allowing State to confer exclusive gaming rights on tribe; noting that "IGRA is undoubtedly a statute passed for the benefit of Indian tribes" and that "[a]pplication of the *Blackfeet* presumption is straightforward.").

3. Plaintiffs' Proposed Interpretation of IGRA Also Ignores Congress' Desire to Defer to the Gaming Policy Decisions of State Legislatures.

The desire to benefit tribes economically was also accompanied by Congress' simultaneous intent to allow States a greater say in decisions regarding the legality of gaming on tribal land. "IGRA's provisions reveal that Congress took great pains to provide states a meaningful opportunity to become intimately involved in the regulation of gaming . . ." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1296 (D.N.M 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1997); *see*

Artichoke Joe's, 216 F. Supp. 2d at 1125-26 (noting that a goal of IGRA was "maintaining state authority" over tribal gaming and that IGRA's statutory scheme gives States "a primary role in the regulatory oversight of tribal gaming[.]").

Given these dual purposes, there is no valid basis for interpreting IGRA as tying the hands of sympathetic state legislatures attempting to use their legislative discretion to provide economic assistance to tribal entities. Plaintiffs' interpretation of § 2710 (d)(1)(B) is contrary to both of the twin cornerstones that underlie IGRA: (1) strengthening tribal economies; and (2) promoting deference to the policy decisions of state legislatures regarding tribal gaming.

4. Excerpts from the Legislative History of IGRA Support a Finding That the Act Allows States to Offer Preferential Gaming Rights to Tribes.

North Carolina courts have, on a number of occasions, consulted legislative history when construing federal statutes. *See*, *e.g.*, *Charlotte Housing Auth. v. Patterson*, 120 N.C. App. 552, 557, 464 S.E.2d 68, 72 (1995) (relying on legislative history to determine Congress' intent in enacting United States Housing Act); *Lilly v. North Carolina Dep't of Human Res.*, 105 N.C. App. 408, 411, 413 S.E.2d 316, 318 (1992) (holding that, assuming clause in Food Stamp Act was ambiguous, legislative history was relevant to show true meaning of statute).

Accordingly, it is appropriate to examine the legislative history of IGRA in order to determine how § 2710 (d)(1)(B) should be construed.

While there is no definitive legislative history regarding § 2710(d)(1)(B) specifically, IGRA's legislative history bolsters the State's position in this case in a number of respects. Perhaps the most compelling piece of legislative history relevant to this appeal is the fact that Congress rejected proposed language that would have led to the precise result sought by Plaintiffs. An earlier version of the bill that ultimately became IGRA, Senate Bill 555 (*See* App. 21), contained express language making it illegal for tribes to conduct gaming that was prohibited in the rest of the State. Specifically, § 11(d)(1) of Senate Bill 555 stated that, subject to the fulfillment of certain other specified conditions, tribes could conduct Class III gaming "*that is otherwise legal within the State where such lands are located* . . ." 133 CONG. REC. S 555, at 3740 (February 19, 1987) (emphasis added). (*See* App. 25) That language, however, was deleted from the final version of the bill. *See Artichoke Joe's*, 216 F. Supp. 2d at 1125.

The italicized language quoted above from Senate Bill 555 conveys a meaning identical to the construction of IGRA advocated by Plaintiffs here - the notion that tribal gaming can take place only where such gaming is lawful in the State at large. However, this language was removed from the bill prior to

Congress' enactment of IGRA. The logical implication is that had Congress wished for such a restriction on tribal gaming to exist, it would have included this language in the final version of the bill. The fact that it chose instead to delete this language attests to the variance between Congress' intent and Plaintiffs' interpretation.

Furthermore, in his statement following the United States Senate Committee Report regarding IGRA, Senator Daniel Evans observed that, under IGRA, "Indian tribes may have a competitive economic advantage because, rightly or wrongly, many states have chosen not to allow the same types of gaming in which tribes are empowered to engage." S. REP. NO. 100-446, at 36 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3105. (*See* App. 19) This statement expressly contemplates a scenario in which a tribe is granted exclusive gaming rights.

Finally, IGRA's legislative history shows a clear recognition of the rule of statutory construction mandated by the Supreme Court in *Blackfeet*. The Senate Committee Report stated that "[t]he Committee . . . trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." *Id.* at 14-15, *reprinted in* 1988 U.S.C.C.A.N. at 3085. (*See* App. 16-17) This statement reflects Congress' clear

expectation that courts interpreting IGRA would resolve any statutory ambiguities in favor of tribes.

E. THE ONLY TWO REPORTED APPELLATE DECISIONS ADDRESSING THIS PRECISE ISSUE HAVE HELD THAT §2710(d)(1)(B) ALLOWS STATES TO PERMIT TRIBAL GAMING EVEN WHERE SUCH GAMING IS NOT ALLOWED ELSEWHERE IN THE STATE.

Flynt and *Artichoke Joe's* are the only two reported appellate decisions which have squarely considered the question of whether § 2710(d)(1)(B) allows States to give exclusive gaming rights to tribes. In both of these cases, the courts held that as long as the law of the State expressly provides for such a result (as is true here), then IGRA is satisfied.

In *Flynt*, the State passed a constitutional amendment giving its governor the authority to negotiate and execute compacts with federally recognized tribes permitting various types of tribal gaming. The plaintiffs, a card room owner and several private gambling establishments, alleged that these compacts were unlawful on the theory that, under IGRA, such gaming could take place only in States that allowed non-tribal citizens to likewise engage in these activities. *Flynt*, 129 Cal. Rptr. 2d at 169-71.

The court determined that while the text of § 2710 (d)(1)(B) - when read in isolation - was ambiguous, the context, legislative history, and purpose of this provision showed no intent by Congress to establish "economic parity" between

tribes and non-tribal citizens. *Id*. at 178. The court interpreted § 2710 (d)(1)(B) as simply requiring that a "[s]tate must first legalize a game, *even if only for tribes*, before it can become a compact term." *Id*. (citations and internal quotation marks omitted) (emphasis in original). In ruling that IGRA permits a State to afford exclusive gaming rights to a tribe, the *Flynt* court concluded that "[q]uite simply, Congress exhibited no desire to command states to enact gaming laws so that private non-Indian enterprises would enjoy the same rights as Indian tribes." *Id*.

The same result was reached in *Artichoke Joe's*. In that case, the court likewise rejected the argument that IGRA should be construed as preventing States from conferring exclusive gaming rights on tribes. The court determined that while § 2710 (d)(1)(B) was ambiguous, the rule of construction set out in *Blackfeet* was applicable. "IGRA is undoubtedly a statute passed for the benefit of Indian tribes. IGRA's declaration of policy . . . firmly places the statute in the category of legislation to which the *Blackfeet* presumption applies." *Artichoke Joe's*, 353 F.3d at 730. The court ruled that the application of the *Blackfeet* rule was "straightforward" in that "[o]ne construction of the provision favors Indian tribes, while the other does not." *Id*. The same is equally true here.

In the trial court, Plaintiffs attempted to distinguish *Artichoke Joe's* and *Flynt* on the ground that, in those cases, the provision of state law authorizing

exclusive tribal gaming rights was located in a constitutional amendment rather than in a statute. However, this is a distinction without difference. Neither *Flynt* nor *Artichoke Joe's* (nor § 2710(d)(1)(B) itself) makes such a distinction. Thus, the effect is the same, under IGRA, regardless of whether the source of state law in a particular case is statutory or constitutional.

Indeed, the court in *Artichoke Joe's* correctly characterized the dispositive issue as whether "there is *law* - separate from the compact itself - that 'permits such gaming' in certain circumstances." *Artichoke Joe's*, 353 F.3d at 721 (emphasis added). Under both North Carolina and federal law, statutes - like constitutional provisions - carry the force of law. *See Carson v. Bunting*, 154 N.C. 530, 538, 70 S.E. 923, 926 (1911) (noting that newly enacted statute was "to be regarded as having the force of law"); *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988) (listing statutes, treaties, and constitutional provisions as all constituting "sources of law").

For this reason, Plaintiffs' attempt to distinguish *Flynt* and *Artichoke Joe's* fails. Moreover, Plaintiffs cannot cite to any cases in which appellate courts have adopted their position on the exact issue presented here.

F. THE UNITED STATES DEPARTMENT OF THE INTERIOR HAS APPROVED TRIBAL/STATE COMPACTS CONFERRING EXCLUSIVE GAMING RIGHTS ON TRIBES.

Finally, it is worth noting that the United States Department of the Interior - which possesses statutory authority for approving Tribal/State compacts and can withhold such approval where a compact's terms violate IGRA[7] - has approved compacts conferring exclusive gaming rights on tribes. Under Plaintiffs' argument, such compacts would be illegal.

By way of background, while IGRA prohibits States from imposing taxes on tribes, *see* 25 U.S.C. § 2710(d)(4), some States have entered into revenue-sharing agreements with tribes in exchange for the conferral of exclusive gaming rights upon the tribe.

> [S]ome states have been able to share in tribal gaming revenues in exchange for exclusive rights to game within a state - at least as against non-Indian gaming. The Secretary of the Interior has approved revenue-sharing arrangements on the ground that those payments are not taxes, but exchanges of cash for significant economic value conferred by the exclusive or substantially exclusive right to conduct gaming in the state. These arrangements are known as "exclusivity provisions" and have become increasingly prevalent.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 12.05 (2005 ed.), at 2. (*See* App. 31)

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[7] *See* 25 U.S.C. § 2710(d)(8)(A), (B)(i).

While North Carolina has not entered into such a revenue-sharing agreement, the effect of the General Assembly's enactment of S.L. 2006-6 was to voluntarily confer the same type of gaming exclusivity upon the Cherokee Tribe. Because Plaintiffs seek a construction of IGRA that would render such exclusivity provisions unlawful, their interpretation is in conflict with the determination of the Department of the Interior - the agency charged with administering IGRA - that such provisions are allowed under IGRA.

In *Artichoke Joe's*, the court noted the express statement in the Department of the Interior's written approval of the State's gaming compacts to the effect that the State possessed the authority to execute gaming compacts conferring exclusive gaming rights on tribes. *Artichoke Joe's*, 353 F.3d at 718. The court then stated the following:

> Assuming, without deciding, that the Secretary's interpretation of § 2710(d)(1)(B) is entitled to deference . . . that interpretation likewise adopts [the State's] construction of the statute and favors Indian tribes. In other words, the *Blackfeet* presumption and the doctrine of agency deference point to the same result.

Id. at 730.

This Court has previously recognized that some degree of weight should be given to the construction given a statute by the agency responsible for its administration. *See Walls & Marshall Fuel Co. v. North Carolina Dep't of*

Revenue, 95 N.C. App. 151, 155-56, 381 S.E.2d 815, 818 (1989) ("In interpreting an ambiguous statute, the construction adopted by those who execute and administer the statute is evidence of what it means."). Thus, this principle constitutes yet another argument in favor of the State's position in this appeal.

CONCLUSION

For all of these reasons, the trial court's order should be vacated, and this action should be dismissed.

Respectfully submitted, this the 14th day of May, 2009.

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CERTIFICATE OF COMPLIANCE WITH RULE 28(j)(2)(A)2.

The undersigned hereby certifies that the foregoing brief complies with Rule 28(j)(2)(A)2 of the Rules of Appellate Procedure in that, according to the word processing program used to produce this brief (WordPerfect X3), the document does not exceed 8750 words, exclusive of cover, index, table of authorities, certificate of compliance, certificate of service, and appendices.

This 14th day of May, 2009.

Electronically Submitted
Mark A. Davis
Special Deputy Attorney General

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing **BRIEF OF DEFENDANT-APPELLANT** in the above titled action upon all other parties to this cause by:

[X] Hand delivering a copy hereof to each said party or to the attorney thereof;

[ ] Transmitting a copy hereof to each said party via facsimile transmittal; or

[ ] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Hugh Stevens
Michael J. Tadych
Everett Gaskins Hancock & Stevens
127 West Hargett Street, Suite 600
Raleigh, NC 27602

This the 14th day of May, 2009.

Electronically submitted
Mark A. Davis
Special Deputy Attorney General

INDEX TO APPENDIX

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

SESSION LAW 2006-6
SENATE BILL 912

AN ACT TO PHASE OUT THE POSSESSION OR OPERATION OF VIDEO GAMING MACHINES BY LIMITING THE NUMBER OF VIDEO GAMING MACHINES THAT MAY BE POSSESSED OR OPERATED TO TWO PER LOCATION ON OCTOBER 1, 2006, AND TO ONE PER LOCATION ON MARCH 1, 2007, AND TO PROHIBIT POSSESSION OR OPERATION OF VIDEO GAMING MACHINES AS OF JULY 1, 2007, EXCEPT PURSUANT TO A TRIBAL-STATE COMPACT.

The General Assembly of North Carolina enacts:

SECTION 1. Effective October 1, 2006, G.S. 14-306.1(b) reads as rewritten:

"(b) Prohibition of More Than ~~Three~~ Two Existing Video Gaming Machines at One Location. – It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation at one location more than ~~three~~ two video gaming machines as defined in subsection (c)."

SECTION 2. Effective March 1, 2007, G.S. 14-306.1(b), as amended by Section 1 of this act, reads as rewritten:

"(b) Prohibition of More Than ~~Two~~ One Existing Video Gaming ~~Machines~~ Machine at One Location. – It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation at one location more than ~~two~~ one video gaming ~~machines~~ machine as defined in subsection (c)."

SECTION 3. G.S. 14-306.1 is repealed.

SECTION 4. Part 1 of Article 37 of Chapter 14 of the General Statutes is amended by adding a new section to read:

"**§ 14-306.1A. Types of machines and devices prohibited by law; penalties.**

(a) Ban on Machines. – It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in G.S. 147-12(14) and G.S. 71A-8.

(b) Definitions. – As used in this section, a video gaming machine means a slot machine as defined in G.S. 14-306(a) and other forms of electrical, mechanical, or computer games such as, by way of illustration:

(1) A video poker game or any other kind of video playing card game.
(2) A video bingo game.
(3) A video craps game.
(4) A video keno game.
(5) A video lotto game.
(6) Eight liner.
(7) Pot-of-gold.
(8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires

deposit of any coin or token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in G.S. 14-306(b)(2) unless conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8. For the purpose of this section, a video gaming machine does not include those that are within the scope of the exclusion provided in G.S. 14-306(b)(1).

(c) Exemption for Certain Machines. – This section shall not apply to:

(1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or

(2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or lease video gaming machines for use only by a federally recognized Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact.

(d) Ban on Warehousing. – It is unlawful to warehouse any video gaming machine except in conjunction with the activities permitted under subsection (c) of this section.

(e) Exemption for Activities Under IGRA. – Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in G.S. 147-12(14) and G.S. 71A-8."

SECTION 5. G.S. 14-306.2 reads as rewritten:

"**§ 14-306.2. Violation of ~~G.S. 14-306.1~~ G.S. 14-306.1A a violation of the ABC laws.**

A violation of ~~G.S. 14-306.1~~ G.S. 14-306.1A is a violation of the gambling statutes for the purposes of G.S. 18B-1005(a)(3)."

SECTION 6. G.S. 147-12(14) reads as rewritten:

"(14) To negotiate and enter into Class III Tribal-State gaming compacts, and amendments thereto, on behalf of the State consistent with State law and the Indian Gaming Regulatory Act, Public Law 100-497, as necessary to allow a federally recognized Indian tribe to operate gaming activities in this State as permitted under federal law. The Governor shall report any gaming compact, or amendment thereto, to the Joint Legislative Commission on Governmental Operations."

SECTION 7. G.S. 14-306.1(i) reads as rewritten:

"(i) Registration With Sheriff. – No later than October 1, 2000, the owner of any video game which is regulated by this section shall register the machine with the Sheriff of the county in which the machine is located using a standardized registration form supplied by the Sheriff. The registration form shall be signed under oath by the owner of the machine. A material false statement in the registration form shall subject the owner to seizure of the machine under G.S. 14-298 in addition to any other punishment imposed by law. ~~At any time that the video gaming machine is moved to a different location, the owner shall reregister the machine with the Sheriff prior to its being placed in operation.~~ At a minimum, the registration form shall require that the registrant provide evidence of the date on which the machine was placed in operation, the serial number of the machine, the location of the facility at which the machine is operated, and the name of the owner of the facility at which the machine is operated. Each Sheriff shall report to the Joint Legislative Commission on Governmental Operations no later than November 1, 2000, on the total number of machines registered in that county, itemizing how many locations have one, two, or three machines. No machine may be moved from its registered location except in conjunction with the activities described in subsections (l) and (m) of this section."

SECTION 8. G.S. 14-306.1(l) reads as rewritten:

"~~(l) Exemption for Certain Machines. – This section shall not apply to assemblers, manufacturers, and transporters of video gaming machines who assemble, manufacture, and transport them for sale in another state as long as the machines, while located in this State, cannot be used to play the prohibited games, and does not apply to those who assemble, manufacture, and sell such machines for the use only by a federally recognized Indian Tribe if such machines may be lawfully used on Indian Land under the Indian Gaming Regulatory Act.~~

(l) Exemption for Certain Machines. – This section shall not apply to:

(1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or

(2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or lease video gaming machines for use only by a federally recognized Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact."

SECTION 9. G.S. 14-306.1(m) reads as rewritten:

"(m) Ban on Warehousing. – It is unlawful to warehouse any video gaming machine except in conjunction with the ~~permitted assembly, manufacture, and transportation of such machines under subsection (l) of this section.~~ activities permitted under subsection (l) of this section."

SECTION 10. G.S. 105-256(d)(1) is repealed, but that repeal does not affect reports for activities prior to July 1, 2007.

SECTION 11. G.S. 14-309 reads as rewritten:

"**§ 14-309. Violation made criminal.**

(a) Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a Class 1 misdemeanor for the first offense, and is guilty of a Class ~~I~~H felony for a second offense and a Class ~~H~~G felony for a third or subsequent offense.

(b) Notwithstanding the provisions of subsection (a) of this section, any person violating the provisions of ~~G.S. 14-306.1~~ G.S. 14-306.1A involving the operation of five or more machines prohibited by that section is guilty of a Class G felony."

SECTION 12. Section 1 of this act becomes effective October 1, 2006, and applies to offenses committed on or after that date; Section 2 of this act becomes effective March 1, 2007, and applies to offenses committed on or after that date; and Sections 3 through 5, 10, and 11 become effective July 1, 2007, and apply to offenses committed on or after that date. The remainder of this act is effective when it becomes law. Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void.

In the General Assembly read three times and ratified this the 6th day of June, 2006.

s/ Beverly E. Perdue
President of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 7:10 p.m. this 6th day of June, 2006

LEXSTAT NC GEN STAT 14-306.1A

GENERAL STATUTES OF NORTH CAROLINA

*** Statutes current through the 2008 Regular Session ***
*** Annotations are current through January 12, 2009 ***

CHAPTER 14. CRIMINAL LAW
SUBCHAPTER 11 . GENERAL POLICE REGULATIONS
ARTICLE 37. LOTTERIES, GAMING, BINGO AND RAFFLES
PART 1. LOTTERIES AND GAMING

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N.C. Gen. Stat. § 14-306.1A (2009)

§ 14-306.1A. Types of machines and devices prohibited by law; penalties

(a) Ban on Machines. -- It shall be unlawful for any person to operate, allow to be operated, place into operation, or keep in that person's possession for the purpose of operation any video gaming machine as defined in subsection (b) of this section, except for the exemption for a federally recognized Indian tribe under subsection (e) of this section for whom it shall be lawful to operate and possess machines as listed in subsection (b) of this section if conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe, as provided in *G.S. 147-12(14)* and *G.S. 71A-8*.

(b) Definitions. -- As used in this section, a video gaming machine means a slot machine as defined in *G.S. 14-306(a)* and other forms of electrical, mechanical, or computer games such as, by way of illustration:

(1) A video poker game or any other kind of video playing card game.

(2) A video bingo game.

(3) A video craps game.

(4) A video keno game.

(5) A video lotto game.

(6) Eight liner.

(7) Pot-of-gold.

(8) A video game based on or involving the random or chance matching of different pictures, words, numbers, or symbols not dependent on the skill or dexterity of the player.

For the purpose of this section, a video gaming machine is a video machine which requires deposit of any coin or token, or use of any credit card, debit card, or any other method that requires payment to activate play of any of the games listed in this subsection.

For the purpose of this section, a video gaming machine includes those that are within the scope of the exclusion provided in *G.S. 14-306(b)(2)* unless conducted in accordance with an approved Class III Tribal-State Compact applicable to that tribe as provided in *G.S. 147-12(14)* and *G.S. 71A-8*. For the purpose of this section, a video gaming machine does not include those that are within the scope of the exclusion provided in *G.S. 14-306(b)(1)*.

(c) Exemption for Certain Machines. -- This section shall not apply to:

(1) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, lease, or transport them for use out-of-state, or

(2) Assemblers, repairers, manufacturers, sellers, lessors, or transporters of video gaming machines who assemble, repair, manufacture, sell, or lease video gaming machines for use only by a federally recognized Indian tribe if such machines may be lawfully used on Indian land under the Indian Gaming Regulatory Act.

To qualify for an exemption under this subsection, the machines must be disabled and not operable, unless the machines are located on Indian land where they may be lawfully operated under a Tribal-State Compact.

(d) Ban on Warehousing. -- It is unlawful to warehouse any video gaming machine except in conjunction with the activities permitted under subsection (c) of this section.

(e) Exemption for Activities Under IGRA. -- Notwithstanding any other prohibitions in State law, the form of Class III gaming otherwise prohibited by subsections (a) through (d) of this section may be legally conducted on Indian lands which are held in trust by the United States government for and on behalf of federally recognized Indian tribes if conducted in accordance with an approved Class III Tribal-State Gaming Compact applicable to that tribe as provided in *G.S. 147-12(14)* and *G.S. 71A-8*.

(f) Machines described in *G.S. 14-306(b)(1)* are excluded from this section.

HISTORY: 2006-6, s. 4; 2006-259, s. 6.

NOTES:

EDITOR'S NOTE. --Session Laws 2006-6, s. 12, makes this section effective July 1, 2007, and applicable to offenses committed on or after that date.

Session Laws 2006-6, s. 12, provides, in part: "Prosecutions for offenses committed before the effective dates in this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions. If a final Order by a court of competent jurisdiction prohibits possession or operation of video gaming machines by a federally recognized Indian tribe because that activity is not allowed elsewhere in this State, this act is void."

EFFECT OF AMENDMENTS. --Session Laws 2006-259, s. 6, effective August 23, 2006, added subsection (f).

LEXSTAT 25 USC 2710

*** CURRENT THROUGH PL 111-12, APPROVED 3/30/2009 ***
*** WITH A GAP OF PL 111-11 ***

TITLE 25. INDIANS
CHAPTER 29. INDIAN GAMING REGULATION

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25 USCS § 2710

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity.

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts.

(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

(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--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $ 25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a

manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

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

(ii) includcs--

(I) tribal lieenses for primary management officials and key employees of the gaming enterprise with prompt notifieation to the Commission of the issuance of such lieenses;

(II) a standard whereby any 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 of gaming, or ereate or enhanee the dangers of unsuitable, unfair, or illegal practices and methods and activities in the eonduet of gaming shall not be eligible for cmployment; and

(III) notifieation by the Indian tribe to the Commission of the results of sueh baekground check before the issuance of any of such licenses.

(3) Net revenues from any elass II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribc only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other lcgally incompetent persons who are entitled to rcceivc any of the pcr capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4) (A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requiremcnts include the requirements described in the subclauses of subparagraph (B)(i) and arc at least as rcstrictive as those established by State law governing similar gaming within the jurisdiction of thc State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to rceeivc a tribal license to own a class II gaming activity conductcd on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be cligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(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 Septembcr 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinancc reviewed and approved by the Commission in accordancc with scction 13 of the Act [*25 USCS § 2712*],

(II) incomc to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subscction,

(III) not less than 60 percent of the net rcvenucs is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriatc assessment to the National Indian Gaming Commission under scction 18(a)(1) [*25 USCS § 2717(a)(1)*] for regulation of such gaming.

(ii) The exemption from the application of this subsection provided undcr this subparagraph may not be transferred to any person or cntity and shall remain in effect only so long as the gaming activity remains within the samc naturc and scope as operated on the date of enactment of this Act [enactcd Oct. 17, 1988].

(iii) Within sixty days of the date of enactment of this Act [enacted Oct. 17, 1988], the Scerctary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming licensc; certificate of sclf-rcgulation.

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after the date of the enactment of this Act [enacted Oct. 17, 1988]; and

(B) has otherwise complied with the provisions of this section[,]

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 7(b) [*25 USCS § 2706(b)(1)*-(4)];

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) [*25 USCS § 2710(b)(2)(C)*] and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 18 [*25 USCS § 2717*] in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact.

(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,

(ii) meets the requirements of subsection (b), 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

(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

(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) [*25 USCS § 2711(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.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) (i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(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

(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.

(3) (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such aetivity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

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

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135) [*15 USCS § 1175*] shall not apply to any

gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7) (A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B) (i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(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

(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 [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

(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.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(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

(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

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

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this Act.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(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 [*25 USCS § 2711(b)*-(d), (f)-(h)].

(e) Approval of ordinances. For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

HISTORY:

(Oct. 17, 1988, P.L. 100-497, § 11, 102 Stat. 2472.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in subsecs. (a)(1)(A), (B), (d)(7)(D)(iv), (vii)(I), (8)(B)(i), (C), and (e), is Act Oct. 17, 1988, P.L. 100-497, 102 Stat. 2467, popularly known as the Indian Gaming Regulatory Act, which appears generally as *25 USCS §§ 2701* et seq. For full classification of such Act, consult USCS Tables volumes.

Explanatory notes:

The bracketed comma has been inserted in subsec. (c)(3)(B) to reflect the probable intent of Congress to include such punctuation.

The bracketed word "tribe" has been inserted in subsec. (d)(7)(B)(iii) to indicate the probable intent of Congress to not capitalize such word.

LEXSTAT 25 USCS § 2702

*** CURRENT THROUGH PL 111-12, APPROVED 3/30/2009 ***
*** WITH A GAP OF PL 111-11 ***

TITLE 25. INDIANS
CHAPTER 29. INDIAN GAMING REGULATION

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25 USCS § 2702

§ 2702. Declaration of policy

The purpose of this Act is--

(1) 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;

(2) 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; and

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

HISTORY:

(Oct. 17, 1988, P.L. 100-497, § 3, 102 Stat. 2467.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Oct. 17, 1988, P.L. 100-497, 102 Stat. 2467, popularly known as the Indian Gaming Regulatory Act, which appears generally as *25 USCS §§ 2701* et seq. For full classification of such Act, consult USCS Tables volumes.

S. REP. 100-446, S. Rep. No. 446, 100TH Cong., 2ND Sess. 1988, 1988 U.S.C.C.A.N. 3071, 1988 WL 169811
(Leg.Hist.)
(Cite as: 1988 U.S.C.C.A.N. 3071)

*3071 P.L. 100-497, INDIAN GAMING REGULATORY ACT
DATES OF CONSIDERATION AND PASSAGE
House: September 27, 1988
Senate: September 15, 1988
Senate Report (Indian Affairs Committee) No. 100-446,
Aug. 3, 1988 [To accompany S. 555]
Cong. Record Vol. 134 (1988)
No House Report was submitted with this legislation.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

SENATE REPORT NO. 100-446
August 3, 1988

The Select Committee on Indian Affairs, to which was referred the bill (S. 555) to regulate gaming on Indian lands, 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

S. 555 provides for a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming. The bill establishes a National Indian Gaming Commission as an independent agency within the Department of the Interior. The Commission will have a regulatory role for class II gaming and an oversight role with respect to class III.

BACKGROUND

S. 555 is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands. In developing the legislation, the issue has been how best to preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons. An additional objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests.

The need for Federal and/or State regulation of gaming, in addition to, or instead of, tribal regulation, has been expressed by various State and Federal law enforcement officials out of fear that Indian bingo and other gambling enterprises may become targets for infiltration by criminal elements. While some States have attempted to assert jurisdiction over tribal bingo games, tribes have very strenu-

to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as parimutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. The State of Nevada and the Fort Mojave Indian tribe negotiated a compact to govern future casino gaming on the Nevada portion of the tribe's reservation. While that compact itself may not be an appropriate model for other compacts, the issues addressed by the compact are the same issues that the Committee considers may be the subject of negotiations between other States and tribes.

In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

The practical problem in formulating statutory language to acoomplish the desired result is the need to provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place. That incentive for the States had proved elusive. Nevertheless, the Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, ***3084** although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming--many can and will.

The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. Section

11(d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. The Committee recognizes that subparts of each of the broad areas may be more inclusive. For example, licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility. A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between. The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.

The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands. Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future.

Finally, the bill allows States to consider negative impacts on existing gaming activities. That is not to say that the bill would allow States to reject Indian gaming on the mere showing that Indian gaming will compete with non-Indian games. Rather, States must show that economic consequences will be severe and that they will clearly outweigh positive economic consequences.

Burden of proof.--Section 11(d)(7) grants a tribe the right to sue a State if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealings with tribes in class III gaming negotiations. While a tribe must show a prima facie case, after doing so the burden will shift to the State to prove that it did act in good faith. The Committee notes that it is States not tribes, that have crucial information in their possession that will prove or *3085 disprove tribal allegations of failure to act in good faith. Furthermore, the bill providesat the court, in making its determination, may consider any of the number of issues listed in this section, including the State's public interest and other claims. The Committee recognizes that this may include issues of a very general nature and, and course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most fa-

vorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

Management contracts.--As used in section 12 and throughout the bill, the term "management contract" refers to agreements governing the overall management and operation of an Indian gaming facility by an entity other than the tribe or its employees. The term "management contract" does not include contracts or agreements for the procurement of particular services, materials or supplies. These service or supply agreements, including the supply of gaming aids such as pull-tabs, computers, punch boards, and communications or other equipment, are subject to regulation under section 11(b)(2)(D). Charges associated with such services, materials, supplies or equipment are to be included as part of the total operating expenses in determining the net revenues under section 4(10).

Some concern has been expressed that the bill requires that existing management contracts be made consistent with the provisions of the bill that limit contract terms to 5 years and fee percentages to 30 percent (see sections 12(b)(5) and 12(c) and 13(c)). Compacts may, of course, provide for additional renewal terms. The Committee believes that the plenary power of Congress over Indian affairs, and the extensive government regulation of gambling, provides authority to insist that certain minimum standards be met by non-Indians when dealing with Indians. The Secretary's powers with respect to Indians are always subject to alteration or change by the Congress. In the area of gaming where many factors other than ordinary business risk enter into the equation, the Committee has no reluctance in requiring changes to existing gambling enterprise contracts, whether or not such contracts have been given a stamp of approval by the Secretary. Some of the contracts, approved or not, have been shown to be clearly unconscionable, and the members of the Committee believe that term of years and fee percentages set forth in the bill are adequate to protect any legitimate potential investor.

SECTION BY SECTION ANALYSIS

Section 1.--Title.--"Indian Gaming Regulatory Act".

Sec. 2.--Findings.--Congress finds that tribes engage in games which generate revenues; Federal law provides no clear standards for regulating Indian gaming; the goal of Federal policy is to promote tribal economic development and, in States where gaming is otherwise legal, tribes have the right to regulate gaming on Indian lands.

Sec. 3.--Declaration of Policy.--The purpose of the act is to provide a statutory basis for operating Indian gaming to promote economic development, to shield tribes from organized crime, to assure ***3086** fairness to operators and players, and to establish a Federal regulatory authority for Indian gaming to meet congressional concerns.

Sec. 4.--Definitions.--

(1) Attorney General (U.S. Attorney General)

(2) Chairman (of National Indian Gaming Commission)

(3) Commission (National Indian Gaming Commission)

this gaming debate is over, I challenge those involved in this debate to devote their energies toward increasing long-term economic development opportunities for Indian Tribes.

JOHN McCAIN.

ADDITIONAL VIEWS OF MR. EVANS

I voted in Committee to report this bill to the full Senate, but I did so with great reluctance. I am troubled by the potential implications S. 555 may have for the fundamental legal relationship between the United States and the several Indian tribes and on the established principles of Federal Indian Law which guide that relationship. S. 555, the Indian Gaming Regulatory Act, should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, the bill should be considered within the line of developed case law extending over a century and a half by the United States Supreme Court, including the basic principles set forth in California v. Cabazon Band of Mission Indians.

The bill's statement of purpose is generally a sound analysis of the law as it applies to jurisdiction in Indian Country pursuant to Public Law 83-280, specifically as established by the Court in Seminole Tribe v. Butterworth and Cabazon. In light of the Committee statement I am confident that the Federal courts will interpret S. 555 in the proper jurisdictional context. Nevertheless, I believe it is necessary to underscore an important distinction between this bill and Public Law 83-280. Under Public 83-280, the courts distinguish between a State's criminal laws which are prohibitory in nature and its civil laws which are regulatory in nature. This distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 states. Under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83- 280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of federal law, to prohibit Class II games. S. 555 should not be interpreted in any way to subject Indian tribes or their members who ***3105** engage in Class II games to the criminal jurisdiction of States in which criminal laws prohibit Class II games.

S. 555 should not be interpreted as going beyond Public Law 83-280 in another respect. Public Law 83-280 transferred to the States jurisdiction over criminal and civil causes of action in Indian Country. In other words Public Law 280 only subjected the actions of individual Indians to State enforcement. Public Law 83-280 did not subject the governing processes of the tribes to State law and public policy constraints, which would be a fundamental derogation of tribal self-government. Likewise, S. 555 should be construed not to subject tribal governance to State court jurisdiction.

Section 10 purports to delegate the Secretary's trust responsibility to the Gam-

ing Commission. I am troubled to think that this section of the Act and the accompanying report language may be read to suggest that the Secretary's charge to carry out the United States' trust responsibility ends where that of the Commission begins. The entire Federal Government owes a trust obligation to the tribes and the Secretary is still charged with carrying out that overall responsibility, especially in areas only incidentally affected by gaming and S. 555 in Indian Country. The Act should not be construed to relieve the Secretary, or any other Federal officer, of trust obligations to the tribes.

Finally, this bill should be construed as an explicit preemption of the field of gaming in Indian Country. Thus, in accordance the fundamental legal principles upon which the Supreme Court relied in deciding Cabazon, where the Federal Government has preempted a field affecting Indians or Indian tribes, there should be no balancing of State public policy and interests when they conflict with tribal rights except where expressly provided in this bill. It is my understanding that S. 555 acknowledges that inherent rights are expressly reserved to the tribes. This bill allows tribes to relinguish some of those rights by way of compacts with the States, in accordance with the Federal Government's trust obligation to the tribes. This bill should not be construed, however, to require tribes to unilaterally relinguish any other rights, powers, or authority.

We should be candid about gambling. This issue is not one of crime control, morality, or economic fairness. Lotteries and other forms of gambling abound in many States, charities, and church organizations nationwide. It would be hypocritical indeed to impose on Indian people more stringent moral standards than those by which the rest of our citizenry chooses to live. Moreover, Indian tribes may have a competitive economic advantage because, rightly or wrongly, many states have chosen not to allow the same types of gaming in which tribes are empowered to engage. Ironically, the strongest opponents of tribal authority over gaming on Indian lands are from States whose liberal gaming policies would allow them to compete on an equal basis with the tribes.

I am no more fond of gambling than any other member of this Committee and no less aware of the potential dangers of organized criminal infiltration of Indian gaming. In 15 years of commercial gaming on Indian reservations, however, tribes have proven more ***3106** capable of controlling this potential problem than have States in which high stakes gambling is played. Given this fact, the bill should not be construed, either inside or outside the field of gaming, as a derogation of the tribes' right to govern themselves and to attain economic self-sufficiency.

DANIEL J. EVANS.

(Note: 1. PORTIONS OF THE SENATE, HOUSE AND CONFERENCE REPORTS, WHICH ARE DUPLICATIVE OR ARE DEEMED TO BE UNNECESSARY TO THE INTERPRETATION OF THE LAWS, ARE OMITTED. OMITTED MATERIAL IS INDICATED BY FIVE ASTERISKS: *****.

2. TO RETRIEVE REPORTS ON A PUBLIC LAW, RUN A TOPIC FIELD SEARCH USING THE PUBLIC LAW NUMBER, e.g., TO(99-495))

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make the adjustment to new and productive jobs, let's make sure we place special emphasis on that part of our population to whom this Nation is indebted—our Nation's veterans.

This morning, in our Veterans' Affairs Committee hearing on the President's budget for the VA and some specific legislative proposals, we received favorable reactions to my bill concerning VJTA from several major veterans service organizations. The veterans groups have consistently supported this program and other initiatives to strengthen veterans employment and training assistance.

I urge my colleagues to join me by cosponsoring this bill. And I am hopeful that Congress will adopt this important measure in the near future.

I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 553

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Veterans' Job Training Act Extension of 1987".

SEC. 2. VETERANS' JOB TRAINING ACT AMENDMENTS.

(a) DEFINITIONS.—Section 3 of the Veterans' Job Training Act, Public Law 98-77 (29 U.S.C. 1721 note) is amended by adding at the end the following new paragraph:

"(4) The term "homeless individual" means an individual who lacks a fixed and adequate nighttime residence and includes an individual whose primary residence is in a publicly or privately operated shelter which provides temporary shelter.".

(b) ELIGIBILITY.—Section 5(a)(1) of such Act is amended—

(1) by inserting "(I)" after "(B)";

(2) by striking out the period at the end of subclause (I), as redesignated by clause (1) of this subsection, and inserting in lieu thereof a semicolon and "or"; and

(3) by adding at the end the following new subclause: "(II) is a homeless individual.".

(c) AUTHORIZATION OF APPROPRIATIONS.—Section 16 of such Act is amended—

(1) by striking out "$65,000 for fiscal year 1988" and inserting in lieu thereof "a total of $85,000 for fiscal years 1986, 1987, and 1988"; and

(2) by striking out "September 30, 1988" and inserting in lieu thereof "September 30, 1989".

(d) EXTENSION OF TERMINATION DATES.—Section 17(a) of such Act is amended—

(1) in clause (1), by striking out "January 31, 1987" and inserting in lieu thereof "December 31, 1987"; and

(2) in clause (2), by striking out "July 31, 1987" and inserting in lieu thereof "June 30, 1988".●

By Mr. INOUYE (for himself, Mr. EVANS, and Mr. DASCHLE):

S. 555. A bill to regulate gaming on Indian lands; to the Committee on Indian Affairs.

GAMING REGULATION ON INDIAN LANDS

● Mr. INOUYE. Mr. President, I am pleased today to introduce the Indian Gaming Regulatory Act, with the cosponsorship of my colleagues, Senator EVANS, vice chairman of the Indian Affairs Committee, and Senator DASCHLE, a new member of the committee.

This bill is the culmination of years of serious negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an effort to provide a system for the regulation of gaming on Indian lands. The need for some Federal or State regulation has been expressed by various State law enforcement officials who fear that Indian bingo games may become targets for infiltration by criminal elements. While some States have attempted to assert jurisdiction over tribal bingo games, tribes have very strenuously resisted these attempts. This conflict has provided the impetus for congressional legislation to enact a system of regulation. In developing the legislation, the issue has been how best to preserve the right of tribes to self-government while, at the same time, to protect both tribes and the public from unscrupulous elements in our society.

The Seminole Tribe of Florida was the first tribe to enter the bingo industry. A court challenge by the State of Florida led the Fifth Circuit Court of Appeals to decide, in *Seminole* v. *Butterworth*, (5th Cir., 1982, cert. denied 1982), that the tribe could regulate gaming free from State interference, primarily because the Federal Government had never transferred jurisdiction to the State of Florida to regulate bingo games on Indian lands.

Since the Seminole Tribe opened its game, over 100 bingo games have been started on Indian lands in States where bingo is otherwise legal. Collectively, these games generate an estimated $100 million in annual revenues to tribes. Bingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a fuller range of government services to their members than would otherwise have been possible.

For various reasons, not all tribes can engage in profitable gaming operations. While I personally believe other economic development opportunities are solely needed on the Nation's Indian reservations, for those tribes that are in the gaming business, the income often means the difference between an adequate governmental program and a bare bones program which is totally dependent on Federal dollars.

Even though the Supreme Court is currently reviewing a California gaming case, it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance the competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands. The bill I am offering today is an attempt to set up that framework and is built on a measure that was reported to the Senate at the end of the last Congress, but which we were unable to consider before we adjourned. The similarities are many: Under this bill, as under that one, we have opted for continued tribal jurisdiction over bingo operations but with oversight and certain veto powers vested in a federally established National Indian Gaming Commission. The administration, perhaps, would choose to completely override tribal jurisdiction by creating a Federal regulatory system that provides no meaningful role for tribal governments. I am firmly convinced that such a system would be overreaching and is unnecessary. History has shown that Indian tribes are quite capable of managing their own affairs.

The legislative history of this measure began in the 98th Congress with the introduction of several bills and some hearings, but no other action by either the Senate or the House. In the 99th Congress, five bills were introduced in the House to provide a Federal role in the oversight of gaming on Indian lands. Representative UDALL's bill, H.R. 1920, emerged as the primary legislative vehicle for the Indian gaming issue. The House held three hearings on the bill's provisions. The administration had no legislative proposal of its own to offer at that time but, in November 1985, representatives of the Department of the Interior and the Department of Justice testified in support of tribal bingo but in opposition to other forms of Indian gambling.

The most controversial issue that concerned class III gaming. Class I is the term used in legislation to describe traditional gaming conducted at Indian pow-wows and ceremonies which is entirely free of outside regulation or oversight. Class II is the term used for bingo, lotto, and other forms of gaming such as pull-tabs, punch cards, tip jars, and the like. Class III is all other forms of gaming—cards, casino, horse and dog racing, jai-alai, and so forth. The bill reported to the House floor allowed the proposed National Indian Gaming Commission to regulate both class II and III gaming. Class III gaming would have been regulated in accordance with State rules and regulations governing such gaming. However, no jurisdiction over Indian lands was conferred on States. A compromise bill passed the House on April 21, 1986, calling for a 5-year moratorium on any new class III tribal gaming and a GAO study to determine

the best regulatory scheme for class III gaming on Indian lands.

The House-passed bill was referred to the Senate Indian Affairs Committee and a hearing was held on June 17, 1986. The Senate hearing included testimony on both H.R. 1920, as passed, and S. 2557, the administration's bill introduced in June 1986, which, among other things, prohibited class III gaming activities unless conducted under State jurisdiction. The Senate committee had held an earlier hearing in June 1985, on S. 902, a bill sponsored by Senator DECONCINI to establish regional gaming commissions. As originally introduced, its provisions were very similar to H.R. 1920.

The Senate Indian Affairs Committee reported an amended version of H.R. 1920 to the Senate on September 15, 1986. The revised committee bill affirmatively recognized tribal jurisdiction over class I and class II gaming but provided an additional Federal regulatory system for class II activities. The bill prohibited class III gaming. Tribes, as a whole, oppose any effort by Congress to unilaterally confer jurisdiction over Indian lands to States and prefer an outright ban of class III games to any direct grant of State jurisdiction. The Senate bill reflected the tribal position, but left the option open to tribes to seek State jurisdiction if they chose to engage in more sophisticated forms of gambling.

For class II gaming, the Senate bill recognized a strong role for tribal governments, while the administration's proposal preempted virtually all authority currently exercised by the tribes. According to the majority views, the committee did "not believe that such a heavy Federal hand is appropriate at this time and has opted for continued tribal control, but subject to a strong Federal presence." * * *"

The major provisions of the bill required tribes to adopt ordinances governing gaming operations and the newly established Commission to approve such ordinances before a game could be licensed. It provided a detailed system for the investigation and regulation of non-Indian investors and managers. It also established a system, patterned on the administration's bill, for civil and criminal penalties, including closure authority, to assure compliance with the act.

Subsequent to reporting the bill, and in further response to administration and State concerns, additional changes were recommended by the chairman of the Indian Affairs Committee. These improvements to the reported bill are incorporated in the measure I am introducing today, along with others that I believe will strengthen the bill and eliminate some major concerns. In brief, the bill provides for a Federal/tribal partnership for the regulation of bingo and similar games on Indian lands. Tribes with gaming operations must pass or have in place resolutions or ordinances that meet the standards provided in the bill. The enabling document must then be approved by a five-member National Indian Gaming Commission, which will be funded by assessments of tribal games and by annual congressional appropriations, on an equal basis.

All class I traditional games that are conducted during Indian ceremonies and pow-wows will remain under the exclusive jurisdiction of tribes. Tribes will continue to have jurisdiction over class II bingo games but this jurisdiction is subject to regulation by the Commission. Besides approving ordinances, the Commission well review all management contracts to insure their compliance with the bill. Contracts will be submitted to rigorous standards before approval or disapproval. Extensive and detailed criminal background checks will be required for all management personnel and the costs of such investigations will be paid for by those being investigated.

All other gaming—casino, cards, pari-mutuel, and so forth—is barred by the bill, unless a tribe receives the approval of the Secretary of the Interior to a transfer of criminal and civil jurisdiction over a class III game to a State. Upon acceptance of such jurisdiction, the State will then license the proposed class III activity. Unlike last year's bill, which attempted to grandfather in all present and future card games that are now legal in certain States, this bill would grandfather only those tribal games which actually operated on January 1, 1987. No other tribal card gaming would be permitted under the bill.

The administration has indicated their support for the definitions in the bill for class I, II, and III gaming. They also accept the grandfathering of existing card games. The administration would like all the Commission's funding to be paid from assessments on games. However, I believe congressional oversight through the appropriations process will be vital to an effective commission.

A continuing issue is the matter of licensing. I believe that tribes, as part of their self-governing process, should continue to license games, operators, and employees. The administration believes that the Commission should do the actual licensing. Since the Commission will have approval power over all ordinances and contracts, and has the authority to shut down a game when anything is out of order, I do not think it is necessary to undermine the right of tribes to govern themselves by removing their power to license games and employees.

I view tribal gaming as just one form of economic development and not necessarily the most beneficial one, primarily because of the dangers inherent in operating a large cash business. However, I recognize how important gaming is for many tribal economies and want to help ensure that tribes, their members, and the public are protected as much as possible from criminal elements. I believe this bill achieves that objective. I offer this rather extensive background statement because I want the Senate to be well informed on the issue of jurisdiction of gaming on Indian lands before considering the legislation. Tribes naturally want very much to retain gaming as an important source of revenue and to expand upon it where feasible. As trustee for Indian tribes and their resources, the Federal Government must address the serious concerns raised by gaming and provide a regulatory system that meets those concerns. This bill provides for such a system and it is my intention to have this legislation addressed expeditiously by the Senate Indian Affairs Committee so that we might complete the work of the past two Congresses.●

● Mr. EVANS. Mr. President, I am pleased today to join with my colleagues Senator INOUYE and Senator DASCHLE to introduce the Indian Gaming Regulatory Act. At the present time, in all States that allow a particular type of gambling subject to State controls and limitations, an Indian tribe is free to operate the same type of gambling free of those controls. This situation is the result of a series of Federal circuit court decisions, beginning with *Seminole* v. *Butterworth*, 658 F. 2d 310 (5th Cir. 1982), cert. denied, 455 U.S. 1020 (1982).

In Seminole, the Fifth Circuit Court of Appeals held that Public Law 83-280 conferred criminal and civil jurisdiction over Indian reservations to certain States, but that it did not confer general regulatory power over Indian tribes. Consequently, the Seminole court held that while a State could prohibit certain types of gambling activities altogther, it could not regulate games in Indian country. This distinction is consistent with Federal court decisions interpreting the Organized Crime Act of 1970.

We recognize the legitimate interests of Indian tribes in the operation of games free of State regulation. The ability of tribes to conduct gaming activities is a valuable asset from which they reap innumerable rewards. Furthermore, a contrary view would undermine the most fundamental aspects of tribal sovereignty. Yet we also recognize the valid concerns of the States and the U.S. Department of Justice that Indian gaming is conducted fairly and free of criminal infiltration. The bill we are introducing today is an attempt to balance these competing concerns.

Briefly, the bill divides games into three categories: ceremonial games

(class I); bingo and pulltabs (class II); and games such as card games, paramutuel horse and dog racing, and jai alai (class III). The bill would have no effect on ceremonial games. But it would establish a National Indian Gaming Commission to oversee tribal regulation of class II games. The Commission would consist of five members, two of which must be members of federally recognized tribes. Not more than three can be of the same political party. The chairman would be appointed by the President, subject to Senate confirmation, and the remainder of the members would be appointed by the Secretary of the Interior. The legislation would prohibit class III games, unless such games are allowed under State law and are approved by the State in which the reservation is located. Finally, the bill would allow conversion of fee lands to trust land for gambling purposes only if the land is within the boundaries of or contiguous to a reservation. The Secretary of the Interior, in consultation with local and State officials, may convert noncontiguous land to trust ownership only if approved by the Governor of the State in which the land is located.

Mr. President, I commend the chairman of the Indian Affairs Committee Senator INOUYE and those who worked long and hard to bring this bill to its present form. Yet I believe, and I am sure they would agree, that certain elements of the bill deserve further consideration and possible refinement. Specifically, I have concerns about the treatment of so-called class III gaming and the application of State regulation over these types of activities. Furthermore, I am concerned about provisions in the bill allowing the Commission to appoint staff without regard to normal civil service limitations.

Mr. President, I look forward to hearings on this legislation to learn the views of others on its particulars. And I look forward to working with the distinguished chairman and members of the Indian Affairs Committee, and ultimately with the distinguished members of the Interior Committee of the House of Representatives, to bring this legislation to fruition.

Mr. President, I ask unanimous consent that the bill and a section-by-section analysis be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 555

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Indian Gaming Regulatory Act".

FINDINGS

SEC. 2. (a) The Congress finds that—

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) States have no criminal jurisdiction over Indians in Indian country except to the extent that the Congress has provided by legislation that the States, rather than the Federal Government, should exercise jurisdiction over a particular subject matter;

(3) the Federal and tribal governments exercise criminal jurisdiction over crimes committed in Indian country, except in certain special situations generally not related to gambling;

(4) Federal law sometimes assimilates the criminal laws of the States when there is no general Federal criminal statute on point;

(5) several Federal courts have held that State criminal laws are assimilated by section 13 of title 18, United States Code for enforcement by the Federal Government in Indian country, that State gambling enforcement statutes are regulatory laws which are not assimilated by section 13 of title 18, United States Code, or made applicable to Indians or Indian tribes by Public Law 83-280; and, consequently, that the Indian tribes have the exclusive right to regulate gaming which is not prohibited by Federal law and which is conducted in a State which does not, as a matter of criminal law and public policy, prohibit such gaming;

(6) Federal courts have held that section 2103 of the Revised Statutes, as amended, (25 U.S.C. 81) requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(7) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands; and

(8) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self- sufficiency, and strong tribal government.

DECLARATION OF POLICY

SEC. 3. The purpose of this Act is—

(1) 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;

(2) 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; and

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

DEFINITIONS

SEC. 4. For purposes of this Act—

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

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

(4) The term "Indian lands" means—

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians and is recognized as possessing powers of self-government.

(6) The term "gaming" means to deal, operate, carry on, conduct, or maintain for play any banking or percentage game of chance played for money, property, credit, or any representative value.

(7) 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.

(8) The term "class II gaming" means games of chance commonly known as bingo or lotto which are played for prizes, including monetary prizes, with cards bearing numbers or other designations, the holder covering such numbers or designations as objects, similarly numbered or designated, are drawn from a receptacle or electronically determined and the game being won by the person first covering a previously designated arrangement of numbers or designations on such card, and shall also include, where otherwise legal, pull-tabs, punch boards, tip jars, and other similar games. Class II gaming may include electronic or electromechanical facsimiles of the foregoing games, where devices of such types are otherwise legal under State law. Within sixty days of the date of enactment of this Act, the Secretary shall identify and prepare a list of each tribally owned card game operated as of January 1, 1987, on Indians lands in those States where such card gaming is otherwise legal, and shall publish such a list in the Federal Register. In accordance with section 13, if the tribal ordinance governing the operation of such identified Indian card game complies with section 11 of this Act and any management contract pertaining to such game complies with section 12 of this Act, such card game shall be deemed a class II gaming activity for purposes of regulation under this Act.

(9) The term "class III gaming" means all other forms of gaming that are not class I gaming or class II gaming.

(10) 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 including management fees.

(11) The term "Secretary" means the Secretary of the Interior.

NATIONAL INDIAN GAMING COMMISSION

SEC. 5. (a) There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b)(1) The Commission shall be composed of five full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) four associate members who shall be appointed by the Secretary of the Interior.

(2)(A) the Department of Justice shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than three members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of a federally recognized tribe.

(4) The members of the Commission shall be appointed for three year terms, except that the initial terms of the Commission shall be staggered so that—

(A) three members, including the Chairman, shall serve terms of three years; and

(B) two members shall serve terms of two years.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who—

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 12 of this Act.

(6) During his term of office, a Commissioner may only be removed by the appointing authority for neglect of duty, or malfeasance in office, or for other good cause shown.

(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 until his successor has been appointed, unless he has been removed for cause under subsection (b)(6).

(d) Three members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

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

(f) The Commission shall meet at the call of the Chairman or a majority of its members.

(g)(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of title 5, United States Code.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of title 5, United States Code.

(3) All members of the Commission shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

POWERS OF THE CHAIRMAN

SEC. 6. (a) The Chairman shall have power, subject to an appeal to the Commission, to—

(1) issue orders of temporary closure of gaming activities as provided in section 14(b);

(2) levy and collect civil fines as provided in section 14(a);

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

(4) approve management contracts for class II gaming as provided in section 12.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

POWERS OF THE COMMISSION

SEC. 7. (a) The Commission—

(1) shall monitor Indian gaming activities on a continuing basis;

(2) shall inspect and examine all premises where Indian 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 a gaming activity and all other matters necessary to the enforcement of this Act;

(5) may use the United States mail in the same manner and under the same conditions as other departments and agencies 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.

(b) The Commission shall submit a report with minority views, if any, to the Congress on December 31, 1988, and every two years thereafter. The report shall include information on—

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

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

(3) recommendations for amendments to the Act; and

(4) any other matter deemed appropriate by the Commission.

COMMISSION STAFFING

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

(b) The Chairman shall appoint and supervise other staff on 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.

(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 Service.

(d) Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this Act, unless otherwise prohibited by law.

(e) The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

COMMISSION—ACCESS TO INFORMATION

SEC. 9. The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this Act. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

INTERIM AUTHORITY TO REGULATE GAMING

SEC. 10. The Secretary shall continue to exercise those authorities currently vested in him relating to supervision of Indian gaming until such time as the Commission is organized and promulgates regulations. The Secretary shall provide staff and support assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

TRIBAL GAMING ORDINANCES

SEC. 11. (a)(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act.

(2) Any Indian gaming that is defined as class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this Act, if 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 prohibited by Federal law).

(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 prohibited by Federal law), and

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

A separate license 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 of the Indian tribe if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe shall have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside independent audits of the gaming will be obtained by the Indian tribe and made available to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) 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

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any 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 of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification to the Commission by the Indian tribe before the issuance of such license of the results of such background check.

(3) Net revenues from any tribal gaming may be used to make per capita payments to tribal members only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B); and

(C) those payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by individuals or entities other than the Indian tribe and conducted on Indian lands, except that the tribal licensing requirements shall be at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No individual or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity within the Indian tribe's jurisdiction if such individual or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(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

(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.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on the date of enactment of this Act.

(iii) Within sixty days of the date of enactment of this Act, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c)(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II), the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(d)(1) Except as provided in paragraph (2) of this subsection, class III gaming shall be unlawful on any Indian lands under section 1166 of title 18, United States Code.

(2)(A) A gaming activity on Indian lands that is otherwise legal within the State where such lands are located may be exempt from the operation of paragraph (1) of this subsection where the Indian tribe requests the Secretary to consent to the transfer of all civil and criminal jurisdiction, except for taxing authority, pertaining to the licensing and regulation of gaming over the proposed gaming enterprise to the State within which such gaming enterprise is to be located and the Secretary so consents. Such transfer shall provide the State with the authority to make appropriate and reasonable assessments of the Indian tribe or management contractor, as appropriate, to compensate such State for all reasonable costs incurred by it for investigating, licensing and regulating the gaming enterprise, but may not exceed the costs attributed to the regulation of other similar gaming enterprises operated by nontribal licensees within such State. If a State assesses any charge, commission, fee, or tax on a non-Indian parimutuel gaming enterprise in excess of the cost of regulating such an enterprise, a class III tribal parimutuel gaming enterprise shall not be liable for such excess charge, commission, fee, or tax so long as the Indian tribe uses the funds retained for purposes limited to those described in subsection (b)(2)(B); but the share of parimutuel pools returned to the bettor at Indian gaming enterprises shall not exceed the percentage share returned to bettors at non-Indian gaming enterprises of a similar nature.

(B) The Secretary shall approve gaming jurisdictional transfer under subparagraph (A) where the Commission certifies—

(i) that the Indian tribe's authorizing resolution or ordinance conforms to the requirements of subparagraphs (A) and (B) of subsection (b)(2);

(ii) that any management contract conforms to section 12; and

(iii) that the State within which such gaming enterprise is proposed to be established has agreed to such jurisdictional transfer.

(C) The Secretary shall cause to be published in the Federal Register a notice of consent to the transfer of jurisdiction under subparagraph (A). Such transfer shall be effective sixty days after publication and shall terminate as of the date such gaming enterprise ceases to operate. In the event of a cessation of operation such transfer of jurisdiction shall remain in full force and effect as to any activity which occurs prior to such cessation.

(D) In accordance with the provisions of section 1166(d) of title 18, United States Code, prosecution and enforcement pursuant to this subsection shall be within the appropriate courts of the respective State.

(E) The provisions of section 5 of the Act of January 2, 1951 (64 Stat. 1135; 15 U.S.C. 1175) shall not apply to any gaming conducted under this subsection.

(3) For purposes of this subsection, any regulation or authority exercised by a State under this subsection, including issuance of a license, shall be exercised in the same manner and to the same extent as it is exercised on non-Indian lands within the State.

(4) For purposes of this subsection, an Indian tribe shall be considered to be a person and shall have the same rights and remedies that any person or citizen of the United States has, and any State or Federal court of competent jurisdiction shall have jurisdiction and authority to issue such orders as may be necessary to enforce the rights granted under this subsection.

(e) For purposes of this section, not later than ninety days after the submission of any tribal gaming ordinance or resolution, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that ninety day period shall be deemed to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this Act.

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 financial interest in, or management responsibility for, such contract, or, 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.

(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; and

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

(c) 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 he determines that such percentage fee is reasonable in light of surrounding circumstances, but in no event shall such fee exceed 30 percent of the net revenues.

(d) Not later than one hundred and eighty days after the submission of a contract, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the one hundred and eighty-day period by not more than ninety 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 he 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.

REVIEW OF EXISTING ORDINANCES AND CONTRACTS

SEC. 13. (a) As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to the enactment of this Act, adopted an ordinance or resolution authorizing class II gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements, must be submitted for his review within sixty days of such notification. Any activity conducted under such ordinance, resolution, contract, or agreement shall be valid under this Act, or any amendment made by this Act, unless disapproved under this section.

(b)(1) Within ninety days after the submission of an ordinance or resolution authorizing class II gaming pursuant to subsection (a), the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 11(b) of this Act.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) conforms to the requirements of section 11(b), he shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) does not conform to the requirements of section 11(b), he shall provide written notification of necessary modifications to the Indian tribe which shall have not more than one hundred and twenty days to bring such ordinance or resolution into compliance.

(c)(1) Within one hundred and eighty days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a), the Chairman shall subject such contract to the requirements and process of section 12 of this Act.

(2) If the Chairman determines, at the end of such period, that a contract submitted under subsection (a) and the management contractor meet the requirements of section 12, he shall approve it.

(3) If the Chairman determines, at the end of such period, that a contract submitted under subsection (a), or the management contractor under a contract submitted under subsection (a), does not meet the requirements of section 12, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than one hundred and twenty days to come into compliance. If a management contract has been approved by the Secretary prior to the date of enactment of this Act, the parties shall have not more than one hundred and eighty days after notification of necessary modifications to come into compliance.

CIVIL PENALTIES

SEC. 14. (a)(1) Subject to such regulations as may be adopted 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 of this Act. Fines collected pursuant to this section shall be utilized by the Commission to defray its operating expenses.

(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 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 of this Act 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 ordinary 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.

(b)(1) The Chairman shall have power to order temporary closure of an Indian game 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 days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than three of its members, decided whether to order a permanent closure of the gaming operation.

(c) A decision 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 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 regulation is consistent with this Act or with any rules or regulations adopted by the Commission.

JUDICIAL REVIEW

SEC. 15. Decisions made by the Commission pursuant to sections 11, 12, 13, and 14 shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code.

SUBPOENA AND DEPOSITION AUTHORITY

SEC. 16. (a) By a vote of not less than three members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Any court of the United States within the jurisdiction of which an injury is carried on may, in case of contumacy or refusal to obey a subpoena to any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.

(e) Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

INVESTIGATIVE POWERS

SEC. 17. (a) Except as provided in subsection (b), the Commission shall preserve any and all information received pursuant to this Act as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of title 5, United States Code.

(b) The Commission may, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information, to the appropriate law enforcement officials.

(c) The Attorney General of the United States is authorized to investigate activities associated with gaming authorized by this Act which may be a violation of Federal law, including but not limited to section 13 of title 18, United States Code (Assimilative Crimes Act), section 1152 of such title (General Crimes Act), section 1153 of such title (Major Crimes Act), and section 1163 of such title relating to embezzlement and theft from tribal organizations. The Attorney General is authorized to enforce such laws, or assist in the enforcement of such laws, upon evidence of violation as a matter of Federal law, or upon the referral of information by the Commission pursuant to subsection (b).

COMMISSION FUNDING

SEC. 18. (a)(1) The Commission shall establish a schedule of fees to be paid annually by each tribal gaming activity to the Commission. Such fees shall not be less than one-half of 1 percent nor more than 2½ percent of the first $750,000, and not more than 5 percent of amounts in excess thereof, of the gross revenues from each activity regulated by this Act.

(2) The Commission, by a vote of not less than three of its members, shall annually adopt the rate of assessment authorized by this section which shall be payable to the Commission on a quarterly basis.

(3) Failure to pay the assessment made under this section shall, subject to the regulations of the Commission, be grounds for revocation of any approval of license of the Commission required under this Act for the operation of tribal gaming.

(4) To the extent that funds derived from assessments made under this section are not expended or committed at the end of the budget year, such surplus funds shall be credited to each gaming activity on a pro rata basis against the assessment made under this section for the succeeding year.

(5) For purposes of this section, gross revenues shall constitute the annual total wagered moneys less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

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

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

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary and shall be included as a part of the budget request of the Department of the Interior.

(c) There is established in the Treasury of the United States a special fund into which all fees collected under this section shall be deposited and used to pay the expenses of the Commission, as limited by subsection (a) of this section, in such amounts and to the extent provided in appropriations acts.

AUTHORIZATION OF APPROPRIATIONS

SEC. 19. (a) Subject to the provisions of section 18, there is hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission.

(b) Notwithstanding the provisions of section 18, there is hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for the first fiscal year after the date of enactment of this Act.

GAMING ON LANDS ACQUIRED AFTER ENACTMENT OF THIS ACT

SEC. 20. (a) Except as provided in subsection (b), gaming regulated by this Act shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after the date of enactment of this Act unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on the date of enactment of this Act; or

(2) the Indian tribe has no reservation on the date of enactment of this Act and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such tribe is presently located.

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

(1) 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

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

(A) a settlement of a land claim,

(B) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process, or

(C) the restoration of lands of an Indian tribe that is restored to Federal recognition.

(c) Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Provisions of the Internal Revenue Code of 1986, concerning the taxation and the reporting and withholding of taxes with respect to gambling or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act the same as they apply to State operations.

DISSEMINATION OF INFORMATION

SEC. 21. Consistent with the requirements of this Act, sections 1301, 1302, 1303 and 1304 of title 18, United States Code, shall not apply to any gaming conducted by an Indian tribe pursuant to this Act.

SEVERABILITY

SEC. 22. In the event that any section or provision of this Act, or amendment made by this Act, is held invalid, it is the intent of Congress that the remaining sections or provisions of this Act, and amendments made by this Act, shall continue in full force and effect.

CRIMINAL PENALTIES

SEC. 23. Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new sections:

"§ 1166. Gambling in Indian country

"(a) Except as provided in subsection (c), all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply on Indian lands in the same manner and to the same extent as such laws apply elsewhere in the State.

"(b) Whoever on Indian lands is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

"(c) For the purpose of this section, the term 'gambling' does not include Indian class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act.

"(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian lands, unless an Indian tribe pursuant to section 11(d) of the Indian Gaming Regulatory Act, or any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the Indian tribe's lands.

"§ 1167. Theft from gaming establishments on Indian lands

"(a) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, or other property of a value of $1,000 or less belonging to an establishment licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $100,000 or be imprisoned for not more than one year, or both.

"(b) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission shall be fined not more than $250,000, or imprisoned for not more than ten years, or both.

"§ 1168. Theft by officers or employees of gaming establishments on Indian lands

"(a) Whoever, being an officer, employee, or individual licensee of a gaming establishment licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value of $1,000 or less shall be fined not more than $250,000 and be imprisoned for not more than five years, or both;

"(b) Whoever, being an officer, employee, or individual licensee of a gaming establishment licensed by an Indian tribe pursuant to an ordinance or resolution approved by the National Indian Gaming Commission, embezzles, abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any moneys, funds, assets, or other property of such establishment of a value in excess of $1,000 shall be fined not more than $100,000,000 or imprisoned for not more than twenty years, or both.".

CONFORMING AMENDMENT

SEC. 24. The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following:

"1166. Gambling in Indian country.
"1167. Theft from gaming establishments on Indian lands.
"1168. Theft by officers or employees of gaming establishments on Indian lands.".

HIGHLIGHTS—INDIAN GAMING REGULATORY ACT

Class I (ceremonial gaming): Traditional gaming remains within exclusive jurisdiction of Indian tribes and outside the scope of the Act.

Class II (bingo, lotto, pull tabs, tip jars and punch boards): Continues to be within tribal jurisdiction but subject to regulation by the National Indian Gaming Commission.

Class III (cards, casinos, horse and dog racing, jai alai): Prohibited, but Secretary may approve a tribal/state agreement to transfer jurisdiction to a state for regulation of a tribal Class III game.

Grandfather of existing games: (1) All card games operated on January 1, 1987, by tribes in states where such games are legal will be treated as Class II games; (2) individually owned Class II games licensed by tribes will also be grandfathered. No new individual or card games are permitted under the bill.

Commission members: Composed of five (5) persons, two (2) of whom must be members of federally recognized tribes; Chairman to be appointed by the President with advice and consent of Senate, and Department of Justice to conduct background investigations of all appointees.

Commission Chairman: May temporarily close games; levy civil fines; approve tribal ordinances or other enabling documents; and approve management contracts; decisions subject to appeal to full Commission.

Commission powers: Permanently close tribal games; enforce collection of civil fines; enforce tribal gaming ordinances; monitor all Indian gaming activities; inspect gaming premises; conduct background investigations of employees and contractors; access records, books and other documents and audit accounts; conduct any investigation necessary in connection with regulation of Class II gaming; consult with law enforcement officials where appropriate; and request the U.S. Attorney General to conduct necessary criminal investigations.

Commission funding: Operating costs derived from tribal assessments (50 percent) and Congressional appropriations (50 percent). Assessment set on a a sliding fee scale from ¼ percent to 2½ percent of first $750,000 of gross revenue and up to five (5) percent of amounts in excess thereof; gross revenue is all income less prize money paid and capital expenditures.

Tribal gaming ordinances: Required for the operation of a Class II game; must be approved by the Commission; tribe must be sole owner of gaming enterprise; revenues can be used for tribal government operations, general tribal welfare (including per capitas that are subject to federal income tax), economic development, and charity; tribe must have system for conducting background checks on key managers and employees and must license such officials; tribe may license a church or other group to conduct charitable gaming within the limits of applicable state law.

Management contracts: Permitted for fees up to 30 percent of net revenue; Commission must investigate contractors and may disapprove a contract based on such investigation; contract must allow tribal access to daily operations of the game, monthly audits, minimum guaranteed payment to the tribe, and have a term of no more than five (5) years.

Review of existing ordinances and contracts: Commission must notify each gaming tribe of review process and the tribe must forward existing contracts and ordinances within 60 days; Commission has 90 days to review ordinance and, if it conforms to Act, it is approved; if not, tribe is notified of needed changes and has 120 days to comply; for contracts, Commission has 180 days to review and if it meets requirements of the Act, it is approved; if not, parties have 120 days to comply (except those contracts previously approved by the Secretary have 180 days to comply).

Civil Penalties: $25,000 fine for violation of any provision of the Act; Commission has power to close a game or to cancel a contract but must notify tribe first of intent to fine, close or cancel.

Concurrent jurisdiction: Tribes may exercise existing tribal authority under tribal law over gaming.

Judicial review: All decisions of the Commission are final agency decisions for purposes of appeal to federal district court.

Subpoena: Commission may subpoena witnesses and documents and depose any person as part of its investigative powers.

New Lands: Gaming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the governor of the affected state concurs in that determination.

Criminal penalties: Range from $100,000 fine and one (1) year in prison to $1,000,000 fine and 20 years in prison.●

By Mr. CRANSTON (for himself, Mr. KENNEDY, and Mr. LEVIN):

S. 556. A bill to prohibit investments in, and certain other activities with respect to, South Africa, and for other purposes; to the Committee on Foreign Relations.

SOUTH AFRICA TRADE EMBARGO/DIVESTMENT

Mr. CRANSTON. Mr. President, last year the Senate overwhelmingly passed the Comprehensive Anti-Apartheid Act of 1986. I was greatly heartened by the strong show of support for that legislation—support which enabled Congress easily to override the Presidential veto.

But I believe it is a misnomer to call that legislation "comprehensive." I do not believe those limited sanctions imposed against South Africa last fall go far enough. And it does not appear that our limited action will convince the repressive Pretoria regime to dismantle its evil apartheid system. Indeed, Government forces in South Africa have recently reaffirmed their determination to continue their brutal

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Cohen's Handbook of Federal Indian Law

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CHAPTER 12 INDIAN GAMING

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§ 12.05 Tribal-State Compacts

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[1] Process

The Indian Gaming Regulatory Act of 1988 (IGRA) was designed to bring states into the process by encouraging tribes and states to enter into cooperative agreements to permit class III gaming on Indian lands within a state, subject to the approval of the Secretary of the Interior.n120 The compact negotiated between individual states and tribes can define with particularity a state's role with regard to gaming activities on Indian lands. While federal law governs the overall structure of the contracting process, state law applies to determine what steps are necessary to authorize a governor to enter into a compact, such as, for example, whether the governor alone has the power to enter into a compact or whether state legislative action is also needed.n121 Disputes over whether and when a Secretary-approved compact may be set aside on state law grounds raise important federalism concerns,n122 and the issue of the precise effect of Secretarial approval.n123 Important reliance interests are affected when compacts are set aside after Secretarial approval.n124 Whether a state could retroactively void tribal-state compacts by making all gaming unlawful is unclear. In *Panzer v. Doyle*,n125 the court noted that whether a state's constitutional change forbidding most gaming would be effective against preexisting compacts would "turn, at least in part, on the application of the impairment of contracts clauses in the United States and [state] Constitutions as well as IGRA." Interference with investment-backed expectations would also lead to a claim for compensation under the fifth amendment takings clause.n126

[2] Compact Provisions

Tribes and states may include a wide variety of subjects in the gaming compacts. Section 2710(d)(3)(C) of IGRA contains a list of subjects that may be contained in the compact, including "any other subjects that are directly related to the operation of gaming activities."n127 More than 200 tribal-state compacts have been approved, and they are often subject to amendments, as well as new negotiations if they have sunset provisions. It is thus impossible to generalize about the content of provisions, but many compacts currently in effect have provisions that deal with: tribal and state licensing and certification for employees; tribal and state enforcement of compact provisions; allocation of civil, regulatory, and criminal jurisdiction and law enforcement; the tribe's sovereign immunity and whether or to what extent it is waived for gaming activities; size of gaming operations; which games are authorized; technical requirements of electronic gaming devices; state inspection, testing, and approval of gaming devices and facilities; tribal payment of state regulatory costs; casino security and monitoring; tribal and state reciprocal access to records and reports; alcohol regulation; day-to-day rules of operation; conditions for amendments; and intrastate parity of gaming operations among tribes.n128

The most contentious issues often relate to state demands for payments from the tribes. IGRA allows, for example, compact provisions calling for assessments by the state to defray its additional regulatory costs.n129 Another section provides that "except for assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a state or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe."n130 This section also provides that no state may refuse to enter into compact negotiations based on the state's lack of authority to impose a "tax, fee, charge or other assessment."n131

Although it is clear that states may not tax gaming aetivities, tribes and states have devised approaches that allow some form of revenue sharing with the states. Thus, some states have been able to share in tribal gaming revenues in exchange for exclusive rights to game within a state--at least as against non-Indian gaming.n132 The Secretary of the Interior has approved revenue-sharing arrangements on the ground that those payments are not taxes, but exchanges of cash for significant economic value conferred by the exclusive or substantially exclusive right to conduct gaming in the state. These arrangements are known as "exclusivity provisions" and have become increasingly prevalent.n133 Despite generating high-level publicity and debate, revenue sharing provides states and tribes with the means to consummate compacts that both sides can legitimately elaim will provide substantial economic benefits to their constituents.n134

The Secretary of the Interior has not embraced all revenue-sharing provisions, however. The Secretary rejected a compact based on the adequacy of a revenue-sharing provision.n135 In addition, the Secretary avoided ruling on the legality of revenue-sharing provisions in several New Mexico gaming compacts in 1997, by refusing to either approve or disapprove the compacts within 45 days after the compact had been submitted for approval, thereby triggering IGRA's automatic approval section.n136

In *In Re Gaming Related Cases*,n137 the Ninth Circuit upheld as valid a revenue-sharing agreement. A tribe alleged that the state of California breached its obligation to negotiate in good faithn138 by insisting on two revenue-sharing provisions and a labor relations provision in the compact.n139 The state demanded the creation of a "Revenue Sharing Trust Fund" (RSTF) to allow California tribes without gaming revenues to share in the proceeds of Indian gaming. The court ruled that the fund fell within the congressional authorization of compact provisions "directly related to the operation of gaming activities."n140 It reasoned that, since a purpose of IGRA was to strengthen tribal governments and economies, a requirement that gaming funds be shared with nongaming tribes fell within the scope of section 2710(d)(3)(vii).n141 A second provision challenged by the tribe was a "Special Distribution Fund" (SDF) to provide funds for gambling addiction programs, aid to local governments affected by gaming, compensation for state regulatory costs, payments for shortfalls to the RSTF, and any other purpose specified by the legislature.n142 The court stated that:

> While the contributions tribes must make to the SDF are significant, the tribes receive in exchange an exclusive right to conduct class III gaming in the most populous State in the country. We do not find it inimical to the purpose or design of IGRA for the State, under these circumstances, to ask for a reasonable share of tribal gaming revenues for the specifie [gaming-related] purposes identified in the SDF provision.n143

The court in *dicta* distinguished the California compacts from those with the states of Connecticut, New Mexico, and New York, under which revenue from gaming is transferred into the states' general funds, noting the "legality of such compacts is not before us, and we intimate no view on the question."n144 The Secretary of the Interior, however, has not expressed concern over how the revenues are used by a state, so long as the exclusivity provides "substantial economic benefit" to the tribe.n145

[3] The Requirement that States Negotiate in Good Faith

IGRA requires states to enter into negotiations with a tribe and to negotiate a class III compact in good faith, or face either suit in federal court or the imposition of gaming procedures by the Secretary of the Interior.n146 IGRA sets forth