
INDIAN GAMING REGULATORY ACT

AUGUST 3 (legislative day, AUGUST 1), 1988.—Ordered to be printed

Mr. INOUE, from the Select Committee on Indian Affairs,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 555]

The Select Committee on Indian Affairs, to which was referred the bill (S. 555) to regulate gaming on Indian lands, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

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

BACKGROUND

S. 555 is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands. In developing the legislation, the issue has been how best to preserve the right of

tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons. An additional objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests.

The need for Federal and/or State regulation of gaming, in addition to, or instead of, tribal regulation, has been expressed by various State and Federal law enforcement officials out of fear that Indian bingo and other gambling enterprises may become targets for infiltration by criminal elements. While some States have attempted to assert jurisdiction over tribal bingo games, tribes have very strenuously resisted these attempts. It was this conflict which gave rise to the *California v. Cabazon Band of Mission Indians* case (*Cabazon*), decided by the Supreme Court on February 25, 1987. (480 U.S. ____, 94 L.Ed.2d 244, 1987). The Court, using a balancing test between Federal, State, and tribal interests, found that tribes, in States that otherwise allow gaming, have a right to conduct gaming activities on Indian lands unhindered by State regulation. This decision followed a long line of cases that began with the case of *Seminole v. Butterworth*, (658 F.2d 3110, 5th Cir., 1982, cert. denied 1982).

The Seminole Tribe of Florida in 1979 was the first tribe to enter the bingo industry. A court challenge by the State of Florida led the Fifth Circuit Court of Appeals to decide, in the *Seminole* case, that the tribe could conduct gaming free from State interference, primarily because the Federal Government had never transferred jurisdiction to the State of Florida to impose its civil laws on Indian lands.

Since Florida is a Public Law 280 state,¹ the Court applied a civil regulatory/criminal prohibitory test to determine the extent of state authority over tribal activities. The *Seminole* court found that Florida's laws governing bingo are civil regulatory, not criminal prohibitory. Therefore, if Florida's laws governing bingo had been found to be criminal prohibitory in nature, they would have applied to the Seminole Tribe. But pursuant to the application of Public Law 280, the State's civil regulatory laws governing bingo were found not to apply to the Seminole Tribe's bingo operations.

Since the Seminole Tribe opened its game and succeeded in court, over 100 bingo games have been started on Indian lands in states where bingo is otherwise legal. As established in testimony presented to the Committee, it was determined that collectively, these games generate more than \$100 million in annual revenues to tribes. Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible. For various reasons, not all tribes can engage in profitable gaming operations. However, for those tribes that have entered into the busi-

¹ Public Law 83-280, codified in 18 U.S.C. 1162 and 28 U.S.C. 1360, authorized the transfer of criminal jurisdiction over Indians and Indian lands from the Federal Government to those state governments that chose to assert such jurisdiction. Tribes were free to continue to exercise civil jurisdiction over their members and their lands. The law was subsequently amended in 1968 to require tribal consent before jurisdiction could be transferred to a State. Since then, no tribes have done so and no new states are permitted to come under the Public Law 280 statute.

ness of business, the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.

In deciding the *Cabazon* case, the Supreme Court used a balancing test, weighing the interests of States, tribes and the Federal Government. The Court relied heavily on the fact that the Department of the Interior, as trustee for Indian tribes, reviews tribal gaming ordinances and approves or disapproves them, as well as all joint venture and management contracts with outside firms. The court also emphasized the Federal Government's interest in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development.

However, in the final analysis, it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands. S. 555 recognizes primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For class III casino, parimutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.

Development of Legislation.—Congressional consideration of Indian gaming legislation began in the 98th Congress with the introduction of several bills and the conduct of hearings. No further action, however, was taken by either the Senate or the House. In the 99th Congress, five bills were introduced in the House to provide a Federal role in the oversight of gaming on Indian lands. Congressman Morris Udall's bill, H.R. 1920, emerged as the primary vehicle for the Indian gaming legislation, and the House Interior Committee held three hearings on the H.R. 1920. The administration had no legislative proposal of its own to offer at that time. In November 1985, representatives of the Department of the Interior and the Department of Justice testified in support of tribal bingo, regulated by a Federal agency, but in opposition to class III gaming unless conducted under State jurisdiction.

Over the course of the development of the legislation, the definition of class I has remained constant but class II and class III definitions have been subject to much debate. Class I is the term consistently used to describe traditional gaming conducted at Indian pow-wows and ceremonies, gaming activities which are entirely free of outside regulation or oversight. Under S. 555, class II is the term used for bingo, lotto, some types of card games, as well as other forms of bingo-type gaming such as pull-tabs, punch cards, tip jars, and the like. Class III is all other forms of gaming—slot machines, casino games including banking card games, horse and dog racing, pari-mutuel, jai-alai, and so forth.

The bill reported to the House floor in April 1986 allowed the proposed National Indian Gaming Commission and the tribes to regulate both class II and III gaming. Class III gaming would have been regulated in accordance with State rules and regulations governing such gaming. However, no jurisdiction over Indian lands was conferred on States. A compromise bill (H.R. 1920) passed the

House on April 21, 1986, calling for a 5-year moratorium on any new class III tribal gaming and a GAO study to determine the best regulatory scheme for class III gaming on Indian lands.

On April 29, 1986, the Supreme Court docketed the *Cabazon* case, significantly altering the course of the legislation as it was referred to the Senate. (The Court actually granted certiorari on June 10, 1986.) Tribes, concerned that the Court's ruling might adversely affect their position on the legislation, became more willing to compromise. Other parties, believing the Court would rule in favor of State regulation, became more adamant about furthering the position in favor of transferring jurisdiction over Indian gaming activities to the States. Despite significant compromises made by tribes, the Senate failed to pass H.R. 1920 before the adjournment of the 99th Congress.

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

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

Subsequent to reporting the bill, and in further response to administration and State concerns, additional changes were recommended by the Chairman of the Indian Affairs Committee. However, despite efforts to negotiate changes that were acceptable to certain parties, the bill was not considered by the Senate prior to adjournment of the 99th Congress.

LEGISLATIVE HISTORY—100TH CONGRESS

Senators Inouye, Evans, and Daschle introduced S. 555 on February 19, 1987, just 6 days prior to the decision in *Cabazon*. The bill was based in large part on the Senate version of H.R. 1920 that was pending at the end of the 99th Congress. S. 1303 was introduced on June 2, 1988, by Senators McCain, Inouye, and Evans, and reflected certain changes based on the *Cabazon* decision. Senators Hecht and Reid introduced S. 1841 on November 4, 1987.

In the House, Representatives Udall and Bereuter introduced H.R. 1079 on February 10, 1987; Representatives Coelho, Lujan, and Pepper introduced H.R. 964 on February 4, 1987, and Representatives Udall, Young (Alaska), Campbell, Smith (Florida), and Bereuter introduced H.R. 2507 on May 21, 1987. H.R. 3605 (identi-

cal to S. 1841) was introduced by Representatives Vucanovich and Bilbray on November 3, 1987. S. 1303 and H.R. 2507 were identical bills when introduced and H.R. 2507 became the House legislative vehicle for Indian gaming.

On June 18, 1987, the Select Committee on Indian Affairs held a hearing on both S. 555 and S. 1303.

STATEMENT OF POLICY

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 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 the additional views of Senator John McCain, 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 land. 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 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. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Finally, the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*. Under Public Law 83-280, the prohibitory/regulatory distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 States. The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities. The Committee does not intend for S. 555 to be used in any way to subject Indian tribes or their members who engage in class II games to the criminal jurisdiction of States in which criminal laws prohibit class II games.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on May 13, 1988, by unanimous vote and with a quorum present, recommends that the Senate pass S. 555, with an amendment in the nature of a substitute.

HIGHLIGHTS—INDIAN GAMING REGULATORY ACT

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

Class II (bingo, lotto, pull tabs, tip jars, punch boards and card games, with the specific exclusion of banking card games such as chemin de fer, baccarat and blackjack).—Class II continues to be within tribal jurisdiction but will be subject to oversight regulation by the National Indian Gaming Commission; care games must be played under state-mandated hour and pot limits, if any.

Class III (all gaming that is not class I or class II, i.e., banking cards, all slot machines, casinos, horse and dog racing, jai-alai).—Tribes may engage in class III gaming if they enter into tribal-State compacts for the operation of tribal class III games.

Grandfather of existing banking card games.—(1) All card games operated by tribes on or before May 1, 1988 that would otherwise be considered as Class III game under the bill will be treated as Class II games; (2) individually owned class II games licensed by tribes will also be grandfathered. No new class III banking card games will be permitted to be regulated as class II games.

Grace period.—All video machines and other electronic or electromechanical facsimiles of games of chance may continue to operate for 1 year after the date of enactment of the bill to give tribes the opportunity to negotiate tribal-State compacts to cover the operation of such games.

Commission.—The National Indian Gaming Commission will be composed of five (5) persons, three (3) of whom must be members of federally recognized tribes; chairman will be appointed by the President with advice and consent of Senate, and the Department of Justice will conduct background investigations of all appointees.

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

Commission funding.—Operating costs of up to \$3 million per year derived from tribal assessments (50 percent) and congressional appropriations (50 percent). Assessments set on a sliding fee scale from ½ percent to 2½ percent of first \$1,500,000 of gross revenues and up to five (5) percent of amounts in excess thereof; gross revenue is all income less prize money paid, if any, and capital expenditures.

Tribal gaming ordinances.—Required for the operation of a class II or class III game; must be approved by the Commission; tribe must be the sole owner of the gaming enterprise; revenues can be used for tribal government operations, general tribal welfare (including per capita that are subject to Federal income tax), economic development, and charity; for class II, tribe must have system for conducting background checks on key managers and employees and must license such officials; tribes may also license an individual or entity to conduct gaming within the limits of applicable state law.

Management contracts.—Permitted for fees up to 30 percent of net revenues with exceptions of up to 40 percent; Commission must investigate contractors and may disapprove a contract based on such investigation; contract must allow tribal access to daily operations of the game, monthly audits, minimum guaranteed payment to the tribe, and have terms of no more than five (5) years, with exceptions up to seven (7) years.

Review of existing ordinances and contracts.—Commission must notify each gaming tribe of the review process and the tribe must forward existing contracts and ordinances within 60 days; Commission has 90 days to review ordinances and, if such ordinances conform to the act, they are approved; if not, the tribe is notified of needed changes and will have 120 days to comply; for contracts, the Commission has 180 days to review and if they meet the requirements of the act, they are approved; if not, the parties have 120 days to comply (except those contracts previously approved by the Secretary have 180 days to comply).

Civil penalties.—\$25,000 fine for violation of any provision of the act; Commission has the power to close a game or to cancel a contract but must notify the tribe first of an intent to fine, close or cancel; appeals are provided for.

Concurrent jurisdiction.—Tribes may exercise existing tribal governmental authority under tribal law over any gaming.

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

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

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

Criminal penalties.—For theft from Indian gaming activities penalties will range from \$100,000 fine and 1 year in prison to \$1,000,000 fine and 20 years in prison.

EXPLANATION OF MAJOR PROVISIONS

Definitions.—*Class I gaming* is defined in section 4(7). The Committee was hesitant to attempt to define traditional or ceremonial gaming as it is clearly an area of tribal self-government. However, the necessity of classifying all types of gaming requires the mention of this form of gaming and the Committee's intent is to make