UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 18-16830

STAND UP FOR CALIFORNIA!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God – Madera and Dennis Sylvester,

Plaintiffs and Appellants,

v.

United States Department of the Interior, *et al.*,

Defendants and Appellees.

United States District Court, Eastern District of California,
Case No. 2:16-CV-02681 AWI-EPG
Hon. Anthony W. Ishii

Appellants' Opening Brief

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Corporate Disclosure Statement

Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God – Madera and Dennis Sylvester (collectively the "Stand Up Appellants") have no parent companies. Nor do any publicly-held companies have a 10% or greater ownership interest in any of the Stand Up Appellants.

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Statement of Jurisdiction

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. On July 18, 2018, the district court entered judgment after filing an order that, among other things, denied Stand Up's motion for summary judgment and granted the North Fork Tribe and the United States' motions for summary judgment. [1ER 1-29, 2ER 33.] Stand Up filed its notice of appeal on September 11, 2018, and its appeal was timely under 28 U.S.C. § 2107(b). [2ER 30-32.] This court has jurisdiction under 28 U.S.C. § 1291.

Addendum

Attached hereto is a separate addendum containing legal authorities required by Circuit Rule 28-2.7.

Issues Presented

In order to conduct Class III, casino-style gaming on tribal land, an Indian tribe is generally required to enter into a compact with the State where the tribal land is located. 25 U.S.C. § 2710(d)(1). If the State fails to negotiate in good faith towards a Tribal-State compact, an

Indian tribe can turn to the courts. 25 U.S.C. § 2710(d)(7)(B)(i). The court can appoint a mediator, who asks the Tribe and State to each submit a proposed compact. 25 U.S.C. § 2710(d)(7)(B)(iii-iv). The mediator chooses one of the two compacts. 25 U.S.C. § 2710(d)(7)(B)(iv). If the State refuses to consent to the mediator-selected compact within 60 days, the mediator notifies the Secretary of the Interior. 25 U.S.C. § 2710(d)(7)(B)(v-vii). The Secretary must then prescribe "in consultation with the Indian tribe, procedures — (I) which are consistent with the proposed compact selected by the mediation under clause (iv), the provisions of this chapter, 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." 25 U.S.C. § 2710(d)(7)(B)(vii). If properly approved, the tribe may then conduct Class III gaming on its tribal land pursuant to these Secretarial Procedures.

The Johnson Act, 15 U.S.C. § 1171 et seq., prohibits, among other things, the use of slot machines on Indian lands. The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., provides an exception to the Johnson Act for gaming conducted under a Tribal-State compact.

It is undisputed that such a compact does not exist here. Rather, gaming on the North Fork Tribe's land will be pursuant to procedures issued by the Secretary.

Question 1: Did the district court err in ignoring the plain language of the Johnson Act and IGRA, which the court conceded was "clear and unambiguous," in holding that gaming conducted under Secretarial Procedures may allow the use of slot machines?

Question 2: Did the district court err by holding that the Secretary was excused from complying with the requirements of National Environmental Policy Act ("NEPA") and Clean Air Act because, according to the district court, the Secretary has no discretion to modify the mediator-selected compact to ensure compliance with the federal laws?

Statement of the Case

A. Statement of Facts

1. The North Fork Tribe proposes to build a large, off-reservation Las Vegas-style casino

The North Fork Tribe submitted an application to the Department of the Interior's ("Department") Bureau of Indian Affairs ("Bureau") to transfer into trust for the Tribe a 305-acre parcel of real property (the "Madera Site") for the purpose of developing a casino resort. [2ER 196.] The proposed development included a gaming facility, hotel, and parking. [*Ibid.*]

As required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Bureau issued a final environmental impact statement (final "EIS") discussing environmental impacts associated with the casino project, including impacts on problem gambling. [See 2ER 215-25.]

The Bureau also issued a conformity determination under Section 176 of the Clean Air Act, 42 U.S.C. § 7506, in which it concluded the

project would generate 42 tons per year of nitrogen oxide emissions and 21 tons per year of reactive organic gas emissions. [2ER 34, 35.]

2. The Secretary approves the casino project, but the required compact is not ratified by the state of California

In September 2011, the Secretary determined that gaming would be permissible on the Madera site under IGRA's two-part determination exception to the general prohibition against gaming on off-reservation lands (the "Two-Part Determination Decision"). See 25 U.S.C. § 2719(b)(1)(A).[1] [2ER 201.] As needed under IGRA, the California governor concurred in the Secretary's determination, the Secretary

[1] Under section 2719, the prohibition against off-reservation gaming—gaming on land acquired for a tribe after 1988—does not apply when "(A) 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." 25 U.S.C. § 2719(b)(1)(A) (emphasis added).

accepted the Governor's concurrence, and the land was accepted in trust in February 2013.[2] [1ER 64; 2ER 196; 3ER 269-70.]

When Governor Brown issued his concurrence, he also announced that he had negotiated and a concluded a Tribal-State gaming compact with the North Fork Tribe to govern gaming at the Madera Site. [3ER 269.] In May 2013, the California Legislature passed AB 277, a bill to ratify the compact. [3ER 272.] But before AB 277 went into effect under California law, the citizens of California voted to reject the Legislature's ratification of the compact [3ER 268, 272.]

In the wake of this vote, the North Fork Tribe filed suit in federal court against the state of California pursuant to IGRA's remedial scheme. *North Fork Rancheria of Mono Indians of California v. State of*

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[2] Stand Up challenged both the two-part determination and the Governor's concurrence in separate litigation. The D.C. district court rejected Stand Up's challenge to the two-part determination, and the D.C. Circuit affirmed. *Stand Up for California! v. United States Dep't of Interior*, 879 F.3d 1177 (D.C. Cir. 2018). The California Court of Appeal, District Five, agreed with Stand Up that the governor had no authority to concur in the Secretary's decision. *Stand Up for California! v. State of California,* 6 Cal. App. 5th 686 (2016). The California Supreme Court granted review, and the case is being held pending a decision in another case that presents the same issue. *Stand Up for California! v. State*, 390 P.3d 781 (Cal. 2017).

California (North Fork I), No. 115CV00419 AWISAB, 2015 WL 11438206 (E.D. Cal. Nov. 13, 2015). The district court found that the Tribe and the State had not entered into a valid compact, and held that the State failed "to enter negotiations with North Fork for the purpose of entering a Tribal State compact within the meaning of § 2710." *Id.* at *7, *12. The district court ordered the State and the Tribe to conclude a compact within 60 days. *Ibid.* When the parties failed to do so, the district court appointed a mediator. The mediator selected the Tribe's proposed compact and gave the State 60 days to consent to the Tribe's compact. [2ER 53.] The State did not consent. The mediator then forwarded the selected compact to the Secretary to prescribe Secretarial Procedures. [*Ibid.*]

On July 29, 2016, the Secretary issued procedures authorizing the North Fork Tribe to conduct Class III gaming at the Madera Site ("Secretarial Procedures"). [3ER 271-73.] In a letter accompanying the Secretarial Procedures, the Acting Assistant Secretary noted that in prescribing the Secretarial Procedures, "we have purposefully refrained from changing regulatory provisions in deference to the Mediator's submission to the Department and the Tribe's specific request that we

change that submission as little as possible."[3] [3ER 273.] The letter further stated, "this action to issue procedures is separate from the Departmental decision made years ago requesting the Governor's concurrence to allow gaming on the subject parcel as well as the subsequent decision made in 2012 to accept that parcel into trust." [*Ibid.*]

Notably, the Secretarial Procedures allow the Tribe to develop and operate a larger casino than contemplated in the prior fee-to-trust, two-part determination, and EIS decisions. The approved plan was for a single casino with a single "247,180 square foot gaming and entertainment facility. . . ." [2ER 211; *see also* 3ER 266 (describing the Tribe's proposed project to include a single casino with a 68,150 square foot casino floor).] The original compact upon which the Department's earlier decisions were based authorized the Tribe to "engage in Class III gaming only on eligible Indian lands held in trust for the Tribe *at a single* Gaming Facility located within the boundaries of the 305-Acre Parcel," and to operate 2000 slot machines. [3ER 267 (emphasis

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[3] As stated above, the mediator selected the North Fork Tribe's proposed compact.

added).] In contrast, the Secretarial Procedures authorize the Tribe to "establish and operate *not more than two* Gaming Facilities . . . located within the boundaries of the Madera Parcel" [3ER 289 (emphasis added)] and "to operate up to 2500 slot machines" after the first two years. [3ER 288.]

B. Procedural History

1. Stand Up's complaint

Stand Up filed this action in November 2016 against the Department, the Secretary, the Bureau, and the assistant Secretary to the Bureau. The initial complaint challenges the Secretarial Procedures under the Johnson Act, IGRA, NEPA, Clean Air Act, FOIA and Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq**.** [3ER 448-464.] The FOIA claim is no longer at issue.

The operative first amended complaint also includes a claim under IGRA and the APA based upon invalidity of the Governor's concurrence, which is required before the Secretary can authorize gaming on newly acquired land. [3ER 430-447.] That claim is not at issue in this appeal.

2. The district court's opinion

On July 18, 2018, the district court denied Stand Up's motion for summary judgment and granted defendants' cross motions for summary judgment. [1ER 1-29.] The details of the district court's opinion are discussed in the argument sections below.

Summary of Argument

1. The district court agreed with Stand Up that IGRA's clear and unambiguous language permits slot machine gaming when conducted under a Tribal-State compact, but not under Secretarial Procedures. Nevertheless, the district court held such an outcome to be "absurd." The district court's conclusion is based on a cramped interpretation of the statutory scheme that unnecessarily strains to find inconsistencies and incongruities in the statute. The more natural and logical interpretation of the plain language of the statute, which harmonizes IGRA's "carefully crafted and intricate remedial scheme" with its other provisions and congressional intent, is that while slot machine gaming may be conducted where the state consents—e.g.,

under a Tribal-State compact—it is not allowed under Secretarial Procedures, which are imposed on the state without its consent.

2. Although it is undisputed that the Secretary did not attempt to comply with NEPA or the Clean Air Act in issuing the Secretarial Procedures, the district court held that the Secretary was not obligated to do so because IGRA prohibits the Secretary from considering or complying with other federal laws when issuing Secretarial Procedures. The district court strained to reach this result by interpreting IGRA's requirement that Secretarial Procedures be "consistent with" the mediator-selected compact, IGRA, and applicable State law, to mean that the Secretary has no discretion to consider any other factors, including the U.S. Constitution or other federal law. The district court's interpretation is contrary to the plain language of the statute, unnecessarily limits the Secretary's authority to conform his procedures to other federal laws, and is in contravention of a long line of case law in this circuit. Once again, the district court's interpretation created conflicts between federal laws when it easily could have, and should have, harmonized those federal laws.

Standard of Review

This court's review of Stand Up's claims under the Administrative Procedure Act is *de novo*, "thus reviewing directly the agency's action under the Administrative Procedure Act's (APA) arbitrary and capricious standard." *Bldg. Indus. Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 792 F.3d 1027, 1031 (9th Cir. 2015) (citations omitted). The court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," or adopted "without observance of procedure required by law." 5 U.S.C. § 706(2).

Legal Discussion

I

The Secretarial Procedures Violate the Johnson Act by Allowing Slot Machines Without a Compact

A. The Johnson Act prohibits slot machine gaming except under a Tribal-State compact or when the State consents to a mediator-selected compact

The Johnson Act prohibits the use of "any gambling device . . . within Indian country." 15 U.S.C. § 1175(a). Slot machines are gambling devices under the Johnson Act. *Id.* at § 1171(a)(1).

IGRA provides exceptions to the Johnson Act's prohibition on slot machines in two situations. First, IGRA provides an exception for "gaming conducted under a Tribal-State compact." 25 U.S.C. § 2710(d)(6). Second, IGRA provides that a proposed compact selected by a court-appointed mediator and consented to by the State "shall be treated as a Tribal-State compact . . . ." 25 U.S.C. § 2710(d)(7)(B)(vi). Under both exceptions, the State has consented to the compact, which may authorize the use of slot machines.

Here, the challenged Secretarial Procedures authorize the North Fork Tribe to operate up to 2500 slot machines after the first two years. [3ER 288.] Yet it is undisputed that neither a Tribal-State compact nor mediator-selected compact consented to by the State govern the Tribe's gaming. [1ER 9.] Indeed, the Secretarial Procedures only exist because the state of California refused to consent to any compact with the Tribe.

Thus, as explained in more detail below, the Secretarial Procedures contravene the plain language of IGRA and the Johnson Act, and the district court erred in upholding the Secretarial Procedures.

B. The "clear and unambiguous" language of IGRA and the Johnson Act provide no exception for Secretarial Procedures

The portion of IGRA providing an exception to the Johnson Act in situations where the State consents to a compact does not mention Secretarial Procedures, nor does the provision authorizing the Secretary to prescribe procedures refer to the Johnson Act. 25 U.S.C. § 2710(d)(6); § 2710(d)(7)(B)(vii). And Congress did not, as it did for compacts

selected by the mediator and consented to by the State, deem that Secretarial Procedures were to be "treated as a Tribal-State compact." 25 U.S.C. § 2710(d)(7)(B)(vi). This makes sense. In contrast with Tribal-State compacts, Secretarial Procedures evidence a complete lack of consent by the State.

In affirming the Secretarial Procedures, the district court was forced to acknowledge that the "statutory language is clear and unambiguous." [1ER 11.] "The Johnson Act is clear in its broad prohibition of sale, 'transport[ation], posess[ion], or use [of] any [slot machine] . . . within Indian Country." [*Id*. at 10, citing 15 U.S.C. § 1175 (alterations in original opinion).] The district court also acknowledged that there were no "exceptions relevant here" even though "Congress was not blind to the limitations imposed by the Johnson Act in enacting IGRA," as Congress specifically carved out an exception to the Johnson Act for gaming conducted under a Tribal-State compact. [*Ibid*.] The district court also conceded that "Congress makes clear that . . . a compact selected by the appointed mediator and consented to by the State 'shall be treated as a Tribal-State compact . . . ,'" but did not include such language where the State refuses consent to the selected

compact, and the Secretary prescribes procedures. [1ER 10-11, citing 25 U.S.C. § 2710(d)(7)(B)(vi).] As the district court acknowledged, Congress knew how to legislate clearly defined exceptions to the Johnson Act, and Congress did so only in circumstances where the State provides some level of approval for slot machine operation by either agreeing to a Tribal-State compact or consenting to a mediator-selected compact. [1ER 10.]

Given the plain language of the statute, this court must presume that Congress did not intend for Secretarial Procedures to be "treated as a Tribal-State compact," and thus did not intend for the Johnson Act exception to apply to Secretarial Procedures. See *Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

C. It is not "absurd" to apply the Johnson Act's prohibition against slot machines for gaming conducted pursuant to Secretarial Procedures

Despite finding the statutory language "clear and unambiguous" and acknowledging that Congress created specific carve-outs for the Johnson Act that did not include Secretarial Procedures, the district court nevertheless found that it would be "absurd" for Congress to prohibit slot machines in gaming authorized by Secretarial Procedures. [1ER 11.] The district court contended that such a prohibition would "result in internal inconsistencies within IGRA," "render the issuance of Secretarial Procedures inoperative in every case," and "undermine the carefully crafted statutory scheme and goals of IGRA and its remedial process." [*Ibid*.]

Not so. The district court's conclusions are based on the flawed premise that application of the Johnson Act would gut all Class III gaming and a misreading of IGRA. We address each of the district court's contentions.

1. Application of the Johnson Act in Secretarial Procedures would not result in internal inconsistencies within IGRA

First, the district court held that application of IGRA's clear and unambiguous language would create an internal inconsistency by compelling the Secretary to "authorize gaming at least partially inconsistent with the Johnson Act." [1ER 11.] This conclusion is based on the court's stated understanding that the Secretary must simply adopt the mediator-selected compact as the Secretary's Procedures, and has no authority to conform the provisions to comply with federal laws other than IGRA. As stated in Part II, ante, this simply misunderstands the Secretary's authority under IGRA, which gives the Secretary authority to alter the provisions of a proposed compact to, for example, ensure that it would not violate the Johnson Act by eliminating the use of slot machines.

Second, the court held that if Secretarial Procedures are not considered synonymous with a Tribal-State compact, then the Secretary would be compelled to authorize procedures that are inconsistent with

IGRA Section 23 (18 U.S.C. § 1166), which the court describes as prohibiting "gambling" unless conducted under a Tribal-State compact. [1ER 11-12 & n.8.] The court, however, simply misunderstands Section 23. A proper understanding of that section shows that application of the Johnson Act to Secretarial Procedures creates no inconsistency.

Section 23 was enacted to make a federal offense out of any violation, committed in Indian country, of a State's laws pertaining to licensing, regulation, or prohibition of gambling, and to give the United States exclusive jurisdiction over criminal prosecutions of violations of State gambling laws in Indian country.[4] 18 U.S.C. § 1166(a), (b), (d). An exception to Section 23 applies for Class III gaming conducted under a Tribal-State compact. 18 U.S.C. § 1166(c)(2), (d). This means that if the

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[4] States have no civil jurisdiction over gambling in Indian country. IGRA was enacted in response to the Supreme Court's opinion in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which held that states had the authority to enforce their gaming laws on Indian land only if the laws prohibited gaming outright as a matter of criminal law and did not merely regulate gaming. *Id.* at 208. In response to *Cabazon*, Congress enacted IGRA to provide "a comprehensive regulatory framework for gaming activities on Indian lands which seeks to balance the interests of tribal governments, the states, and the federal government." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997).

State negotiates a compact with a tribe, the State will have jurisdiction to regulate the gaming conducted on the tribe's land and will have jurisdiction over criminal prosecutions for violation of the State's laws.

But there is no exception to Section 23 if the tribe's gaming is conducted under Secretarial Procedures. This does not mean, as the district court apparently believed, that Section 23 would then prohibit gaming altogether. Rather, if Secretarial Procedures are not the full equivalent of a compact (as Stand Up contends), then the United States would retain exclusive jurisdiction over criminal prosecutions of State gambling laws within Indian country. The state would have no regulatory authority. *Cabazon Band of Mission Indians*, 480 U.S. at 208.

This distinction between gaming conducted under a compact and gaming under Secretarial Procedures is entirely consistent with IGRA's purpose in allowing States to enforce their gambling laws only under a Tribal-State compact. 134 Cong. Rec. 23883, at 24022-23 (1988) "It is a long and well-established principle of Federal-Indian law . . . that unless authorized by an Act of Congress, the jurisdiction of State

governments and the application of State laws do not extend to Indian lands. . . . [T]he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. . . . Consistent with these principles, the committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws--- . . . [a]nd State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities. The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of State laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S. 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose.") Under the district court's interpretation, by contrast, if Secretarial Procedures are treated as equivalent to a Tribal-State compact for all purposes under IGRA (including under section 23), then

violation of State gambling laws where Secretarial Procedures have been issued would be within the State's, rather than federal government's, jurisdiction. *That* would be absurd, considering the State's rejection of its opportunity to compact, and the issuance of the Secretarial Procedures by a federal officer, rather than the State.

2. The Johnson Act's prohibition against slot machines for gaming conducted pursuant to Secretarial Procedures does not "render the issuance of Secretarial Procedures inoperative in every case"

According to the district court, Class III gaming is only authorized by Section 2710(d)(1), and that section authorizes such gaming only if, among other things, it is conducted in conformance with a Tribal-State compact. Thus, Secretarial Procedures must be treated as the equivalent of a Tribal-State compact; otherwise, Class III gaming pursuant to Secretarial Procedures would never be authorized under Section 2710(d)(1), which would render the entire Secretarial Procedures remedial process "meaningless." [1ER 12.]

The district court simply misread the statute. Section 2710 not only authorizes Class III gaming pursuant to a Tribal-State compact through subsection (d)(1), but separately authorizes Class III gaming pursuant to Secretarial Procedures in subsection (d)(7)(A)(vii). That latter subsection specifically provides that if the State does not consent to a mediator-prescribed compact, then the Secretary "shall prescribe, in consultation with the Indian tribe, procedures . . . *under which Class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction*." (emphasis added).

So, when the Secretary issues procedures for Class III gaming, that gaming is not authorized by Section 2710(d)(1)—which only authorizes gaming pursuant to a Tribal-State compact—but rather is authorized by Section 2710(d)(7)(A)(vii). Thus, contrary to the district court's opinion, there is no need to treat Secretarial Procedures as the equivalent of a Tribal-State compact in order to make sense of IGRA's remedial scheme. Indeed, the fact that the statute separately authorizes gaming under Secretarial Procedures shows that Congress *did not* intend for such procedures to be treated as equivalent to a compact under IGRA. The district court's decision renders the separate

authorization for gaming under Secretarial Procedures entirely superfluous. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statute should be construed to give effect to all provisions and to avoid superfluities).

This reading of IGRA is not only consistent with the plain statutory language, but is also consistent with the "well established" canon of statutory interpretation that the "specific governs the general." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); see also *Westlands Water Dist. v. Nat. Res. Def. Council*, 43 F.3d 457, 461 (9th Cir. 1994). "The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC*, 566 U.S. at 645, citing *Morton v. Mancari*, 417 U.S. 535, 550–551 (1974). Here, IGRA's very specific remedial process, which explicitly allows for Class III gaming according to Secretarial Procedures, is the exception to the general rule that Class III gaming be allowed only pursuant to a Tribal-State compact.

Importantly, this reading of Section 2710 not only gives effect to every provision in that statute, but also gives effect to the Johnson Act's general prohibition against slot machines and IGRA's narrow exception to that prohibition where the State has consented to gaming by entering into a Tribal-State compact. As the district court recites later in its decision, "An interpretation that gives effect to every clause is generally preferable to one that does not." [1ER 20, citing *Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2014).] Here, both IGRA's remedial process and the Johnson Act can and should be given effect. The prescription of Secretarial Procedures that allow for Class III gaming under IGRA can coexist with the Johnson Act's prohibition against slot machines because there exists a myriad of Class III games that do not require the use of slot machines.

Class III gaming is broadly defined to include all forms of gaming that are not Class I or Class II gaming. 25 U.S.C. § 2703(8). Class I gaming includes only "social games solely for prices of minimal value" or certain traditional forms of Indian gaming. 25 U.S.C. § 2703(6). Class II gaming includes bingo and certain card games but excludes "banking card games" such as baccarat or blackjack. 25 U.S.C. § 2710(7). Class III

gaming thus includes not only slot machines, but also baccarat, blackjack, poker, roulette, and much more. See, e.g., *Catskill Dev., L.L.C. v. Park Place Entm't Corp.*, 547 F.3d 115, 119, n.4 (2d Cir. 2008) (Class III includes casino "standards" including roulette, blackjack, and slot machines). Thus, the Secretary can comply with both IGRA and the Johnson Act by prescribing Secretarial Procedures that allow any casino-style Class III games that do not involve the use of slot machines.

3. Treating Secretarial Procedures as a more limited remedy than a Tribal-State compact would not undermine IGRA's purpose

Finally, the district court held that "a reading of IGRA that treats Secretarial Procedures as a limited remedy, offering fewer Class III gaming options than a Tribal-State compact, would wholly undermine the purpose of the remedial process." [1ER 12.] In so holding, the court ignored a warning reiterated by the U.S. Supreme Court: "Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *United States v. Locke*, 471 U.S. 84, 96 (1985)

(quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75, (1982) (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977)). As the district court recites later in its opinion: "It is not the Court's province to second guess Congressional judg[]ments." [1ER 20.] In enacting IGRA, Congress provided a "carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 76 (1996) (refusing to "rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known" certain suits against states would be barred by the Eleventh Amendment). The plain language of this scheme should not be disturbed by the courts.

In any event, the district court's conclusion that Stand Up's reading of the statute would undermine IGRA's remedial purpose is just wrong. The district court drew that conclusion because the court was concerned that there would be "no incentive for states to negotiate in good faith" without the possibility of "Secretarial Procedures authorizing a tribe to conduct Class III gaming in the event of a state's failure to negotiate in good faith." [1ER 13.] Not so.

Stand Up does not contend that the Secretary cannot prescribe Procedures that allow for Class III gaming when the State fails to negotiate in good faith. Although the Secretary cannot prescribe procedures that allow for slot machines, the Secretary could still issue procedures without input from the State. [See 1ER 13.] That gives the tribes leverage when negotiating with the State. It is not for the courts to recalibrate IGRA's "finely-tuned balance between the interests of the states and the tribes." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998). And Stand Up does not dispute, as the district court states, that "no court has ever found that class III gaming cannot be conducted pursuant to Secretarial Procedures for want of a Tribal-State compact." [1ER 13.] But, once again, Stand Up does not ask for such a finding. Stand Up merely asks the court to enforce the plain language of the statute, which does not create an exception to the Johnson Act's prohibition on slot machines for tribes that conduct gaming pursuant to Secretarial Procedures.

Even if this Court were to look beyond the language of IGRA, Congress's rationale for the Tribal-State compact as the mechanism for approving slot machines is consistent with an intent to limit Class III

gaming where the State refuses to consent to a compact. Congress enacted IGRA to provide "a comprehensive regulatory framework for gaming activities on Indian lands which seeks to balance the interests of tribal governments, the states, and the federal government." *Pueblo of Santa Ana*, 104 F.3d at 1548. In determining how IGRA would regulate Indian gaming, Congress recognized 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." S. Rep. 100-446, at 13 (1988). Faced with that problem, Congress's "logical choice [was] to make use of existing State regulatory systems." *Id*. at 13-14. The mechanism Congress chose to make use of state regulatory systems was the Tribal-State gaming compact. *Id*. at 6.

Consistent with Congress's intent to use existing state regulatory systems to govern tribal gaming, IGRA waives application of the Johnson Act only in states that explicitly approve slot machines in a compact. 25 U.S.C. § 2710(d)(6)(A). That this was congress's intent is evidenced by IGRA's legislative history.

Notably, at the time of IGRA's enactment, slot machines were illegal in most states, including California. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1256 (9th Cir. 1994).[5] Nevada was one of the few states that allowed slot machines and, therefore, had a vested interest in whether IGRA would waive the Johnson Act to allow those machines on tribal lands even without state consent. In debating S. 555, the bill that would become IGRA, Senator Harry Reid of Nevada raised questions regarding the Johnson Act waiver to the bill's sponsor Senator Daniel Inouye, Chairman of the Select Committee on Indian Affairs: "One of the significant provisions of the bill we are considering today is that it would waive the application of the Johnson

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[5] Based on this prohibition, the Ninth Circuit held that California was not required to negotiate with Tribes for these types of games. *Rumsey Indian Rancheria*, 64 F.3d at 1260. Indeed, prior to the enactment of Proposition 1A in 2000, the California Legislature was expressly prohibited by Article IV, section 19(e), of the California Constitution from ratifying compacts authorizing banked and percentage card games and slot machines. Cal. Const., art. IV, § 19(e) ("The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey."); see also *Hotel Employees and Restaurant Employees Int'l Union v. Davis*, 21 Cal.4th 585, 589 (1999). Thus, prior to the enactment of Proposition 1A, a tribe could not operate slot machines or banked and percentage card games regardless of whether it conducted gaming under a compact or Secretarial Procedures.

Act for tribes who have negotiated compacts with a State for the operation of gaming devices as part of class III gaming operations. Would the chairman please confirm this Senator's understanding that the limited waiver is the only respect in which S. 555 would modify the scope and effect of the Johnson Act?" 134 Cong. Rec. 23883, at 24024 (1988). Senator Inouye responded that Senator Reid's interpretation was correct, and the waiver applies only to compacts. "The bill is not intended to amend or otherwise alter the Johnson Act in any way." *Id.*

Senator Reid's inquiry, and his opposition during the hearings on S. 555 to any expansion of Indian gaming, was motivated by his desire to protect existing Nevada gaming interests by confirming that tribes could not offer slot machines in competition with those interests without state approval. Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty*, 43 Ariz. St. L J. 17, 89 (2010).

In short, Congress intended exactly what the plain language of IGRA says—that the Johnson Act's prohibition on slot machines is

waived only when the states specifically consent to allowing slot machines through a compact.

II

The Secretary Violated Both NEPA and the Clean Air Act

Stand Up challenged the Secretarial Procedures under two federal environmental statutes. First, Stand Up argued the Secretary violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., by issuing the Secretarial Procedures without performing any environmental assessment required under NEPA. As the district court acknowledged, it was "undisputed that no [environmental assessment] was conducted with respect to issuance of Secretarial Procedures." [1ER 15.]

Second, Stand Up argued the Secretary also violated the Clean Air Act, 42 U.S.C. § 7401 et seq., by issuing the Secretarial Procedures without performing a "conformity" analysis required under section 176 of the Clean Air Act. 42 U.S.C. § 7506. Again, the district court acknowledged that it was "undisputed that the Secretary did not conduct a conformity determination with respect to the impact of

prescribing gaming procedures" and that the "Secretary did [not] indicate reliance on the previously conducted conformity determination in prescribing gaming procedures." [1ER 22-23.]

Nonetheless, the district court rejected both Stand Up's NEPA and Clean Air Act arguments under what it called the "rule of reason." According to the court, Section 2710(d)(7)(B)(vii) requires the Secretary to prescribe procedures that "are consistent with the proposed compact selected by the mediator . . ., the provisions of this chapter, and the relevant provisions of the laws of the State." The court interpreted that section "to contain an exhaustive list of authorities to be considered by the Secretary in prescribing Secretarial Procedures." [1ER 19.] Notably missing from that list is a requirement to ensure compliance with federal law. Thus, according to the district court, while the mediator can consider "other applicable Federal law" in deciding whether to choose a compact submitted by the State or the compact submitted by the tribe, the Secretary lacks the power to even consider the same: "The Secretary could not depart from the mediator-selected compact unless it was necessary to comply with IGRA or relevant state law." [1ER 21.]

Having concluded that the Secretary could not modify the mediator-selected compact to ensure compliance with federal law, the court held that the Secretary was excused from complying with NEPA and the Clean Air Act. [1ER 16 (holding that Secretary "is only subject to NEPA environmental assessment obligations if the agency has the authority to prevent the potential environmental effect at issue"); 1ER 23 (holding the "Secretary lacks sufficient control over the prescribing of gaming procedures to be able to make modifications based on the requirements of the [Clean Air Act]").]

As we explain in detail below, the district court's holding creates a new and dangerous precedent: that the Secretary, in prescribing gaming procedures, has no ability to consider whether those procedures violate any federal law other than IGRA. This is just wrong. While IGRA specifies that the Secretary's Procedures must be "consistent with" the selected compact, IGRA, and state laws, nothing in that statute prohibits the Secretary from modifying the mediator-selected compact as necessary to comply with federal law. The district court's interpretation unnecessarily constrains the Secretary's discretion in a

manner that could result—and, here, did result—in violations of federal laws.

A. The district court's decision creates an unnecessary conflict between IGRA and federal environmental laws

The district court's decision creates an unnecessary conflict between IGRA and federal law, including federal environmental laws, by effectively exempting the Secretary from compliance with federal law in issuing Secretarial procedures. But the district court ignores a basic tenet of statutory interpretation: "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (citations and quotations omitted). "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Ibid.* (citations and quotations omitted).

It is important that both NEPA and the Clean Air Act precede IGRA by decades. See Pub.L. 91–190 (enacting NEPA in 1970); Pub.L. 88-206 (enacting Clean Air Act in 1963); Pub.L. 100-497 (enacting IGRA in 1988). Repeals by implications are strongly disfavored, and a strong presumption will be made that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. *Ibid.* (citations and quotations omitted). As the Supreme Court explained, allowing judges to pick and choose between statutes risks transforming them into policymakers, a job best left to Congress. *Ibid.*

As explained in the next section, the district court also twists the language of the statute in order to create, rather than avoid conflict, and overlooks the absurdity of its interpretation.

B. The district court misinterprets the statutory language

Where, as here, a state and Indian tribe fail to conclude a Tribal-State compact, "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." 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator shall then "select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court." *Ibid*. In other words, the mediator has only two options: (1) pick the compact proposed by the Tribe or (2) pick the compact proposed by the State. The mediator must choose the one that best comports with IGRA, "any other applicable Federal law" and with the "findings and order of the court," but the statute does not allow the mediator to otherwise modify the compact that it picks. Thus, even where each of the two proposed compacts violates "other applicable Federal law" or any other laws, the mediator must still pick one of the two compacts. The mediator then submits the selected compact to the Tribe and the State to allow the State to consent to the selected compact. 25 U.S.C. § 2710(d)(7)(B)(v)-(vi). If the State does not consent within 60-days, the mediator notifies the Secretary, so that the Secretary can, in consultation with the Indian tribe, prescribe Secretarial Procedures which are required to be "consistent with the proposed compact selected

by the mediator . . . , the provisions of this chapter, and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii).

The district court held that in adopting procedures the Secretary has no authority to modify the mediator-selected compact because any such modification would make the procedures not "consistent with" that proposed compact. [1ER 20-21.] But this is an unnecessarily cramped reading of the statutory language. Contrary to the district court's conclusion, "consistent with" does not mean "exactly the same as." Secretarial Procedures can be "consistent with" the mediator-selected compact, while also making changes to that compact to ensure compliance with federal law.

Notably, Congress was clear that when the parties propose compacts to a mediator, that mediator must "adopt" one of the two proposed compacts. This plain language deprives the mediator of authority to make modification. Had Congress similarly intended to prohibit the Secretary from making any modifications to the compact chosen by the mediator, Congress surely would have used similar language requiring the Secretary to "adopt" that compact as the

Secretary's procedures. Congress did not do so, but rather gave the Secretary leeway to make modification to the mediator-selected compact so long as the procedures remain "consistent with" that compact.

Importantly, here the Secretary could have complied with NEPA and the Clean Air Act without modifying the gaming procedures in the mediator-selected compact. For example, the Secretary could have chosen to mitigate emissions and other environmental impacts. 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.25(b)(3); 40 C.F.R. §§ 93.158(a)(2), 93.160. Mitigation need not affect the gaming, and may involve repairing, rehabilitating, or restoring the affected environment, or replacing or providing substitute resources. 40 C.F.R. § 1508.20(c), (e). Thus, the Secretary could have complied with federal law while also prescribing procedures that were "consistent with" the mediator-selected compact. See *Jamul Action Committee v. Chaudhuri*, 837 F.3d 958, 961 (9th Cir. 2016) ("to the fullest extent possible . . . public laws of the United States [must] be interpreted and administered in accordance with [NEPA].") citing *Westlands Water Dist.*, 43 F.3d at 460.

Indeed, even if the district court were correct that the Secretary had no authority to modify the mediator-selected compact to comply with federal law, that would not excuse the Secretary from complying with NEPA. NEPA's purposes are many, and include the "larger informational role" of public disclosure of a project's environmental impacts and public assurance that the government has considered environmental concerns. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-350 (1989); see also *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 649-650 (9th Cir. 2014). The Secretary could have followed federal law by complying with NEPA and served the public informational purposes of that act without modifying the mediator-selected compact at all.

Finally, the district court's conclusion that the Secretary cannot modify the mediator-selected compact other than as necessary to comply with IGRA or relevant state law is unnecessarily narrow and outright dangerous. If both the submitted compacts contain provisions that violate federal laws or contain errors, the statute is clear that the mediator must still select one of the two compacts. It is the district court's position that the Secretary cannot then diverge from a selected

compact that otherwise violates federal law, despite acknowledging that the Secretary has "the most relevant experience in overseeing Tribal-State compacts." [1ER 19.] The district court's interpretation robs the Secretary of any discretion to deviate from the mediator-selected compact, even if the compact contains provisions that violate federal laws. The district court's holding could force the Secretary to implement procedures that violate not only environmental laws such as NEPA and the Clean Air Act, but also civil rights laws, labor laws, or even other tribal laws. That was surely not Congress's intent.

C. The cases cited by the district court do not support the court's decision

The district court's reliance on *Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004) is misplaced, because it is founded upon the district court's incorrect conclusion that the Secretary has no authority or discretion to comply with NEPA or the Clean Air Act. [1ER 21.] Indeed, the district court concedes that "[i]f preparation of an [environmental impact statement] might have some impact on the

Secretary's prescribing of Secretarial Procedures, the rule of reason would not excuse compliance with NEPA." [1ER 17.] s4

Public Citizen thus begins, rather than ends the question of whether the rule of reason excuses the Secretary's failure to comply with NEPA.

The district court also erred in relying on *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1225 (10th Cir. 2017) and *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), which the district court cited in support of its restrictive view of the Secretary's powers. [See 1ER 19-20.] Neither *New Mexico* nor *Texas* stands for the proposition that the Secretary can only deviate from the mediator's selected compact to comply with IGRA or state law.

The Secretary's authority to deviate from the mediator-selected compact was not at issue in *New Mexico*. The excerpt cited by the district court about the Secretary's limited authority in prescribing procedures is dicta taken out of context. The *New Mexico* court was merely reciting IGRA's requirement that the Secretary prescribe procedures "consistent with the proposed compact selected by the

[court-appointed] mediator . . . .” *New Mexico*, 854 F.3d at 1225. But the case does not involve the Secretary’s issuance of Secretarial Procedures, either consistent with a mediator-selected compact or otherwise. The case strikes down regulations promulgated by the Department to allow the Secretary to issue procedures when a state is alleged to have negotiated a compact in bad faith, and where a lawsuit under IGRA to compel the state to negotiate is barred under the Eleventh Amendment. *Id*. at 1231. Notably, the Tenth Circuit in *New Mexico* also opined that “once the process has reached the point where the Secretary is statutorily authorized to prescribe procedures, there arguably could be more than one permissible reading of the Secretary’s authority—for example, regarding what it means to adopt procedures ‘consistent with the proposed compact.’ ” *Id*. at 1225. Thus, the Tenth Circuit’s decision does not support the district court’s overly cramped reading of the Secretary’s authority in prescribing procedures “consistent with” the mediator-selected compact.

The Fifth Circuit in *Texas* found that IGRA “cabins the Secretary’s authority” on the “decisive questions of good faith and the final imposition of a compact on an unwilling or uncooperative state.” *Id*. at

500. The Secretary thus has no say in deciding a state's good faith, may not name the mediator, and may not "pull out of thin air the compact provisions that he is empowered to enforce." *Texas*, 497 F.3d at 503. The *Texas* dissent (which the district court cited at 19) similarly found that the Secretary was not "enabled to simply disregard the mediator's proposal" and that the Secretary's power to prescribe was not "unbridled." *Id*. at 524. There lies a chasm, however, between: (1) the outright disregard of the mediator's proposal and pulling provisions out of thin air and (2) and the Secretary's inability to deviate from mediator-selected compact in order to comply with federal law. Indeed, the Fifth Circuit recognized that "the Secretary may not establish his own procedures unless he does not approve the mediator's proposal" and "may not disapprove the mediator's proposal *unless it violates federal or state law*, violates the trust obligations to the tribe, or does not comply with the technical requirements of a proposal." *Ibid*. (emphasis added). Thus, that court recognized that the Secretary *may* supplement the mediator's proposal if it violates federal law so long as the procedures are "consistent with the proposed compact selected by the mediator." *Ibid*., citing 25 U.S.C. § 2710(d)(7)(B)(vii).

Finally, this Court's decisions in *Jamul Action Committee*, 837 F.3d at 958, *Westlands Water Dist.*, 43 F.3d at 457, and *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986) do not support the district court's judgment. To the contrary, they support Stand Up's position. In those cases, this Court recognized that "NEPA applies 'unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives *impossible*." *Jamul Action Committee*, 837 F.3d at 961, citing *Jones*, 792 F.2d at 826 (emphasis added).

This Court has recognized only two circumstances in which an agency need not complete an EIS even in the presence of major federal action and despite the absence of express statutory exemption. *Jamul Action Committee*, 837 F.3d at 963. First, an agency need not adhere to NEPA "where doing so 'would create an irreconcilable and fundamental conflict' with the substantive statute at issue." *Ibid*. Second, in limited instances, a substantive statute 'displaces' NEPA's procedural requirements. *Ibid*; see also *San Luis & Delta-Mendota Water Authority*, 747 F.3d at 648.

In *Jamul Action Committee* and *Westlands Water District*, an irreconcilable conflict arose because Congress imposed upon the agency "an unyielding statutory deadline for agency action." *Jamul Action Committee*, 837 F.3d at 964; see also *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 791 (1976). In this Court's opinion in *Jones*, by contrast, despite an apparent irreconcilable conflict between NEPA and the Marine Mammal Protection Act's statutory deadlines, this Court found the conflict to be reconcilable in light of "the congressional desire that we make as liberal an interpretation as we can to accommodate the application of NEPA." *Jones*, 792 F.2d at 826.

Here, as discussed above, the Secretary could have complied with NEPA and the Clean Air Act and therefore no such irreconcilable conflict exists in this case. Far from making "as liberal an interpretation as we can to accommodate the application of NEPA," the district court inexplicably adopted a narrow and cramped reading to exclude application of NEPA. This was error.

Nor does IGRA "displace" NEPA's procedural requirements under the precedent of this Court. *San Luis & Delta-Mendota Water Authority*, 747 F.3d at 649; *Douglas County v. Babbitt*, 48 F.3d 1495, 1503 (9th Cir. 1995). In *Douglas County*, this Court held that, despite the absence of any irreconcilable conflict between NEPA and the process for designating critical habitat under Section 4 of the Endangered Species Act, Section 4 effectively accomplished all of NEPA's goals without requiring an EIS, thereby "mak[ing] the NEPA procedure seem 'superfluous.'" *Douglas County*, 48 F.3d at 1503. The same cannot be said of IGRA, as there is nothing in IGRA that ensures that NEPA's goals are effectively accomplished. See *San Luis & Delta-Mendota Water Authority*, 747 F.3d at 649.

Accordingly, the district court erred in finding an irreconcilable conflict between IGRA's Secretarial Procedures process and NEPA and the Clean Air Act.

D. To the extent the agency is entitled to deference, it has acted as if it has discretion to deviate from the mediator-selected compact

Although the Secretary contends in this action that he has no ability to consider environmental impacts nor ability to make changes to the mediator-selected compact to comply with federal law other than IGRA, he has not taken that position outside of this lawsuit. See *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 826 (9th Cir. 2012) (interpretation of statute taken by agency in litigation is not entitled to *Chevron* deference).

The Department's letter that accompanied the Secretarial Procedures here undermines the position that the Secretary had no discretion to modify the mediator-selected compact unless necessary to comply with IGRA or state law. Specifically, the letter provided that the Department "purposefully refrained from changing regulatory provisions in deference to the Mediator's submission to the Department and the Tribe's specific request that we change that submission as little as possible." [3ER 273.] Such language reflects the Secretary's

understanding, prior to this litigation, that he has discretion to change the mediator-selected compact for reasons beyond compliance with IGRA or state laws, but would not do so in deference to the mediator and Tribe.

Moreover, it is undisputed that the Secretary deviated from the mediator-selected compact to eliminate the imposition of obligations on the State. [1ER 17.] The Secretary replaced the obligations the mediator-selected compact placed on the State with a provision that allowed the State to "opt-in to the regulatory role," and provided that the National Indian Gaming Commission would perform the role if the State did not opt-in. [*Id*. at 17-18.] It is also undisputed that such obligations, if not removed, would have violated the Tenth Amendment of the U.S. Constitution. [*Id*. at 18.] Without disputing that the U.S. Constitution constitutes "other applicable federal law," the district court nonetheless dismissed this change as also necessary to comply with IGRA. [*Ibid*.] In other words, the district court contends that a provision that violates the U.S. Constitution cannot be changed but-for the fact that the provision also violates IGRA. That is nonsensical.

To support its finding that IGRA "makes clear that a State cannot be compelled to negotiate with an Indian tribe toward entering a compact or take *any* gaming-related action with respect to an Indian tribe," the district court cited: (1) 25 U.S.C. § 2710(d)(3)(A); (2) 25 U.S.C. § 2710(d)(7)(B); (3) Senate Report 100-446 at *13-14 (1988); and (4) subsequent judicial decisions regarding IGRA. [1ER 18-19 (emphasis in original).] While the implied premise of IGRA's remedial process is that a state cannot be compelled to negotiate with an Indian tribe, none of the statutory provisions cited by the court—or any other provision in IGRA—contains that limitation, much less a provision that a state cannot be compelled to take "*any* gaming-related action with respect to an Indian tribe." Thus, the Secretary's modification to the mediator-selected compact in this case to make clear that the State was not required to regulate the casino project was a change made to conform with the Tenth Amendment, and not any provision of IGRA.

The district court's reliance on the Senate Report 100-446 is also mistaken. The report addresses Congress's attempt to formulate language 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." S. Rep. 100-446 at *13. In that context, Congress noted that there was then neither an "adequate Federal regulatory system in place for class III gaming" nor tribes that had adequate regulatory systems. S. Rep. 100-446 at *13. Congress went on to explain that "a logical choice is to make use of existing State regulatory systems, 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."

This, at most, gives a nod to the idea that state consent would be necessary in order to use its regulatory system, but is a far cry from a definitive statement that a state cannot be compelled to take "*any* gaming-related action with respect to an Indian tribe." Nor does this concept—which is squarely addressed by the Tenth Amendment and related anti-commandeering doctrine—appear in the language of IGRA.

The district court also cites cases for the proposition that IGRA, by providing a remedial process, does not compel a state to negotiate with

a tribe. [See 1ER at 18-19, citing *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1435 (10th Cir.1994); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993); *Estom Yumeka Madiu Tribe of the Enter. Rancheria of California v. California*, 163 F.Supp.3d 769, 779 (E.D. Cal. 2016); *New Mexico v. Dept. of the Interior*, 854 F.3d at 1213.] These cases, however, merely clarify that IGRA does not compel states to *enter into* a compact; but IGRA does, in fact, compel states to negotiate a compact. Nothing in these cases supports the district court's conclusion that the Secretary's modification of the mediator-selected compact in this case (to remove the provision requiring the State to regulate the gaming) was compelled by IGRA. IGRA says nothing about whether a state can be compelled to regulate gaming, much less whether a state can be compelled to take "*any* gaming-related action with respect to an Indian tribe." Again, the prohibition against such compelled action comes from the Tenth Amendment, not IGRA.

Finally, and perhaps most compelling, the Secretary's arguments in this case are entirely inconsistent with his past practice. *See, e.g.,* Letter from Kevin K. Washburn, Assistant Secretary - Indian Affairs to

Honorable Bo Mazzetti, Chairman Rincon Band of Luiseno Indians (Feb. 8, 2013), available at https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm (acknowledging that "there are other provisions that we might have changed, consistent with IGRA and the mediator's submission" but choosing not to make such changes).

As one example, in October 2014, the Secretary issued a Third Amended Class IIII Gaming Procedures for the Northern Arapaho Nation ("Arapaho Nation Procedures"). See https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/as-ia/oig/oig/pdf/idc1-033877.pdf, accessed December 31, 2018. This amendment, which extended the term of the Arapaho Nation Procedures by 20 years, was made in response to a request by the Northern Arapaho Tribe. In a previous amendment of the Arapaho Nation Procedures, changes included addition of a limitation that the "total gaming floor square footage shall not exceed 69,000 square feet" and removal of a limitation that "[o]ther premises shall not exceed 1,000 square feet of gaming floor per premise." Compare Class III Gaming Procedures for the Northern Arapaho Nation dated September 21, 2005 at Section III(A) https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-

038585.pdf and Second Amended Class III Gaming Procedures for the Northern Arapaho Nation dated August 2, 2007 at Section III(A) https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc-038581.pdf. Other changes included: (1) change of the requirement that the Northern Arapaho Tribe notify the National Indian Gaming Commission of rule changes within 10 days so that rule changes need only be provided upon request (see Sections III.B); (2) change of the section titled "Log of Unusual Occurrences" to reflect that person making the entry may be a Northern Arapaho Gaming Agency employee rather than security employee (see Sections IV.I); (3) wording change so that the National Indian Gaming Commission has "immediate" rather than "free" access to inspect the Northern Arapaho Tribe's gaming facility and gaming records (Sections IV.J); (4) fix for a typographical error from "filed investigators" to "field investigators" (Sections IV.K); (5) change so that the "Tribe" rather than the "Northern Arapaho Gaming Agency" must have an annual audit of the gaming operations (Sections IV.L).

In short, the Secretary has amended even prescribed Secretarial Procedures to correct errors, clarify terms, and make substantive

changes. None of these changes were mandated by IGRA or state law. It would be absurd to hold that the Secretary could make such changes in amending existing Secretarial Procedures, but not in initially prescribing Secretarial Procedures to the extent they deviate from the mediator-selected compact.

E. The issuance of Secretarial Procedures is a major federal action requiring issuance of an environmental impact statement under NEPA

NEPA requires federal agencies to prepare a detailed environmental impact statement for all "major Federal actions affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The district court declined to "determine whether prescribing gaming procedures is a major Federal action," in light of its decision that the Secretary was excused from NEPA compliance based on the "rule of reason." [1ER 16.] Should this court determine that the rule of reason does not excuse the Secretary's compliance with NEPA, it should remand for the district court to determine whether the issuance of Secretarial Procedures is a major federal action. We address this issue

briefly on the chance this court decides to resolve this issue in the first instance.

In this Circuit, the issuance of a permit constitutes a "major federal action" requiring NEPA compliance if that permit "is a prerequisite for a project with adverse impact on the environment." *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996). Here, the Secretarial Procedures are analogous to a permit because the Tribe cannot conduct class III gaming at the Madera Site without authorization under the Secretarial Procedures. 25 U.S.C. § 2710(d)(7)(B)(vii). Moreover, the Secretary acknowledged that the development and operation of a smaller casino that was previously proposed would have adverse impacts on the environment. [2ER 196-97.] As part of his prior decisions granting the North Fork Tribe's two-part determination and fee-to-trust transfer, the Secretary indeed prepared an EIS that found the casino project would have significant impacts on the environment. [2ER 220 (traffic, problem gambling); 2ER 223-24 (cumulative impacts on air quality and traffic).] This previous EIS fails to satisfy the Secretary's NEPA obligations in connection with the Secretarial Procedures because: (1) the Secretary expressly

disclaimed any reliance on the prior EIS [3ER 273]; and (2) Secretarial Procedures approved a larger casino project than that analyzed in connection with the earlier two-part determination and fee-to-trust transfer. [Compare 2ER 211] (single casino with a single "247,180 square foot gaming and entertainment facility") and 3ER 289 (up to two gaming facilities with no explicit size limitation.]

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Conclusion

For the foregoing reasons, this court should reverse the district court's order.

Dated: January 23, 2019

SNELL & WILMER L.L.P.
Sean M. Sherlock
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Statement of Related Cases:

The case on review was not previously before this court.

Other cases involving the same or similar parties and issues in other courts are:

(1) *Stand Up for California v. U.S. Dep't of the Interior*, No. 1:12-cv-02039 (D.D.C., filed Dec. 19, 2012) (D.C. Circuit Nos. 16-5327, 16-5328) (U.S. Supreme Court No. 18-61, petition for writ of certiorari filed on July 9, 2018). Stand Up filed this action against the Secretary of the Interior to challenge the Secretary's two-part, fee-to-trust, and environmental impact determinations regarding proposed off-reservation gaming by the North Fork Tribe. The Picayune Tribe filed a similar action, which the district court consolidated with the Stand Up action. The district court ruled in favor of the Secretary, and the D.C. Circuit affirmed. The U.S. Supreme Court denied Stand Up's petition for writ of certiorari on January 7, 2019.

(2) *Stand Up for California v. State of California*, No. MCV062850 (Super. Ct. Madera County, filed Mar. 27, 2013) (opinion filed by California Court of Appeal Fifth District (Nos. F069302/F070327) on

December 12, 2016) (petitions for review filed with California Supreme Court on January 20 and 23, 2017 (No. S239630)). Stand Up filed this action against the state of California, contending that the California governor lacked authority to concur in the Secretary's two-part determination. The trial court ruled in favor of the State, but the California Fifth District Court of Appeal reversed, holding that the governor's concurrence was invalid. The California Supreme Court has granted review and the case is being held pending resolution of the same issue in another case.; and

(3) *North Fork Rancheria of Mono Indians v. State of California*, No. 1:15-cv-00419-AWI-SAB (E.D. Cal., filed Mar. 17, 2015). The North Fork Tribe filed this action against the State of California to compel the State to negotiate a new Tribal-State compact in good faith. The district court ruled in favor of the North Fork Tribe and ordered the two parties to conclude a compact for gaming within 60 days. *North Fork v. California*, 2015 WL 11438206 (E.D. Cal. Nov. 13, 2015); 25 U.S.C. § 2710(d)(7)(A), (d)(7)(B). The parties were unable to do so. *North Fork v. California*, Dkt. 27 at 1 (E.D. Cal. Jan 15, 2016). The district court appointed a mediator, directed the parties to submit their last best

offers for a compact to the mediator, and directed the mediator to select one of the two proposed compacts. *Id.*, Dkt. 30 at 1 (E.D. Cal. Jan. 26, 2016); see 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator selected the compact submitted by the North Fork Tribe, but California did not consent to the mediator-selected compact within the 60-day period provided by IGRA. 2ER 53.; see 25 U.S.C. § 2710(d)(7)(B)(v-vi). The mediator informed the Secretary that California did not consent to the selected compact. 2ER 53; see 25 U.S.C. § 2710(d)(7)(B)(vii). On July 29, 2016, the Secretary notified the North Fork Tribe and California that it had issued Secretarial Procedures to authorize Class III gaming at the Madera Site. [3ER 271-410.]

Addendum of Statutes and Legislative History

Statutes

Legislative History

Statutes

15 U.S.C. § 1175(a). Specific jurisdictions within which manufacturing, repairing, selling, possessing, etc., prohibited; exceptions

(a) General rule

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18, including on a vessel documented under chapter 121 of Title 46 or documented under the laws of a foreign country.

. . .

18 U.S.C. § 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country 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--

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(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 country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

25 U.S.C. § 2710(d). Tribal gaming ordinances

. . .

(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) of this section, 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) of this section.

(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 2711(e)(1)(D) of this title.

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 activity;

(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 1175 of Title 15 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 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 chapter 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 chapter, 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 chapter,

(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 chapter.
>
> **(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 2711 of this title.

42 U.S.C. § 4332(2)(C). Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

> . . .
>
> **(C)** include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--
>
> > **(i)** the environmental impact of the proposed action,
> >
> > **(ii)** any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

. . .

42 U.S.C. § 7506(c)(1). Limitations on certain Federal assistance

. . .

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of Title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative

responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means--

> **(A)** conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and
>
> **(B)** that such activities will not--
>
> > **(i)** cause or contribute to any new violation of any standard in any area;
> >
> > **(ii)** increase the frequency or severity of any existing violation of any standard in any area; or
> >
> > **(iii)** delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.
> >
> > The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.
> >
> > . . .

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X re S. 555

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Congressional Record

PROCEEDINGS AND DEBATES OF THE 100th CONGRESS, SECOND SESSION

SENATE—*Thursday, September 15, 1988*

(Legislative day of Wednesday, September 7, 1988)

The Senate met at 10:30 a.m., on the expiration of the recess, and was called to order by the Acting President pro tempore [Mr. SANFORD].

PRAYER

The Chaplain, the Reverend Richard C. Halverson, D.D., offered the following prayer:

Let us pray:

May we spend a moment in silence, in memory of Sgt. Joseph Louviere, veteran Capitol Police officer, who died early this week.

(The Senate observed a moment of silence.)

Beloved, let us love one another: for love is of God * * *.—1 John 4:7.

Eternal God of infinite love, we thank Thee for the unforgettable experience of last night, as the Senators and their lovely ladies broke bread together. Thank Thee for the exquisite beauty of the setting overlooking the Mall and the buildings silhouetted against a golden sunset. Thank Thee for all who made it possible in preparing and serving the food and providing security, and in entertaining with music and fireworks. Thank Thee for our host and hostess, beloved leader Senator BYRD and his gracious lady.

Help us, Lord, never to allow diversity to divide us or fragmentize us. Bind us together in demonstration of the fundamental fact of our national legacy—"Out of many, one."

We pray in the name of Jesus, Prince of Peace. Amen.

RECOGNITION OF THE MAJORITY LEADER

The ACTING PRESIDENT pro tempore. Under the standing order, the majority leader is recognized.

A TIME OF TOGETHERNESS

Mr. BYRD. Mr. President, I thank the Chaplain for his prayer, and I thank all who attended the meeting last night.

It showed a truly patriotic and bipartisan and friendly camaraderie—Republicans and Democrats, including guests from the House leadership.

I especially thank BOB DOLE for his timely and cogent and very appropriate and gracious remarks last evening. I thank him for bringing his lovely lady, Elizabeth.

I also thank the Speaker and other Members of the House leadership for attending—Mr. WHITTEN, Mr. FOLEY, Mr. COELHO, and LINDY BOGGS.

I thank the Good Lord for the ideal weather that prevailed. So many things could have gone wrong but did not.

It is these moments, Mr. President, that humanize us, bring us down to terra firma, and remind us that there is something more important than partisan politics.

As I have said to our Republican leader, whom I greatly admire, and as I have said before, President Reagan is fortunate that he has BOB DOLE as the Republican leader—a leader who can be partisan but, more important, who knows when to be partisan and when not to be partisan. That is something a lot of people in this town have not learned yet. A lot of people in politics have not learned it.

It was a great evening. Erma and I are grateful for the presence of all who were there with us.

SENATE SCHEDULE

Mr. BYRD. Mr. President, the Senate will not be in session on Wednesday of next week, Yom Kippur.

We will go to the minimum wage today—in accordance with the order—in the late afternoon and we will be on that tomorrow.

On Monday, we will put aside the minimum wage measure, and take up the United States-Canada Trade Agreement. We will vote on that agreement on Monday, in the early evening. Then we will go back to the minimum wage measure.

It is presently my plan to go to parental leave legislation following the minimum wage bill.

I have had a lot of inquiries about the tax technical amendments bill. I am not now in a position to configure our future schedule to the point that we can say what day or when that measure will be brought up. I will talk with my colleagues and with the Republican leader.

There are some other important measures that will be brought up and which will be competing for time and place in the schedule.

Mr. President, I have nothing further to say. I yield the floor.

RECOGNITION OF THE REPUBLICAN LEADER

The ACTING PRESIDENT pro tempore. Under the standing order, the Republican leader is recognized.

A TIME OF TOGETHERNESS

Mr. DOLE. Mr. President, I will take a moment to concur with the distinguished majority leader.

Last night was one of those memorable evenings, perfect in every way. It was an opportunity for all of us and important members of our staff and others to get together.

I want to thank Joe Stewart. He must feel a lot better this morning, knowing that is over. He did an outstanding job. It was a great evening.

As I indicated last night, we are fortunate to have the leadership of Senator ROBERT BYRD. As I said in the Cloakroom a few moments ago, I hope we can put all this together and put it in the RECORD. I think it would be something that not only those who were there but others as well would like to have. It was an evening I would like to remember, and I could mail it to some of my friends in my home State.

So I again thank the distinguished majority leader and his wife, Erma, for a beautiful evening, one that was enjoyed by everyone.

It was capped by a brilliant fireworks display, the likes of which I had not seen before, and I have been around here for some time. It was a perfect evening in every way. It will be hard to top.

As I said last night, in the year 2089,

● This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

In 1952, he became the youngest full general in U.S. history and was appointed to command NATO in 1956—a position he held until 1963.

As NATO commander, Norstad weathered some of the most dangerous crises of the Cold War: Berlin in 1961 and Cuba in 1962. He had the skills of a diplomat while serving as the Free World's top soldier on the front line of the East-West confrontation. He had to balance conflicting interests on a continuous basis: concerns over German rearmament, France's war with Algeria, the evolving role of nuclear weapons in the defense of Europe, and many others. General Norstad performed with grace and ability that will be long remembered.

Upon retirement from the military, Lauris Norstad did not, contrary to the aphorism about old soldiers, fade away. He joined Owens-Corning Fiberglass and rose to become CEO. Sales more than doubled under his leadership. He also served as a director of a number of other large companies. After a lifetime of leading in military and security affairs, General Norstad went on to become a force in private enterprise.

Mr. President, a truly great American has passed away. I am sure my colleagues join me in expressing condolences to Lauris Norstad's family. Our Nation—and the world—will miss Gen. Lauris Norstad.●

REGULATING OF GAMING ON INDIAN LANDS

Mr. INOUYE. Mr. President, pursuant to authority granted by the majority leader, I ask unanimous consent for the immediate consideration of S. 555, Calendar Order No. 862.

The PRESIDING OFFICER. Under the previous order, the clerk will report.

The assistant legislative clerk read as follows:

A bill (S. 555) to regulate gaming on Indian lands.

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Select Committee on Indian Affairs with an amendment to strike all after the enacting clause and insert in lieu thereof, the following:

That this Act may be cited as the "Indian Gaming Regulatory Act".

FINDINGS

SEC. 2. 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) Federal courts have held that section 2103 of the Revised Statutes (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;

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

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

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

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—

(A) 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

(B) 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)(A) The term "class II gaming" means—

(i) the games of chance commonly known as bingo or lotto (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

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

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

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including pull-tabs, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this Act, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after the date of enactment of this Act, to negotiate a Tribal-State compact under section 11(d)(3).

(9) The term "class III gaming" means all 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, excluding 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 Attorney General 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 three members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) three members, including the Chairman, shall have a term of office of three years; and

(ii) two members shall have a term of office 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) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President for, in the case of associate member, by the Secretary) 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 of office until his successor has been appointed, unless the member 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 of the Commission to serve as Vice Chairman. The Vice Chairman 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, but shall meet at least once every 4 months.

(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 in accordance with title 5, United States Code, 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, on behalf of the Commission, 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 and class III gaming as provided in section 11; and

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

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

POWERS OF THE COMMISSION

SEC. 7. (a) The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by an affirmative vote of not less than 3 members, to establish the rate of fees as provided in section 18;

(4) by an affirmative vote of not less than 3 members, to authorize the Chairman to issue subpoenas as provided in section 16; and

(5) by an affirmative vote of not less than 3 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b)(2).

(b) The Commission—

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) recommendations for amendments to the Act; and

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

COMMISSION STAFFING

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

(b) The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(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. Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the date of enactment of this Act relating to supervision of Indian gaming until such time as the Commission is organized and prescribes 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 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)(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 of the Indian tribe 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 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 by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe 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 legally incompetent persons who are entitled to receive any of the per 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 requirements include the requirements described in the subclauses of subparagraph (B)(i) and are 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 person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person 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 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.

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

(A) authorized by an ordinance or resolution that—

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

(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).

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 activity;

(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) 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) 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 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.

(e) 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.

MANAGEMENT CONTRACTS

SEC. 12. (a)(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1), but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, 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) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman 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), the Chairman 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), the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c)(1) Within 180 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.

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

(3) If the Chairman determines 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 120 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 180 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.

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

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

(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 for 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 shall, 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 shall investigate activities associated with gaming authorized by this Act which may be a violation of Federal law.

COMMISSION FUNDING

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

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

(i) no less than 0.5 percent nor more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000,

of the gross revenues from each activity regulated by this Act.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $1,500,000.

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

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

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

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

(b)(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.

AUTHORIZATION OF APPROPRIATIONS

SEC. 19. (a) Subject to the provisions of section 18, there are 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 are 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 Indian tribe is presently located.

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

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

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

(i) a settlement of a land claim,

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

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

(2) Subsection (a) shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida,

the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

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

(d)(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of this Act unless such other provision of law specifically cites this subsection.

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.

NARRAGANSETT INDIAN TRIBE

SEC. 23. Nothing in this Act may be construed as permitting gaming activities, except to the extent permitted under the laws of the State of Rhode Island, on lands acquired by the Narragansett Indian Tribe under the Rhode Island Indian Claims Settlement Act or on any lands held by, or on behalf of, such Tribe.

CRIMINAL PENALTIES

SEC. 24. 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 in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

"(b) Whoever in Indian country 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—

"(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

"(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

"(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 country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

"§ 1167. Theft from gaming establishments on Indian lands

"(a) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, 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 money, 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 employers 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. 25. 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.".

Mr. INOUYE. Mr. President, the regulation of gaming activities on Indian lands has been the subject of much controversy. Representatives of States with experience in regulating some forms of gaming activities, such as Nevada and California, have expressed much concern over the potential for the infiltration of organized crime or criminal elements in Indian gaming activities. The criminal division of the U.S. Department of Justice has expressed similar concerns, although as stated in Senator McCAIN'S additional views to the committee's report on S. 555, in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity.

Recognizing that the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests, some have suggested the creation of a Federal regulatory agency to regulate class II and class III gaming activities on Indian lands. Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in State agencies, and thus that there was no need to duplicate those mechanisms on a Federal level.

It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an Act of Congress, the jurisdiction of State governments and the application of State laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. The committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments

retain all rights that were not expressly relinquished.

Consistent with these principles, the committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws——

Mr. DOMENICI. Mr. President, may we have order?

The PRESIDING OFFICER (Mr. BINGAMAN). The Senate will be in order. The Senator from Hawaii.

Mr. INOUYE. And State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.

The mechanism for facilitating the unusual relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of State laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S. 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose. Further, it is the committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might have otherwise reserved, the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes, or as a general abrogation of other reserved rights or of tribal sovereignty.

It is also true that S. 555 does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-State compact. In adopting this position, the committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied. S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands and accordingly I urge my colleagues to adopt this important legislation, so that we may bring a final resolution to the much-debated issue of the regulation of the conduct of gaming activities on Indian lands.

Mr. PELL. Mr. President, I would like to thank the managers of S. 555, the Indian Gaming Regulatory Act, and particularly the chairman of the Select Committee on Indian Affairs [Mr. INOUYE], for their hard work and patience in achieving a consensus on this important measure.

In the interests of clarity, I have asked that language specifically citing the protections of the Rhode Island Indian Claims Settlement Act (Public Law 95-395) be stricken from S. 555. I understand that these protections clearly will remain in effect.

Mr. INOUYE. I thank my colleague, the senior Senator from Rhode Island [Mr. PELL], and assure him that the protections of the Rhode Island Indian Claims Settlement Act (P.L. 95-395), will remain in effect and that the Narragansett Indian Tribe clearly will remain subject to the civil, criminal, and regulatory laws of the State of Rhode Island.

Mr. CHAFEE. Mr. President, I too would like to thank the chairman [Mr. INOUYE] and members of the Select Committee on Indian Affairs for their cooperation and assistance. The chairman's statement makes it clear that any high stakes gaming, including bingo, in Rhode Island will remain subject to the civil, criminal, and regulatory laws of our State.

Mr. DOMENICI. Mr. Chairman, I want to thank you for including an amendment to clarify that lotto games are played only at the same location as bingo games which are class II games under the bill. I believe there are other Senators who have questioned whether lotto and lotteries are interchangeable terms. This amendment makes it clear that they are not and that traditional type lottery games are indeed class III. As such, lotteries may only be conducted by a tribe if such games are otherwise legal in the State and if the tribe and the State have reached a compact to regulate such games.

I also appreciate the clarifying amendment relating to the prohibition on direct taxation by a State on Indian lands. The bill clearly prohibits any direct tax on Indian lands by any State but does not permit tribes and States to negotiate assessments that may be paid by a tribe to a State to cover the costs of any regulation and enforcement that is necessary to carry out the purposes of the compact.

Tribes in my State are very concerned about the precedent of allowing States to have jurisdiction over Indian lands. I share those concerns and would like to ask about other precedents for State jurisdiction over Indian lands.

Mr. INOUYE. Thank you for your concern about this issue that goes to the heart of Indian country. First, let me say that under S. 555, there is no blanket transfer to any State of any jurisdiction over Indian lands. Indian tribes are sovereign governments and exercise rights of self-government over their lands and members. This bill does not seek to invade or diminish that sovereignty. The issue has been how to resolve the clash between States and tribes with respect to sophisticated forms of gaming such as casinos and parimutuel gaming.

States that allow such gaming have regulatory systems in place and are adamantly opposed to tribes operating such games unless they do so in accordance with State law. The States interests in protecting all citizens, including tribal members, from unscrupulous persons is a concern shared by lawmakers everywhere, including tribal officials. However, it is simply not realistic for any but a very few tribes to set up regulatory systems. Nor did the Select Committee on Indian Affairs view as meritorious any suggestions for the establishment of a Federal regulatory mechanism to duplicate what already exists at the State level.

Therefore, for those tribes wishing to engage in such gaming, the most realistic option appeared to be State regulation. However, the committee was fully cognizant of the strenuous objections that would be raised by tribes to any outright transfer of State jurisdiction, even for the limited purpose of regulating class III gaming. Thus, the best option available is the approach taken by the committee on S. 555 and that is the tribal-state compact approach.

Under this provision, tribes that choose to engage in gaming may only do so if they work out a tribal-state compact with the State. Tribes that do not want any State jurisdiction on their lands are precluded from operation of what the bill refers to as class III gaming.

This is not the best of all possible worlds but the committee believes that tribes and States can sit down at the negotiating table as equal sovereigns, each with contributions to offer and to receive. There is and will be no transfer of jurisdiction without the full consent and request of the affected tribe and that will be governed by the terms of the agreement that such tribe is able to negotiate.

There is the additional issue of assimilative crimes. In many cases of criminal conduct in Indian country, the Federal courts use or borrow State law to punish such conduct. This bill provides that, as a matter of Federal law, State criminal laws on gambling will be used by the U.S. Government to prosecute, in Federal court, violations of such crimes when committed in Indian country.

This is consistent with current practice under the Assimilative Crimes Act (18 U.S.C. 13), enacted in 1909. In addition to the incorporation of State criminal codes beginning in 1909, there are other statutes such as the Indian

Child Welfare Act and the Indian Education Act that require the adoption of the higher of either Federal or State health and safety standards in Indian country. Thus, this bill is clearly not the first to incorporate State laws into Federal statute for Indian country. I hope that this explanation is helpful to my distinguished colleague, Mr. DOMENICI.

Mr. DOMENICI. Thank you for your remarks.

Mr. REID. Mr. President, I would like to pose a question to the chairman of the committee concerning the effect of S. 555 on the Johnson Act, a Federal statute codified at 15 U.S.C. 1171 which, among other things, prohibits the use of gambling devices on Federal lands and Indian lands. As the chairman is well aware, this statute was enacted by Congress in 1950 and amended in 1962 as part of an effort to control organized crime and other criminal activity associated with gambling devices. The circumstances which led Congress to adopt the Johnson Act are no less compelling today than they were in 1950 or in 1962.

One of the significant provisions of the bill we are considering today is that it would waive the application of the Johnson Act for tribes who have negotiated compacts with a State for the operation of gaming devices as part of class III gaming operations. Would the chairman please confirm this Senator's understanding that the limited waiver is the only respect in which S. 555 would modify the scope and effect of the Johnson Act?

Mr. INOUYE. Yes, the Senator is correct. The bill as reported by the committee would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact with the State in which the tribe is located. The bill is not intended to amend or otherwise alter the Johnson Act in any way.

Mr. REID. Mr. President, I would like to engage the chairman in a colloquy regarding the meaning of the "grandfather clause" provided in the bill which permits the continued operation of certain "banking" card games in operation as of May 1, 1988. Specifically, this provision would permit the continued operation, as class II gaming activities, of certain games played in the States of Washington, North Dakota, South Dakota, and Michigan which ordinarily would fall within the definition of class III gaming.

It has been this Senator's understanding that this provision was adopted to protect tribes with existing investments in such games from hardships associated with changes in the law brought about by this legislation. This Senator also understands that the committee intended that the grandfather clause should not serve as the basis for expansion of existing gaming operations to new locations not in operation as of May 1, 1988. Would the chairman confirm that this provision does not provide authority for the establishment of new banking card game operations or the institution of new games in existing operations?

Mr. INOUYE. The Senator is correct. The grandfather clause is intended merely to protect tribes with existing operations from hardship due to this change in the law. While the bill may permit the expansion of particular operations which were in existence as of May 1, 1988, for example, by the addition of gaming tables or seats in an existing establishment, it does not authorize the expansion of such operations to new locations, the establishment of new operations, or the institution of new games at existing operations. In other words, both the gambling operation and the particular games played in that operation must have been in place on or before May 1, 1988, in order to have the benefit of this provision.

Mr. EVANS. Mr. President, there are several points concerning the Indian Gaming Regulatory Act that should be highlighted.

As we are all aware, many Indian tribes are opposing S. 555 at least in part because of the potential of extending State jurisdiction over Indian lands for certain gaming activities. I wish to make it very clear that the committee has only provided for a mechanism to permit the transfer of limited State jurisdiction over Indian lands where an Indian tribe requests such a transfer as part of a tribal-State gaming compact for class III gaming. We intend that the two sovereigns—the tribes and the States—will sit down together in negotiations on equal terms and come up with a recommended methodology for regulating class III gaming on Indian lands. Permitting the States even this limited say in matters that are usually in the exclusive domain of tribal government has been permitted only with extreme reluctance. As discussed in the committee report, gambling is a unique situation and our limited intrusion on the right of tribal self-governance in this area has no implications for any other area of tribal self-governance or State-tribal relations.

I wish to also make clear that when a tribe and a State negotiate a compact, there need be no imposition of State jurisdiction whatsoever. Language in the report, such as "the extension of State jurisdiction and the application of State laws" and "relinquishment of rights" must be read in their full context of a compact where a tribe requests and consents to such extension or relinquishment. We are aware that the Fort Mohave Tribe and the State of Nevada have negotiated a potential compact where the tribe has chosen to be subject to Nevada's extensive regulatory system in the Nevada portion of its reservation for its proposed casino operation. This compact is probably unique to its own set of facts and should not be viewed as a prototype. As the report makes clear compacts should not be used as subterfuge for the imposition of State jurisdiction on tribes.

As noted earlier a compact should be a negotiation between two sovereigns. It is entirely conceivable that a particular State will have no interest in operating any part of the regulatory system needed for a class III Indian gaming activity, and there will be no jurisdictional transfer recommended by the particular tribe and State. Each compact will need to consider, among other items, the experience and expertise of the particular tribe and State with gaming, and the existence of regulatory mechanisms within each government. Congress should expect a reasoned and rational approach to these compacts, and not simply a demand that tribes come under a State system.

Mr. INOUYE. The compacts are not intended to impose de facto State regulation. Rather, the idea is to create a consensual agreement between the two sovereign governments and it is up to those entities to determine what provisions will be in the compacts. Page 65 of the bill references the types of provisions that may go into compacts. These provisions are not requirements. Some tribes can assume more responsibility than others and it is entirely conceivable that a State may want to defer to a tribal regulatory authority and maintain only an oversight role.

I do want to publicly state that I hope the States will be fair and respectful of the authority of the tribes in negotiating these compacts and not take unnecessary advantage of the requirement for a compact.

Mr. EVANS. On the question of precedent, am I correct that the use of compacting methods in this bill are meant to be limited to tribal-State gaming compacts and that the use of compacts for this purpose is not to be construed to signal any new congressional policy encouraging the subjugation of tribal governments to State authority.

Mr. INOUYE. The vice chairman is correct. No subjugation is intended. The bill contemplates that the two sovereigns address their respective concerns in the most equitable fashion. There is no intent on the part of Congress that the compacting methodology be used in such areas such as taxation, water rights, environmental regulation, and land use. On the contrary, the tribal power to regulate such activities, recognized by the U.S.

Supreme Court in cases such as United States versus Montana and Kerr-McGee versus Navajo Tribe, remain fully intact. The exigencies caused by the rapid growth of gaming in Indian country and the threat of corruption and infiltration by criminal elements in class III gaming warranted the utilization of existing State regulatory capabilities in this one narrow area. No precedent is meant to be set as to other areas.

Mr. EVANS. Another concern that has been raised involves the grandfathering of certain cards games that would otherwise be class III activities as class II activities in the definitional section of the bill. All such games are still subject to the licensing and jurisdictional requirements of section 11. Section 11 establishes Federal standards for the Commission and the courts to follow in determining which gaming may be within the jurisdiction of particular Indian tribes. I should point out that our definition section in the reported bill is different than either S. 555 or S. 1303 as introduced. In the introduced bills all card games were class II activities for Indian tribes. The bills as introduced reflected a viable reading of the current state of the law. It was only fair therefore to allow these activities to continue as class II.

Mr. INOUYE. The Senator is correct concerning the operation of the grandfather clause and the rationale for including the provision.

Mr. EVANS. A collateral question has arisen concerning one card game in my State that had operated prior to the cutoff date. That is the game of the Lummi Indian Tribe and it is referred to in the committee report. The Lummi Tribe and the U.S. attorney, after a challenge to the tribe's card operation and a preliminary judicial determination, have had a voluntary settlement agreement providing for the indefinite closure of the Lummi card room. My understanding is that under that settlement agreement in order to reopen the card room, the Lummi Tribe must obtain the approval of the Federal court for the Western District of Washington. Under the grandfather provision of S. 555 the Lummi Tribe would still be required to obtain such approval. It, of course, would also need to obtain a license under section 11 from the Commission, and as noted above, I would expect both decisions to turn on the analysis of State law post cabazon utilizing the standards contained in section 11(b)(1)(A).

Mr. INOUYE. The Senator is correct, that is the standard that governs the determination of whether any specific gaming is within the jurisdiction of an Indian tribe in a particular State.

Mr. EVANS. Another concern I have relative to subject areas that may be included in a class III compact is the provision allowing for State assessments to defray the costs of jointly regulating such activities. It is my understanding that this section does not contemplate the tribes bearing the entire costs of setting up State regulatory infrastructures where none have previously existed and that those assessments should strictly be directly and exclusively related to the costs of the States involvement in cooperatively regulating at a specific reservation.

Mr. INOUYE. The Senator's interpretation is accurate. These assessment provisions may also be used to provide an avenue by which the tribes may contract with the State for its regulatory services and reimburse the State for its expenses.

Mr. EVANS. Mr. President, on page 90 of the bill there is language proposing to amend chapter 53 of title 18 of the United States Code. It is my understanding that this language would, for the purposes of Federal law, make applicable to Indian country all State laws pertaining to licensing, regulation, or prohibition of gambling except class I and II gambling which would be regulated by a tribe or class III gambling which will be regulated by a tribal-State compact. Am I correct that this section is not intended to permit State jurisdiction over reservation gambling in the absence of tribal regulation or a tribal-State compact for class III gaming?

Mr. INOUYE. The vice chairman of the committee is correct. This section is to be read consistently with the compacting language on pages 60 and 61 of the bill which makes class III gambling on Indian lands illegal if conducted in the absence of a tribal-State compact. Such a compact would be applicable to all lands within the reservation.

Mr. EVANS. It is my understanding that the references in the bill to "Indian lands," "Indian lands of the Indian tribe," "Indian lands over which the tribe has jurisdiction," and "lands owned by the Indian tribes" are meant to be interpreted the same way to apply to all lands within reservation boundaries and trust lands outside the reservations. Is my understanding correct?

Mr. INOUYE. The Senator from Washington is correct. These references throughout the bill must be looked upon with reference to the definition of "Indian lands" on pages 43 and 44 of the bill which includes all lands within the limits of any reservation and those trust or restricted lands outside the reservations.

Mr. EVANS. It is my understanding that the bill leaves undisturbed the tribe's right to totally prohibit certain forms of gambling within an Indian reservation or upon trust lands outside the reservation should the tribe so choose.

Mr. INOUYE. That is correct, the bill is intended to leave intact the tribe's regulatory authority over all lands within the reservation boundaries and upon trust or restricted lands outside the boundaries. The provisions of section 11(d)(2)(D) authorize a tribe to completely prohibit all or certain forms of gaming if they so desire.

AMENDMENT NO. 3039

Mr. INOUYE. Mr. President, I call up the committee amendments as set forth in the unanimous consent and I ask for its immediate consideration.

The PRESIDING OFFICER. The amendments will be stated.

The assistant legislative clerk read as follows:

The Senator from Hawaii [Mr. INOUYE] proposes amendments numbered 3039.

Mr. INOUYE. Mr. President, I ask unanimous consent that the reading of the amendments be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendments are as follows:

On page 44, delete lines 12 through 15, and renumber the subsequent definitions accordingly;

On page 45, line 12, after "including" insert "(if played in the same location)";

On page 56, line 9, delete "of the Indian tribe" and insert in lieu thereof "within the tribe's jurisdiction";

On page 57, line 13, after "(F)" insert the words "there is";

On page 78, line 21, delete the word "adopted" and insert in lieu thereof "prescribed";

On page 80, line 19, delete "is consistent" and insert in lieu thereof "is not inconsistent";

On page 81, line 16, delete "injury" and insert in lieu thereof "inquiry";

On page 85, lines 18 and 19, delete "the first fiscal year after the enactment of this Act" and insert in lieu thereof "each of the fiscal years beginning October 1, 1988, and October 1, 1989";

On page 87, line 9, delete "of an" and insert in lieu thereof "for an";

On page 90, line 2, delete "Except as provided in subsection (c)," and insert in lieu thereof "Subject to subsection (c), for purposes of Federal law,";

On page 91, on lines 12 and 19, and on page 92, lines 4 and 13, before the word "licensed", insert "operated by or for or";

On page 89, beginning on line 16, delete all of section 23 and renumber the subsequent sections accordingly.

On page 44, line 22, delete the word "games" and insert the word "game".

On page 44, line 23, delete the word "lotto".

On page 45, line 1, delete the word "are" and insert in lieu thereof the word "is".

On page 45, line 12, after the word "pull-tabs", insert the word "lotto".

On page 65, line 20, delete the word "Nothing" and insert in lieu thereof the following: "Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection , nothing".

On page 47, line 17 delete the term "five" and insert in lieu thereof the term "three".

On page 47, line 22, delete the term "four" and insert in lieu thereof "two".

On page 48, line 6, delete the term "three" and insert in lieu thereof "two".

On page 48, line 7, delete the term "three" and insert in lieu thereof "two".

On page 48, line 14, delete the term "three" and insert in lieu thereof "two".

On page 48, line 16, delete the term "two" and insert in lieu thereof "one".

On page 49, line 14, delete the term "three" and insert in lieu thereof "two".

On page 81, line 2, delete the term "three" and insert in lieu thereof "two".

On page 57, delete lines 1 through 3 and insert in lieu thereof:

"(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;"

On page 61, line 13, after the "." insert new paragraphs 3 through 5 as follows:

"(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; 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);

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) and shall submit to the Commission a complete resumé 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 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 a majority vote of its members."

Mr. INOUYE. Mr. President, these amendments are technical in nature and they have been studied by all parties interested and they constitute for the most part technical amendments recommended by the distinguished Senator from Arizona, Mr. McCAIN.

The PRESIDING OFFICER. Is there further debate?

The Senator from Arizona is recognized.

Mr. McCAIN. Mr. President, I rise to speak on amendments. I know my distinguished friend from Washington is waiting to speak, as well as my friend from New Mexico.

First, Mr. President, I would like to thank the chairman of the Indian Affairs Committee, my distinguished friend and colleague from the State of Hawaii. Before I address the subject of the amendments, I would like to say a few words about his role in this legislation.

As you may know, a few days ago a number of Indian leaders held a press conference here in Washington to express their strong opposition to the bill now under consideration. I respect their right to hold such a forum. Indeed, I appreciate their involvement in this very important piece of legislation which affects Indian economies throughout the Southwest, indeed the country.

Mr. President, unfortunately a few of the Indian leaders who spoke could not confine their remarks in opposition to the bill but had to engage in a personal attack on Senator INOUYE by making the suggestion that his efforts on this bill were done for personal gain.

That charge is absolutely false. As this body knows, there is no man of higher integrity in this body than Senator INOUYE. He has worked long and hard on a number of issues that are of deep concern to many native Americans. He has visited my State. He has visited every State in America that has significant native American populations. And as his friend and admirer, I deeply resent those allegations that were made to inpugn the integrity of a truly great American.

Without having this body draw any judgment about any previous chairman of the Indian Affairs Committee, I think it is clear that Senator INOUYE has provided the degree of leadership, degree of dedication, and the degree of commitment that has not been seen in that committee before. And I am sad, indeed obviously somewhat angry, that a few Indian leaders would choose to ignore that fact.

However, I am also aware of the far greater number of Indian people who would join me in thanking Senator INOUYE for all his efforts, not on this piece of legislation alone, on which he has labored now for 2 years, but on all the other issues that affect Indian people from museums to Indian health to Indian education to preservation of Indian self-determination, to trying to right the wrongs that have been done to that persecuted minority of Americans in this country.

Mr. President, I do not want to belabor the subject. I just strongly recommend to my Indian friends throughout the country that it is not helpful in any way to attack the integrity of one of the most respected men in America. And it makes it difficult, very frankly, for people on both sides of the aisle to work in a cooperative and trusting fashion.

Now, Mr. President, let me address the amendment, if I may. I point out, also, that as we have wrestled with this issue for the last 4 years, Congressman UDALL and I have sought to reach a compromise, which would be agreeable to all parties concerned. Unfortunately we did not receive any support in those efforts at compromise, and I, of course, like most other Members of the committee, have serious concerns about the legislation before us, and I personally would have rather seen a different class III provision than the tribal-State compacts as called for. But for the reasons I have stated, my additional views on the committee report, namely, frustration for lack of support from tribes for any particular legislative solution, I am willing to give this approach a test. If after a period of time the compact approach proves unfair to Indian tribes in their ability to establish and operate class III gaming activities, then the Congress may have to revisit this class III provision.

Mr. President, the Indian community must understand that no gambling activity can take place anywhere without supervision and regulation. I could cite example after example of Indian communities where gaming has been established and unsavory and unwanted and indeed, in some cases, criminal elements have entered into that gaming enterprise and the Indians have suffered rather than gained from those gambling enterprises.

Mr. President, I can also tell you that I oppose personally gambling in my State. I oppose gambling on Indian reservations, but when Indian communities are faced with only one option for economic development, and that is to set up gambling on their reservations, then I cannot disapprove of those gambling operations.

Mr. President, I could go on. The hour is late. I have other Members who are waiting to speak, including my distinguished colleague and ranking member of the committee, Senator EVANS, as well as my friend from New Mexico. The committee amendment I am cosponsoring with Senator INOUYE would make technical corrections to the bill as reported by the committee. In addition to the technical changes, the committee amendment incorporates three of my amendments which will affect class II games only. The first change would be to reduce the size of the National Indian Gaming Commission from five to three full-time Commissioners. The rationale for

this change is to reduce the costs, borne in large part by gaming tribes, since the Commission would only be responsible for class II games. The amendment would also allow tribes that have excellent records in operating class II games to be subject to less onerous and less expensive Federal oversight of their gaming activities.

Finally, Mr. President, I would like to thank my good friends from the State of Nevada, Senator HECHT and Senator REID, for their effort in behalf of this legislation. I think it is appropriate to be passed. I also would like to serve notice that I, Senator INOUYE, Senator EVANS and other Members of the Select Committee on Indian Affairs will be watching very carefully what happens in Indian country. If the States take advantage of this relationship, the so-called compacts, then I would be one of the first to appear before my colleagues and seek to repeal this legislation because we must ensure that the Indians are given a level playing field in order to install gaming operations that are the same as the States in which they reside and will not be prevented from doing so because of the self-interest of the States in which they reside. Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Hawaii.

Mr. INOUYE. I just wish to thank my distinguished friend from Arizona for his very generous comments and to tell him I, too, will be watching the implementaton of this bill very carefully. If it does not work, we will be visiting this again.

Mr. EVANS addressed the Chair.

The PRESIDING OFFICER. The Senator from Washington.

Mr. EVANS. Mr. President, the distinguished chairman of the Subcommittee on Indian Affairs, Senator INOUYE from Hawaii, and I have filed what I consider to be an important colloquy, one which in detail goes into the elements of this bill and tries to assure that its provisions do not act as a precedent for other nonrelated relationships between Indian tribes and the United States or State governments.

Mr. President, the legislation before us, the Indian Gaming Regulatory Act, represents one of the very rare instances in the recent history of our relationship with Indian tribes when we have felt compelled to address public concern over the internal affairs of tribes. I appreciate the time allotted me to clarify our intentions in introducing and moving this legislation through the Senate.

I first wish to commend the chairman of the Select Committee on Indian Affairs. The Senator from Hawaii has been a stalwart in moving on important legislation during this Congress. The committee has been as active and as productive, I believe, in this Congress as in the previous several Congresses combined. He has introduced this bill and proceeded to bring it to the full Senate for consideration.

Throughout the difficult process of developing this legislation Senator INOUYE has worked diligently to accommodate the concerns of certain States and the non-Indian gaming industry while jealously guarding the self-governing rights of the tribes, and this is critically important in this legislation. With this in mind Mr. President, I want to emphasize our intended scope of the application and enforcement of this law.

The Indian Gaming Regulatory Act does exactly that—regulates Indian gaming. By no means is any provision of this act intended to extend beyond this field of gaming in Indian country. Furthermore, this bill was drafted with the full understanding of the principles of law which guide our relationship with the Indian tribes.

The inherent sovereign rights of the Indian tribes were reserved by the tribes for the fullest and unencumbered benefit of the Indian people. These rights have been recognized time and time again by the highest courts of our Nation, and they continue in existence except in rare instances where the Congress has exercised its power to restrict them. When this body has chosen to restrict the reserved sovereign rights of tribes, the courts have ruled that such abrogations of tribal rights must have been done expressly and unambiguously.

Many long hours were devoted to this legislation to iron out any possible ambiguities, and we hope to have achieved a bill both clear and concise in this regard. Therefore, if tribal rights are not explicitly abrogated in the language of this bill, no such restrictions should be construed. This act should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the Cabazon decision.

The portion of this bill most troubling to the tribes is that which provides for a cooperative mechanism through which the tribes and the States can agree on the extent of Indian gaming that would prove beneficial to both the tribes and the States. The Tribal/State compact language intends that two sovereigns will sit down together in a negotiation on equal terms and at equal strength and come up with a method of regulating Indian gaming.

The provisions for Tribal/State compacting are not meant to favor either party, and are certainly not meant to propagate the extension of criminal or civil jurisdiction over Indian gaming, but rather are meant to provide an avenue for cooperative negotiations between the tribes and the States for regulating gaming in a manner beneficial to both parties.

I do hope, Mr. President, that the States will see the wisdom in dealing fairly and respectfully with the tribes, and will recognize the mutual benefit of a strong tribal economy and of integrating tribal economies into the general economy of the State.

I will not pretend to imply that I believe this act will conclude our dealings with gaming in Indian country, but I want to leave my colleagues with a message to share with their respective constituencies as the public becomes more and more educated on our unique relationship and responsibilities to the Indian tribes.

The first inhabitants of this continent played an integral part in the birth of this Nation and have been a source of great wealth, both spiritual and physical, in America's rise to prominence. Sadly, at times, in our textbooks and in our homes, we have sometimes been delinquent in giving credit and being gracious to the first American. We have sometimes failed to share our opportunities with the Indian while recognizing the Indians' right to live by their own values, to govern themselves, and to determine their own future for themselves, their children, and their cultures.

I firmly believe that we now stand at a crossroads, at a point where we may seize the opportunity to acknowledge the Indians' unequivocal right to self-determination and to invite the Indian tribes into the American mainstream. I am not advocating a return to the failed assimilationist policies of the past, but rather the possibility that the tribes can fully participate in our economic prosperity while they retain and while we respect their rights to decide to what extent and in what manner they choose to participate.

A new understanding of our economic relationship with the tribes would require, in the economic field even more so than in others, that we treat the Indian not as a race but as a political and legal entity as the courts have so ruled. With this understanding in the future we may avoid such legislation as this before us which has had such dangerous potential for infringing on tribal rights.

In the market for gaming as with other markets, the Indian tribes must accumulate wealth, develop track records, and make financial and market connections to succeed in our economic system. When any non-Indian entity or region succeeds in these endeavors we proclaim it to be a booming economic sector ripe for productivity, employment, and financial opportunity. Unfortunately, when

Indian tribes and reservations succeed in these endeavors, the surrounding communities often shrink into a shroud of protectionism and isolationism accusing Indians of gathering the benefits which rightfully belong to the non-Indian community.

We should be candid about the interests surrounding this particular piece of legislation. The issue has never really been one of crime control, morality, or economic fairness. Lotteries and other forms of gambling abound in many States, charities, and church organizations nationwide. At issue is economics. At present 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 body—probably less—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 capable of controlling this potential problem than have some States in which high stakes gambling is played. Given this fact, the Indian gaming regulatory act 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.

Mr. President, the U.S. Constitution declares the U.S. Congress to be our Government's representative in its dealing with the Indian tribes. In my opinion it is incumbent upon us to deal fairly and respectfully with the tribes. We must not impose greater moral restraints on Indians than we do on the rest of our citizenry. We must guard against being overly responsive to the political and economic interests of our constituents to the detriment of the less politically powerful Indian people, as some proponents who seek regulation of Indian gaming would have us do. We must acknowledge that the manner in which our Nation deals with its indigenous peoples is a human concern of importance to all of us on a national scale. Finally we must participate in educating our constituents of the rights and responsibilities which the Indian tribes and the United States have with regard to each other.

With that set of important caveats and warnings, Mr. President, I believe the act which we have before us has come as close as we can to providing appropriate regulation while at the same time not stepping over that very important boundary and derogating rights of Indian people any more than the rights they gave up 150 years ago in the signing of our treaties.

Mr. DOMENICI addressed the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. DOMENICI. I wonder if the distinguished chairman will yield 3 minutes to the Senator from New Mexico.

Mr. INOUYE. Before I yield, I wish to thank my vice chairman for his very generous comments and to simply say I wish to associate myself with his remarks.

I will be very happy to yield whatever time the Senator needs.

Mr. DOMENICI. Three minutes.

Mr. INOUYE. Three minutes. Fine.

Mr. DOMENICI. Mr. President, first, let me thank the distinguished chairman of the Senate Select Committee on Indian Affairs, Senator INOUYE, for the colloquy in which he has engaged with the Senator from New Mexico. It was helpful to me, and I believe it will be helpful to our Indian people because it does, indeed, clarify again in a yet different way the issue of Indian sovereignty and makes it unequivocal that there is no intention to denigrate Indian sovereignty. We are talking specifically about the mutual responsibility between the Indian people and the State in which they reside. The class of gambling beyond bingo will require entering into an agreement where both sovereigns, the State and the Indian people, attempt to arrive at a regulatory scheme which will adequately protect the Indian people and the non-Indian people.

I wish to associate myself with the remarks of the distinguished junior Senator from Arizona with reference to the chairman of this committee and his efforts in behalf of this bill. Not for a minute does the Senator from New Mexico believe that the distinguished Senator from Hawaii had any ideas, any notions, or any reason to be involved in this bill other than he is concerned about the Indian people. He is also concerned about the evolution of gambling going on unattended in light of certain decisions of the U.S. Supreme Court.

While we do not all agree that this bill is perfect, and hardly any legislation is—and perhaps the Senator from New Mexico might even do it differently—I have checked around with the members of the committee, with many Members of the Senate, and I have reached the following conclusion. The committee has worked diligently in one of the most difficult areas of activity in years and has come up with this approach after hours and hours of difficult debate. Most Senators who have an interest in this issue because they are concerned about the Indian people or gambling or the combination thereof have concluded that this is the best we are going to do and we ought to get on with doing it.

It is for that reason I am here tonight saying, after a few amendments that were included in the chairman's technical amendments and the colloquy that he entered into with me, let us get on with sending this bill to the House.

Let me also say a few words about Indian economic opportunity, jobs for the Indian people. I hope that we really do not look back 10 years from now and say that most of the jobs and economic prosperity is coming from gambling. I hope in 10 years we could look back and say we had to do this because our Indian people had such difficulty in getting economic opportunity to their people that they had to look to gambling. I hope we will be able to look back in 10 years and say this was just part of a whole series of economic opportunities for our Indian people. They do not currently have that opportunity.

I think we ought to work with them, the States ought to work with them, and the business community in the United States ought to work with them, corporations ought to work with them to give them an oportunity to share in job opportunities. They need it desperately. If they have to resort to gambling, we have provided the right framework to do it in a fair and appropriate manner.

I thank the Chair and I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. INOUYE. Mr. President, I yield 3 minutes to the Senator from North Dakota.

The PRESIDING OFFICER. The Senator from North Dakota.

Mr. BURDICK. Mr. President, while I voted in committee to report the bill S. 555, a bill to regulate gambling on Indian country, the final bill has met with great opposition by tribes in my State of North Dakota.

In light of opposition both from the North Dakota Indian tribes who believe the bill goes too far to imposing State jurisdiction, and from Nicholas Spaeth, North Dakota attorney general who believes the bill does not go far enough to protect State interests, I am compelled to voice my opposition.

I realize that the chairman of the Select Committee on Indian Affairs has worked long and hard to reach a viable compromise and compromise always means that no one interest will predominate over another. In particular I am pleased to note that the issue of whether tribes can operate statewide lotteries without a tribal/state compact has been resolved in the committee amendments. This was a particular concern that I voiced and I appreciate the chairman's assistance in this matter. I commend the chairman

in his efforts but regret that I cannot support the bill.

I ask unanimous consent that a statement from Nicholas Spaeth, North Dakota attorney general be printed in the RECORD.

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

ATTORNEY GENERAL,
STATE OF NORTH DAKOTA,
Bismarck, ND, September 8, 1988.

Hon. QUENTIN BURDICK,
U.S. Senator, Hart Senate Office Building, Washington, DC.

DEAR SENATOR BURDICK: I received a copy of S. 555 as reported out of the Senate Committee. While I support the need for comprehensive federal legislation in the area of Indian gaming, I find it impossible to support S. 555 in its present form. I feel the citizens of North Dakota would be better off without congressional legislation than with this bill as it came out of committee.

Currently, Indian gambling is proliferating rapidly. An Indian tribe in the State of Minnesota is currently planning to erect a $4 to $5 million bingo facility and arrange for bus transportation from North Dakota to the tribal land and back. North Dakota tribes are advertising extensively in various media in an effort to solicit players to come on the reservations and play at their facilities. Almost 100 percent of the players participating in gaming on Indian lands are non-Indians. On at least one of the reservations in North Dakota, plans are underway to develop casino gambling with unlimited stakes. The other reservations can be expected to follow shortly.

The scope of regulating gambling is one that requires an in-depth understanding of the game and a great deal of experience with regulation. The gaming industry is particularly vulnerable to the cunning and technically sophisticated defrauder. It is also one that lends itself to embezzlement, skimming, and other examples of "white collar crime" which are hard to detect and prove. Consider the innumerable problems that Atlantic City and the state of Nevada now experience with the type of regulation and experience that they possess.

To allow the same type of gaming on Indian lands to be regulated by individuals with little or no experience, interest in regulation, or resources will subject the tribes to the highly probable threat of embezzlement and loss. It will also subject the citizens of the state of North Dakota to additional criminal elements, law enforement problems, injury to their currently healthy charitable gaming industry, and pose social and economic problems in the future that the state, with its limited resources, will be hard pressed to cure.

I would like to point out specific problems I have with S. 555 as it is not proposed. There are many areas which I do not believe are in the best interests of the citizens of North Dakota. Those areas are as follows:

In the section on definitions, the bill provides as follows: Section (4)(a) defines Indian land to mean all lands within the limits of an Indian reservation. Three of the North Dakota reservations has considered fee lands within the exterior boundaries of the reservation. Allowing tribal gaming and regulation on non-tribal lands with create considerable hostility and resentment among the substantial number of non-Indians in these areas.

In another section the following provision occurs: Section (8)(A)(i) defines class II gaming to include lotto. This would permit a tribally operated lottery. The citizens of North Dakota have voted down a state lottery by overwhelming numbers twice in the last 2½ years. Thus, the tribes in numerous states, including North Dakota tribes, could band together to bring a game into the state which the majority of our citizens have clearly indicated they do not want. Lottos are typically multi-million dollar gaming operations controlled by a few large companies who are the greatest beneficiaries of the game. Lotto is regressive in nature and preys on the lower social economic groups who can least afford to expend money in its pursuit. These are some of the reasons why North Dakotans have rejected lotteries twice in the recent past. We cannot allow lotteries to come into the state via Indian gaming.

Part (ii) of that same section discusses class II card games. While the bill limits class II card games to only those games allowed by law in the state and only if they follow state law as to limits, hours, etc., North Dakota is one of the states exempt from this. The tribes in North Dakota may play the games operated before May 1, 1988. They may play these games up to the nature and scope in which they were operated before that date. This effectively removes all bet limits from tribal card games allowing unlimited stakes in poker and blackjack on North Dakota reservations.

Currently, several of the reservations are running high-stakes or unlimited bet card games. Under S. 555, this could continue as a permanent feature. Instead, all card games should follow state rules and laws. The citizens of North Dakota intentionally placed betting limits on gaming to avoid high-stake casino gaming and its accompaning problems. Our citizens are greatly concerned about unregulated gaming on Indian lands. Complaints to my office voice resentment at the availability of high-stakes or unregulated gaming on Indian lands.

Section (8)(D) provides for a state-tribe compact dealing with class II gaming to be created within one year. This compact must address the legalization of electronic and video poker, blackjack, bingo, and other similar games. Currently, those games are illegal in North Dakota. However, this bill requires the state to negotiate in "good faith" with the tribes to legalize such games. It imposes a limit of one year in which to establish these compacts. If within that one year the state is not acting in "good faith" in enacting such a compact, then court redress is the option. This places the total burden upon the State of North Dakota. This section will certainly result in litigation which will be costly and time consuming. North Dakotans should decide whether or not to allow such games in their State. If they do so decide, then and only then should Indian reservations be allowed to conduct such games.

Section 5 establishes a national Indian gaming commission. As previously discussed, the regulation of gaming is a highly specialized endeavor. It requires a serious commitment, high integrity, a willingness to enforce complex laws fairly and equally to all, and a highly trained professional staff. Even with all of these, the New Jersey and Nevada experiences, as well as our personal experiences in North Dakota, indicate that regulation is extremely difficult. In addition, it is only fair to the citizens of North Dakota, to charities that depend on gaming funds, and to minimize law enforcement problems that regulation be fair, knowledgeable, and consistent throughout the state. The experience with tribal regulation of gaming has shown that none of the above exist.

The creation of an understaffed, inexperienced commission which has inadequate authority and which is dependent upon the gaming organizations for the majority of its funding will not remedy the problems related to gaming enforcement. I am especially troubled that class II gaming on reservations will be dependent upon a commission which has an inherent conflict of interest. That conflict is that its budget will be, to a large degree, dependent upon the organizations that it will regulate. This can have no other effect but to cloud its objectivity and to weaken its enforcement stance. It will also encourage the committee allow competitive advantages to tribal organizations and, thus, enhance its funding.

Section 11(4)(A) allows the tribes to license non-Indian gaming operations without subjecting the non-Indians to state regulation. The tribe is required to enforce state laws and rules upon non-Indian gaming. However, their track record in North Dakota has not been good. Illegal gaming has been tolerated and the tribes have not regulated the legal gaming contained within their borders. Non-Indian gaming in North Dakota should and needs to be regulated by the state of North Dakota. It is contrary to all sense of fairness that non-Indians who may be located on the fee land within "Indian lands" should be treated differently than non-Indians located on fee land anywhere else in the state of North Dakota.

I feel that it is a basic principle of justice that regulation must be fair and equal for all. As long as tribal governments and Indian gaming organizations are required to abide by the same rules as state organizations, thus not providing the tribe with a competitive advantage or ineffective regulation, then justice is being served.

Section (D)(3)(A) provides that tribes may request states to enter into compacts governing class III gaming activities (casino). The burden is on the state to negotiate in good faith. Once the tribe makes such a request, the state must negotiate with them. Thus, North Dakota could be held hostage to whatever tribe in the United States negotiates the most liberal contract anywhere in the United States. If a state with a small Indian population and no understanding of the problems encountered in regulating gaming agreed to a liberal, unworkable compact, all other states would be hard pressed not to agree to that same compact or risk being found to be not acting in "good faith." This is not arm's length negotiations, but a forcing of the states to allow very liberal gaming activities within their borders.

As it relates to class III gaming, S. 555 biggest weakness is that it does not impose a moratorium. In the past, all bills involving Indian gaming regulation contained a three to five year moratorium on class III gaming. This gives states, tribes, and the federal government a chance to develop a "track record" before casinos are authorized and developed in the various tribal areas. S. 555 allows casinos as soon as a compact can be worked out or mandated by the courts.

As stated in (11)(3)(A), "the state shall negotiate with the Indian tribes in good faith to enter into a compact." North Dakota will be forced to leap before it knows how to walk. Without a chance to see if the tribes

will regulate gaming and to what extent they will regulate that gaming, the state must enter into negotiations to allow casinos within its borders. North Dakota's experience with high-stake casinos is minimal. Yet now, the state must negotiate within a short period of time (no more than one year) to allow casinos within its borders. Failing to negotiate in good faith on this issue may cause a mediator or the courts to impose a compact. A moratorium must be put back into the bill.

For all of the above reasons, North Dakota would be better off with no congressional legislation than with S. 555 as it presently exists. If the problems addressed herein, i.e., deletion of the federal commission, a moratorium on class III gaming, the treatment of all card games the same, etc., are corrected, then such a bill would greatly benefit North Dakota and its citizens.

Sincerely,

NICHOLAS J. SPAETH.

Mr. INOUYE. Mr. President, I yield 3 minutes to the distinguished Senator from Nevada.

Mr. HECHT. Thank you, Mr. President.

I wish to thank the distinguished Senator from Hawaii, Senator INOUYE, for his outstanding leadership on this bill and all who have worked with him.

The resort business and gaming is our main industry for Nevada. I have been in Nevada for over 40 years. And the regulation of gambling is very important not only to Nevada, but to the rest of the country. Mr. President, this is a good bill that we are acting on today. And on a personal note I would like to state that I have been in the resort business, and hold a gaming license with hotel stock that is in a blind trust. I represent Nevada in the U.S. Senate, and the resort business is our main economy.

Again, my thanks to the distinguished Senator from Hawaii, Senator INOUYE, for his leadership on this very outstanding legislation.

Mr. INOUYE. Mr. President, I thank my friend from Nevada.

Mr. ADAMS. Mr. President, I think it is quite clear that this bill is going to pass today in its present form, and I do not propose to take up the Senate's time attempting to postpone the inevitable. I would, however, like to briefly express my concerns about this legislation.

This bill represents a sincere effort by the Senate Select Committee on Indian Affairs to craft a mechanism for regulation of gaming on Indian reservations that is consistent with accepted principles of tribal sovereignty. The most difficult issue to resolve has been how to best regulate on Indian reservations gaming activities such as casino gaming and dog and horse racing which are regulated in different ways by different States, are potentially high profit enterprises, and in the past at the State level have experienced problems with attempted infiltration by organized crime.

These types of gaming operations are classified in the bill as class III games, and tribes can run class III games only in accordance with compacts negotiated with State governments. I appreciate that the State-tribal compact concept incorporated in government negotiation between States and Indian tribes. It is not clear to me that the current bill language achieves this goal, but I certainly hope to be proved wrong, and understand the reasons why the committee wishes to facilitate Indian/State discussions in this context. If there are future efforts, however, to extend this type of compact to other types of regulation of Indian activities, I will probably oppose such efforts, because this might well result in significant State intrusions into regulation of tribal activities.

Mr. DASCHLE. Mr. President, as a member of the Select Committee on Indian Affairs and as an original cosponsor of S. 555, I regrettably object to the final version of this bill. I will cast my vote accordingly.

My reason for opposing the bill is that those Indian tribes from South Dakota whom I represent have informed me that this bill is unacceptable. The tribes strongly object to any form of direct or indirect State jurisdiction over tribal matters. They believe the provisions calling for a tribal-State compact are in derogation of the status of Indian tribes as domestic sovereign nations. The direct or indirect application of State law in Indian country, they believe, is a dangerous and unwarranted precedent for further inroads upon tribal sovereignty. They further believe that opponents to Indian self-determination and strong tribal government will use this unwarranted precedent as a justification for State taxation, zoning, water regulation and further jurisdiction over tribal economic activities.

Tribes have traditionally opposed any State jurisdiction interfering with their sovereign powers to regulate internal affairs on tribal lands. This bill would establish Federal guidelines for the regulation of gaming and would be within the context of the tribal-Federal government-to-government relationship. State jurisdiction, however, is outside that relationship.

As the Friends Committee on National Legislation has pointed out, S. 555 represents the first time a State would have jurisdiction over tribal affairs rather than over individuals. This organization maintains that S. 555 would have a more intrusive effect on tribal sovereignty than Public Law 280, even in States which rejected Public Law 280 when it was possible to take on jurisdiction without the consent of tribes. Furthermore, S. 555 would erode the intent of the "Indian Civil Rights Act of 1968" which forbids States to take civil or criminal jurisdiction over Indians without tribal consent.

Even though the selection committee has made a serious effort to address these concerns in the report language accompanying the bill, the tribes I represent remain skeptical. I cannot, therefore, in good faith continue to support the bill.

The PRESIDING OFFICER. Is there further debate on the amendment of the Senator from Hawaii? If not, the question is on agreeing to the amendment of the Senator from Hawaii [Mr. INOUYE].

The amendment (No. 3039) was agreed to.

Mr. INOUYE. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. EVANS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. INOUYE. Mr. President, I ask for final passage.

The PRESIDING OFFICER. Does the Senator from Washington yield back the remainder of his time?

Mr. EVANS. I yield back the remainder of my time.

Mr. INOUYE. I yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to the committee amendment in the nature of a substitute, as amended.

The committee amendment in the nature of a substitute, as amended, was agreed to.

Mr. INOUYE. Mr. President, I move to reconsider the vote by which the committee amendment in the nature of a substitute, as amended, was agreed to.

Mr. CRANSTON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill ordered to be engrossed for a third reading, was read the third time, and passed, 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. 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) Federal courts have held that section 2103 of the Revised Statutes (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;

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

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

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

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—

(A) 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

(B) is recognized as possessing powers of self-government.

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

(7)(A) The term "class II gaming" means—

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

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

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

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that—

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include—

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on the date of enactment of this Act, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after the date of enactment of this Act, to negotiate a Tribal-State compact under section 11(d)(3).

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

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

(10) 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 three 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) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General 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 two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission—

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) two members shall have a term of office of one year.

(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) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) 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 of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6).

(d) Two 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 of the Commission to serve as Vice Chairman. The Vice Chairman 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, but shall meet at least once every 4 months.

(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 in accordance with title 5, United States Code, 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, on behalf of the Commission, 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 and class III gaming as provided in section 11; and

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

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

POWERS OF THE COMMISSION

SEC. 7. (a) The Commission shall have the power, not subject to delegation—

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 18;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 14(a);

(3) by an affirmative vote of not less than 3 members, to establish the rate of fees as provided in section 18;

(4) by an affirmative vote of not less than 3 members, to authorize the Chairman to issue subpoenas as provided in section 16; and

(5) by an affirmative vote of not less than 3 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 14(b)(2).

(b) The Commission—

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) recommendations for amendments to the Act; and

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

COMMISSION STAFFING

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

(b) The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of title 5, United States Code, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(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. Notwithstanding any other provision of this Act, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before the date of enactment of this Act relating to supervision of Indian gaming until such time as the Commission is organized and prescribes 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 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)(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 tribes 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 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 by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe 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 legally incompetent persons who are entitled to receive any of the per 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 incom-

petent 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 taxability 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 requirements include the requirements described in the subclauses of subparagraph (B)(i) and are 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 person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person 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 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; 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);

(B) the tribe shall continue to submit an annual independent audit as required by section 11(b)(2)(C) and shall submit to the Commission a complete résumé 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 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)(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).

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 activity;

(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) 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 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.

(e) 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.

MANAGEMENT CONTRACTS

SEC. 12. (a)(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1), but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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 class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, 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) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing class II gaming or class III gaming is submitted to the Chairman 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), the Chairman 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), the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c)(1) Within 180 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.

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

(3) If the Chairman determines 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 120 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 180 days after notification of necessary modifications to come into compliance.

CIVIL PENALTIES

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

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

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

(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 not inconsistent 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 two 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 inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for 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 shall, 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 shall investigate activities associated with gaming authorized by this Act which may be a violation of Federal law.

COMMISSION FUNDING

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

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

(i) no less than 0.5 percent nor more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000,

of the gross revenues from each activity regulated by this Act.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $1,500,000.

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

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

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

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

(b)(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.

AUTHORIZATION OF APPROPRIATIONS

SEC. 19. (a) Subject to the provisions of section 18, there are 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 are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989.

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 Indian tribe is presently located.

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

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

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

(i) a settlement of a land claim,

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

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

(2) Subsection (a) shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled *St. Croix Chippewa Indians of Wisconsin* v. *United States*, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465, 467), subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

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

(d)(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming oper-

ations conducted pursuant to this Act, or under a Tribal-State compact entered into under section 11(d)(3) that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after the date of enactment of this Act unless such other provision of law specifically cites this subsection.

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) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

"(b) Whoever in Indian country 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—

"(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

"(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

"(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 country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

"§ 1167. Theft from gaming establishments on Indian lands

"(a) Whoever abstracts, purloins, willfully misapplies, or takes and carries away with intent to steal, any money, funds, or other property of a value of $1,000 or less belonging to an establishment operated by or for or 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 money, funds, or other property of a value in excess of $1,000 belonging to a gaming establishment operated by or for or 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 employers of gaming establishments on Indian lands

"(a) Whoever, being an officer, employee, or individual licensee of a gaming establishment operated by or for or 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 operated by or for or 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.".

Mr. INOUYE. Mr. President, I move to reconsider the vote by which the bill, as amended, was passed.

Mr. EVANS. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

EXECUTIVE CALENDAR

Mr. BYRD. Mr. President, I ask the distinguished Republican leader whether or not the following calendar orders on the Executive Calendar have been cleared on his side: under International Banks on page 3, Calendar Order No. 843, and then the nomination on page 4, all the nominations on page 5, and the nomination on page 6.

Mr. DOLE. Yes, each of those nominations have been cleared on this side.

Mr. BYRD. Mr. President, I thank my friend.

I ask unanimous consent that the Senate go into executive session to consider the nominations under new reports on page 3 under International Banks, going through pages 4, 5 and 6, and that the nominations be considered en bloc, agreed to en bloc, the motion to reconsider en bloc be laid on the table, Senators' statements, if there be such, be included in the RECORD at the appropriate places as though read, and that the President be immediately notified of the confirmation of the nominees, and the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nominations considered and confirmed en bloc are as follows:

INTERNATIONAL BANKS

W. Allen Wallis, of New York, to be United States Alternate Governor of the International Bank for Reconstruction and Development for a term of five years; and United States Alternate Governor of the Inter-American Development Bank for a term of five years. (Reappointments).

UNITED NATIONS

Vernon A. Walters, of Florida, to be a Representative of the United States of America to the Forty-third Session of the General Assembly of the United Nations.

The following-named person to be a Representative of the United States of America to the Forty-third Session of the General Assembly of the United Nations: Pearl Bailey, of Arizona.

The following-named person to be an Alternative Representative of the United States of America to the Forty-third Session of the General Assembly of the United Nations: Noel Gross, of New Jersey.

The following-named person to be an Alternative Representative of the United States of America to the Forty-third Session of the General Assembly of the United Nations: Lester B. Korn, of California.

The following-named person to be an Alternative Representative of the United States of America to the Forty-third Session of the General Assembly of the United Nations: Hugh Montgomery, of Virginia.

Patricia Mary Byrne, of Ohio, to be an Alternative Representative of the United States of America to the Forty-third Session of the General Assembly of the United Nations.

The following-named persons to be Representatives and an Alternative Representative of the United States of America to the Forty-third Session of the General Assembly of the United Nations:

Representatives:

Rudy Boschwitz, United States Senator from the State of Minnesota.

Christopher J. Dodd, United States Senator from the State of Connecticut.

Alternate Representative: Arthur Schneier, of New York.

INTERNATIONAL ATOMIC ENERGY AGENCY

Joseph F. Salgado, of California, to be the Representative of the United States of America to the Thirty-second Session of the General Conference of the International Atomic Energy Agency.

Lando W. Zech, of Virginia, to be an Alternative Representative of the United States of America to the Thirty-second Session of the General Conference of the International Atomic Energy Agency.

The following-named person to be an Alternative Representative of the United States of America to the Thirty-second Ses-