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The Indian Gaming Regulatory Act Amendments Act of 1994, S. 2230, (103d Cong., 2d Sess.): A Brief Analysis

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Summary

This report¹ provides a brief analysis of S. 2230, the Indian Gaming Regulatory Act Amendments of 1994 (the Amendments) introduced June 23, 1994, by Senators Inouye and McCain, chairman and vice-chairman of the Senate Committee on Indian Affairs, to amend the Indian Gaming Regulatory Act (IGRA).² It will be divided into five parts: stated purposes, enhanced powers of the National Indian Gaming Commission (the Commission), proposed tribal-state compacting process, modifications of current law with respect to class II gaming, modification of current law with respect to class III gaming; and miscellaneous amendments.

Stated Objectives

The purposes of the Amendments, as stated by Senator Inouye, are: (1) to establish "clear Federal standards" for class II and III gaming on Indian lands; (2) to expand the federal regulatory presence in class III gaming; (3) to institute a process that allows the states to enter into tribal-state compacts to oversee class III gaming or to opt out; (4) to provide a process to determine which games may be subject to compact; (5) to provide a process for a tribe to enter into a compact with the Secretary of the Interior (the Secretary) when a state opts out; (6) to establish a federal licensing system for class II and class III gaming; (7) to prescribe a procedure to take into consideration the interest of all parties when land is taken into trust for gaming purposes; and, (8) to install a mechanism

¹ "Indian Gaming Regulatory Act: Judicial and Administrative Interpretations," CRS Report 93-793A (September 7, 1993), provides general background. American Law Divisions general distribution memoranda are available on: "Applicability of Various Labor Laws to Indian Gaming" (February 24, 1994) and "Taxation of Net Proceeds of Indian Gaming," (March 14, 1994).

² Pub. L. 100-497, 102 Stat. 2467; 25 U.S.C. §§ 2701-2721.

for assessing the cost of federal regulation.³ Not included is any attempt to resolve the question as to how to treat tribes that have been the subject of settlement acts that have addressed the question of civil and criminal jurisdiction on tribal lands.⁴

Enhanced Powers of National Indian Gaming Commission

Under S. 2230, when its members are sworn in, the Commission would be an independent agency, and the current Commission's authority would expire. The Commission's membership would be enlarged from three to five full-time members, no more than 3 of whom may be members of the same political party, one of whom must be a certified public accountant, and one must have experience in law enforcement. All would be presidentially appointed with Senate confirmation; currently, associate members are appointed by the Secretary. Members could be removed from office during their 5-year terms only for cause. Conflict-of-interest provisions would be expanded: no member may pursue any other business, engage in any gaming activities, have a pecuniary interest in a gaming business or contract, or have been convicted of a felony.

The bill treats the Commission under seven categories: general powers, regulatory authority, licensing, hearings, Commission staffing, Commission access to information, and investigations and actions. It states that the Commission is to have law enforcement powers necessary to fulfill the purposes of the legislation, rulemaking authority, investigatory authority, authority to establish fees to be paid by each regulated class II and class III gaming activity, authority to issue orders closing gaming operations, and authority to issue and restrict gaming licenses and to fine persons licensed. It also will have authority to inspect gaming premises, demand access to gaming books and records, serve process, conduct hearings, collect fees and assessments, assess penalties, and provide training for Indian tribal governments.

The Commission is to approve all gaming-related contracts. Under current law, it must approve all management contracts for class II and class III gaming. Its power to regulate Indian gaming is likewise expanded. Current law speaks of monitoring and inspecting class II gaming; this legislation would make it clear that the Commission is to regulate such gaming, issue licenses, conduct background checks, and promulgate standards. Among the matters to be regulated are: background investigations, any gaming licensing, internal control requirements for the operation of Indian gaming, security personnel and systems, rules for play of games, credit and debit collection controls, gaming device controls, and accounting and auditing. The Commission is to inspect and examine premises, monitor background investigations and licensing conducted by tribal governments; monitor and regulate tribal gaming systems' internal controls.

³ 140 Cong. Rec. S 7561 (June 23, 1994) (daily ed.).

⁴ These include the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721, et seq.; the Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701, et seq.; the Florida Indian (Miccosukee) Land Claims Settlement Act, 25 U.S.C. §§ 1741, et seq.; the Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751, et seq.; the Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. §§ 1771, et seq.; the Florida Indian (Seminole) Land Claims Settlement Act, 25 U.S.C. §§ 1772, et seq.; and, the Washington Indian (Puyallup) Land Claims Settlement Act, 25 U.S.C. §§ 1773, et seq.

The Commission is to establish hearing procedures for issuance of licenses for gaming operations, key employees, persons materially involved in gaming operations, gaming related contractors, gaming service industries, and other entities. Final agency action is subject to review in the Circuit Court of Appeals for the District of Columbia.

The Commission is authorized to staff the agency without regard to the provisions of title 5, United States Code, relating to the competitive civil service except that no appointee may receive pay in excess of the annual rate of basic pay payable for ES-5 of the Senior Executive Service; temporary and intermittent appointees would be limited to the daily equivalent of the maximum annual rate of basic pay payable for ES-6. The legislation would also authorize detail of employees from other federal agencies. The Commission is authorized access to other agencies' information not otherwise prohibited by law.

The legislation would authorize the Commission to investigate violations or potential violations of IGRA, to conduct investigations in support of its rulemaking authority, to issue subpoenas and to enforce them in federal district court, and to seek injunctive action in federal district court.

The legislation specifically addresses the type of systems that must be regulated and the persons who must be licensed. It prescribes requirements that each applicant for a license must establish by clear and convincing evidence, including the supplying of information, consent to inspections, and continuing cooperation. It imposes a duty to inform the Commission of actions that violate IGRA. The legislation would specify the requirements for any corporation that is licensed to manage a gaming operation, including that it be incorporated in the United States, various detailed safeguards regarding management, ownership, production of documentation regarding financial stability and integrity, and other disclosures relating to the applicant. With respect to licensing key employees of a class III gaming operation, the legislation specifies that each applicant produce such documentation as to establish by clear and convincing evidence financial stability and integrity, including various specific types of information relating to finances, family, and civil and criminal record. The legislation also makes the key-employee licensing criteria applicable to gaming-related contractors and service industries, but permits the Commission to permit their operating prior to the grant of a license; it also permits the Commission to exempt regulated entities from the licensing requirement upon a finding that licensing is not necessary to protect the public interest.

The Commission's approval is required for any Indian gaming management contracts and gaming-related contract requirements; statutory standards are provided for it to use in evaluating such contracts. It is also required to review existing tribal-state compacts and determine whether they meet the new regulatory and licensing requirements and directly regulate and license gaming under any compacts that do not meet such standards. A similar review of existing contracts is required.

Conduct of Class II Gaming on Indian Lands

One major departure from the IGRA is that although S. 2230 uses the term, "Indian lands," to describe the geographical area on which Indian gaming may occur, it does not define it, possibly opening the way for the Commission or the federal courts to elaborate on its meaning.

Like the IGRA, S.2230 would allocate jurisdiction over class I gaming to Indian tribes. Whether class II gaming may occur would remain unchanged from the regimen established under IGRA. If the gaming is permitted by the state for any purposes and if the gaming is not otherwise specifically prohibited on Indian lands by federal law, it may occur on Indian lands provided licenses are obtained and statutory criteria regarding tribal proprietorship and allocation of revenues are met, and annual outside audits conducted, contracts in excess of \$10,000 annually are audited, the facilities are constructed in a manner protecting the environment and health and safety, and there are adequate tribal systems to insure background investigations and tribal licenses meeting Commission criteria.

Class III Gaming and the Compacting Process

In addition to not defining "Indian lands," and providing for Commission monitoring and oversight of licensing and operations, S. 2230 departs from the IGRA scheme of tribal-state compacting in several ways: providing for a compact with the Secretary of the Interior if a state chooses not to negotiate; providing for an initial determination whether a particular activity is subject to the compacting process; waiving state's immunity from suit; and, providing for compulsory mediation in instances where the negotiation process reaches impasse.

Under S. 2230, no class III gaming may occur unless there is a compact adopted by the governing body of the tribe and approved by the Secretary and the gaming activity is determined to be eligible for inclusion in a compact. Any tribal ordinance approving a gaming activity may be revoked and shall be effective when published in the *Federal Register*, except that gaming operations under a valid compact may continue for one year and the revocation is to be construed not to affect any civil action arising or crime committed before the close of the one-year period.

The compacting process under S. 2230 requires a tribe to request the Secretary to enter into negotiations for a compact for any gaming activity. If, after 30 days the Secretary determines that an activity should not be included in the compact by virtue of not meeting the requirements of the statute, the tribe is to be informed. At the same time the tribe requests the Secretary to enter into negotiations, the tribe is to notify the state. If, within a specified period, the state requests negotiations, it shall be deemed to have waived its sovereign immunity. Any compact negotiated by the state and the tribe is to include provisions regarding the application of civil laws and regulations of the tribe or the state, allocation of criminal and civil jurisdiction between the state and the tribe, assessment by the state of amounts necessary to defray the costs of regulating gaming activities, taxation by the tribe of gaming activity in amounts comparable to amounts assessed by the state for comparable activities, remedies for breach of contract, standards for operation of gaming activities, and other subjects reasonably related to the operation of gaming activities.

The legislation provides a schedule for negotiations between the state and tribe, authority for the federal courts to issue declaratory judgments when there is a dispute between the state and the tribe as to whether a particular activity may be included in a compact, and procedures for mediating disputes and selecting mediators. By stating standards for the courts in deciding which activities are permissible, the legislation differs from IGRA; it, therefore, contains a savings clause attempting to preserve as legal any

activities that are as a matter of federal law, lawful in any jurisdiction on the date of enactment. It would direct the courts to find that a gaming activity is permissible if it is not prohibited as a matter of state criminal law. If the activity is prohibited, it is to be permitted if its principal characteristics are not distinguishable from a gaming activity not so prohibited. The activity may also be permitted, if it is prohibited but allowed subject to regulation or permitted to any person or entity within the state. The legislation would also state that the following types of activities are distinguishable: gaming devices, lottery games, banking games, parimutuel wagering, and other games of chance.

As in current law, approval of the compact is relegated to the Secretary but reasons for disapproval are limited.

Gaming on After-acquired Lands

Under current law, the Secretary of the Interior may take land into trust pursuant to other statutory authority but gaming may not occur on such lands unless land is contiguous to a reservation or is for a tribe that has no reservation. There is also an exception by which the Secretary may take land into trust for gaming, after having consulted with state, local, and officials of other tribes, and having determined that the gaming would be in the best interest of the tribe and not detrimental to the surrounding community, provided the governor of the state in which the gaming activity is to be conducted occurs.

This proposal would alter the process by which the Secretary may authorize gaming on subsequently acquired lands under the general exception by no longer requiring concurrence of the governor but requiring that the Secretary review recommendations of the governor of the state in which the lands are located and any other officials and determine that the gaming would be in the best interest of the tribe and not detrimental to the surrounding community.

Miscellaneous

Definitions are given for terms not currently defined by statute and, thus, now possibly subject to differing interpretations by the federal courts. There are also some definitions that vary with those promulgated by the Commission under IGRA. Among the new definitions are: "banking games," "electronic, computer, or other technologic aid," (which differs from the Commission's current definition by distinguishing slot machines and games of chance from such aids),⁵ "gambling device," "gaming activity," "gaming-related contract," "gaming related contractor," "gaming service industry," "key employee," "lottery game," "principal characteristics," "prohibited as a matter of State criminal law," and, "slot machine."

Civil penalties would be extended to include violations of regulations as well as statutory violations and by anyone (as distinguished from the current law's applicability to tribal operators). Fines would be increased to a maximum of \$50,000 per day.

The Commission would be directed to establish a schedule of fees for both class II and class III gaming activities of no less than 0.5 percent nor more than 2 percent of gross revenues, with adjustments downward for tribal regulatory functions and credits toward next year's fees granted on a pro rata basis should any year's collections exceed expenditures of the Commission. The Commission is to submit its annual budget request, including any request for appropriations, directly to the Congress. A \$5,000,000 authorization of appropriations is to be provided for fiscal years 1996-1998.

There is also a provision that makes it clear that Indian gaming establishments have to report currency transactions in excess of \$10,000 to the Internal Revenue Service and defining Indian Gaming establishments as "financial institutions" for purposes of the Currency and Foreign Transactions Reporting Act. Under current Treasury regulations, although other gambling casinos have been required to file CTR's, Indian gaming casinos have not.

⁵ 25 C.F.R. § 502.7(b). The proposal also differs by requiring that the device not be a gambling device or a slot machine.