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Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 7, 2006

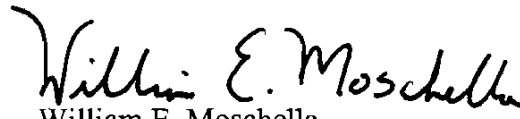
The Honorable J. Dennis Hastert
Speaker
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

I am transmitting herewith a legislative proposal relating to the use of gambling devices as technologic aids in Class II gaming in Indian Country.

We appreciate the opportunity to present this proposal. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget advises that there is no objection to the presentation of this legislation to the Congress.

Sincerely,


William E. Moschella
Assistant Attorney General

Enclosure

IDENTICAL LETTER SENT TO THE HONORABLE RICHARD B. CHENEY, PRESIDENT
OF THE SENATE



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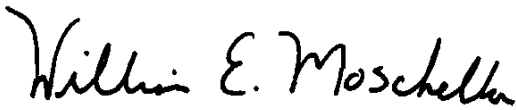
The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

I am transmitting herewith a legislative proposal relating to the use of gambling devices as technologic aids in Class II gaming in Indian Country.

We appreciate the opportunity to present this proposal. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget advises that there is no objection to the presentation of this legislation to the Congress.

Sincerely,


William E. Moschella
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Enclosure

IDENTICAL LETTER SENT TO THE HONORABLE J. DENNIS HASTERT, SPEAKER OF
THE HOUSE OF REPRESENTATIVES

A BILL

To amend the Gambling Devices Act of 1962 to provide for the use of gambling devices as technological aids

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

SECTION 1. SHORT TITLE

This Act may be cited as the "Gambling Devices Act Amendments of 2006".

SECTION 2. CONGRESSIONAL FINDINGS AND PURPOSES

The Congress finds the following:

(1) The Gambling Devices Act of 1962, 15 U.S.C. §§ 1171, et seq. , prohibits the use of gambling devices on Indian lands but there is an express repeal of this prohibition in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, et seq., for Class III gaming conducted pursuant to a tribal-state compact.

(2) There is no express repeal of this prohibition to allow the use of gambling devices as technologic aids in Class II gaming under the Indian Gaming Regulatory Act in either the Indian Gaming Regulatory Act or in the Gambling Devices Act. The Federal Circuit Courts of Appeals are divided on the issue of whether the Gambling Devices Act applies to Class II gaming.

(3) When the Indian Gaming Regulatory Act was enacted, Congress intended that tribes be allowed to use technologic aids in Class II gaming, but that there be clear distinction between the machines used in Class II gaming and those used in Class III gaming under the IGRA.

While Congress intends that the tribes should be allowed to take advantage of the advances in

technology thereby allowing the use of technologic aids that are also gambling devices under certain circumstances, a clear distinction should continue to exist between the gambling machines and devices used in Class II and those used in Class III gaming.

(4) The National Indian Gaming Commission is the federal agency with oversight authority for Class II gaming. In order to allow the use of gambling devices as technologic aids and also maintain a clear distinction between the gambling devices used in Class II and those used in Class III gaming, the National Indian Gaming Commission should issue regulations setting forth the specific requirements for gambling devices that can be used as technologic aids.

SECTION 3. DEFINITIONS

Section 1 of the Act of January 2, 1951 (15 U.S.C. § 1171; commonly referred to as the "Johnson Act") is amended –

(1) by adding after subsection (a) the following new subsection:

"(b) The "application of an element of chance" may occur through

- (i) the operation of the machine, mechanical device, subassembly or essential part alone; or
- (ii) by the insertion into the machine, mechanical device, subassembly or essential part of physical materials or items containing, providing, or supplying the element of chance; or
- (iii) by the connection, linking, or attachment via any means of the machine, mechanical device, subassembly or essential part to another machine or mechanical, electromechanical or electronic device, including computers and computer software or programs, that generate, determine, supply, or provide the element

of chance.”.

(2) by redesignating subsections (b) through (f) as subsections (c) through (g);

(3) in subsection 1171(d), by striking (b) and inserting (c); and

(4) by adding at the end the following:

“(h) The term “Indian Gaming Regulatory Act” means the statute set forth at 25 U.S.C. §§ 2701, et seq.;

(i) The term “National Indian Gaming Commission” means the entity established by 25 U.S.C. § 2704;

(j) The term “Class II gaming” means the term as defined in 25 U.S.C. § 2703(7);

(k) The term “Class III gaming” means the term defined in 25 U.S.C. § 2703(8) and conducted pursuant to a tribal-state compact under 25 U.S.C. § 2710(d) of the Indian Gaming Regulatory Act or pursuant to Secretarial procedures under 25 U.S.C. § 2710 or pursuant to Secretarial procedures under 25 U.S.C. § 2710;

(l) The term “technologic aids” or “technologic aid” means electronic, computer or technologic aids used in Class II gaming defined under 25 U.S.C. § 2703(7)(A)(i); and

(m) The term “Indian country” means the term as defined in 18 U.S.C. § 1151.”.

SECTION 4. TRANSPORTATION OF GAMBLING DEVICES AS UNLAWFUL,
EXCEPTIONS; AUTHORITY OF FEDERAL TRADE COMMISSION

Section 2(c) of the Act (15 U.S.C. § 1172(c)) is amended --

- (1) by striking "Exception" and inserting "Exceptions";
- (2) by inserting "(1)" before "This";
- (3) by redesignating (1) and (2) as paragraphs (A) and (B);
- (4) by adding at the end the following:

“(2) This section does not prohibit the transport of a gambling device to or in a place in Indian Country for use in Class III gaming or for use in Class II gaming where (i) the gambling device has been certified as, or is transported for the purpose of certifying it as, a Class II technologic aid pursuant to regulations adopted by the National Indian Gaming Commission; and (ii) the use of the gambling device in Class II gaming is conducted pursuant to the requirements of the Indian Gaming Regulatory Act and regulations adopted by the National Indian Gaming Commission.”.

SECTION 5. SPECIFIC JURISDICTION WITHIN WHICH MANUFACTURING, REPAIRING, SELLING, POSSESSING, ETC. PROHIBITED; EXCEPTIONS

Section 5 of the Act (15 U.S.C. § 1175) is amended by adding at the end of Section 1175 the following:

“(d) Exception

- (1) This section does not prohibit the repair, sale, transport, possession, or use of any gambling device within Indian country if –
 - (A) the gambling device is used in Class III gaming; or

(B) the gambling device has been certified as, or is

transported for the purpose of certifying it as, a Class II technologic aid pursuant to regulations adopted by the National Indian Gaming Commission.

(2) The provisions of this Section shall not bar the continued use until no later than 18 months after the date of the enactment of this Act for gambling devices used as technologic aids that were in actual operation on the date of enactment of this Act, if the gambling device remains in operation at the same location where the gambling device was located and in actual operation on the date of enactment of this Act, and either (i) the Chairman or General Counsel of the National Indian Gaming Commission had issued a written advisory opinion prior to the date of enactment of this Act, concluding that the gambling device was Class II unless a federal court has adjudicated otherwise, or (ii) a United States Circuit Court of Appeals ruled prior to the date of enactment of this Act, that the gambling device was Class II.”.

SECTION 6. PROHIBITED ACT

Section 5 of the Act (15 U.S.C. § 1175) is amended by adding at the end the following:

“(e) Altering technologic aids after certification

It shall be unlawful for any person to alter any gambling device, including alterations of computer programs, software or electrical components therein, after certification as a Class II technologic aid pursuant to regulations adopted by the National Indian Gaming Commission pursuant

to this Act, unless the alteration itself has been certified by the National Indian Gaming Commission pursuant to these such regulations”.

SECTION 7. ADMINISTRATION

Section 5 of the Act (15 U.S.C. § 1175) is amended by adding at the end the following:

“(f) Regulations

The National Indian Gaming Commission shall adopt or amend regulations pursuant to the Indian Gaming Regulatory Act, governing the use of gambling devices as class II technologic aids which are consistent with subsection 1175(d) of this Act. Such regulations shall maintain a distinction between the gambling devices used as technologic aids in Class II gaming and those gambling devices used in Class III gaming based upon the internal and external characteristics of the gambling devices and the manner in which the games utilizing such gambling devices are played.”.

SECTION 8. PENALTIES

Section 6 of the Act (15 U.S.C. § 1176) is amended by striking “fined not more than \$5,000” and inserting “fined under title 18, United States Code,”.

SECTION 9. CONFORMING AMENDMENTS

(1) Section 4(7)(B)(ii) of the Indian Gaming Regulatory Act (25 U.S.C. § 2703(7)(B)) is amended by adding at the end the following: “unless the use of the slot machine of any kind is permitted by the exception set forth in 15 U.S.C. § 1175(d)(1)(B).”; and

(2) Section 4(7) of the Act (25 U.S.C. § 2703(7)) is amended by adding at the end the following:

“(G) Notwithstanding any other provision of this Act, “Class II gaming” is also subject to the Gambling Devices Act, 15 U.S.C. §§ 1171, et seq.”.

SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

This section provides that this act may be cited as the “Gambling Devices Act of 2006.”

Section 2. Congressional Findings and Purposes

This section provides congressional findings and purposes for this Act.

Section 3. Definitions

This section amends 15 U.S.C. § 1171 to add new definitions. A new subsection 1171(b) is created to clarify that “the application of an element of chance” for a gambling device can be generated by either the operation of the machine itself, by the insertion of a physical item that generates the element of chance into the machine, or by the connection of the machine to another machine, including a computer, that generates the element of chance. This amendment is in response to court decisions, such as United States v. Santee Sioux, 324 F.3d 607 (8th Cir. 2003). In the Santee Sioux decision, the Eighth Circuit held that Lucky Tab II was not a gambling device because the machine itself did not generate the element of chance. Rather, it was the deal of paper pulltabs that was inserted into the machine that generated the element of chance. Prior cases, however, held that the machines were gambling devices where the element of chance was based upon the insertion of items into the machine. See United States v. Wilson, 475 F.2d 108 (9th Cir. 1973) (Court found that two types of machines constituted gambling devices -- bead ball” machine where the element of chance was provided by the sheets of paper inside bead balls that were inserted into the machine and if the number of the paper matched a number on a placard on the machine then the player won a prize; and “Bonanza” machine where machine dispensed ticket and the ticket was visible through a glass viewer prior to insertion of money into the machine.)

This section also adds definitions for the terms “Indian Gaming Regulatory Act,” “National Indian Gaming Commission,” “Class II gaming,” “Class III gaming,” “technologic aids,” and “Indian country.” These definitions are being added to Section 1171 because these terms are used in the proposed amendments to Sections 1172, 1175, 1176, and 1177.

Section 4. Transportation of Gambling Devices as Unlawful; Exceptions

In order to permit the use of gambling devices as technologic aids to Class II gaming under the Indian Gaming Regulatory Act (IGRA), 15 U.S.C. § 1172 is amended to permit the transportation of gambling devices to tribal casinos for use in Class II gaming where gambling devices meet certain requirements set forth in Section 1175 and to permit the transportation of such devices to obtain certification as a Class II device.

Section 5. Specific Jurisdiction within which Manufacturing, Repairing, Selling, Possessing, etc. Prohibited; Exceptions

Section 1175 of Title 15, United States Code, makes it “unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device . . . within Indian country.” The Indian Gaming Regulatory Act expressly repealed this prohibition for Class III gaming conducted pursuant to a Tribal-State compact in 25 U.S.C. § 2710(d)(6). There is, however, no express repeal of Section 1175's prohibition on the use of gambling devices for Class II gaming in the IGRA. A new subsection 1175(d) is created by this bill to provide an express exception allowing the use of gambling devices as technologic aids to Class II gaming under certain circumstances.

There is a split among the Circuit Courts of Appeals as to whether the IGRA repealed the Johnson Act's prohibition on the use of gambling devices in Indian country for Class II gaming using technological aids. In United States v. Santee Sioux Tribe of Oklahoma, 324 F.3d 607 (8th Cir. 2003), the Eight Circuit held that the IGRA did not repeal the Johnson Act with respect to Class II gaming, thus holding that the use of Johnson Act gambling devices as technological aids to uncompact Class II gaming was prohibited. The court then went on to find that the machine at issue was not a gambling device as that term is defined by the Johnson Act. In contrast, the Tenth Circuit in Seneca-Cayuga Tribe of Oklahoma v. NIGC, 327 F.3d 1019 (10th Cir. 2003) and United States v. 162 MegaMania Gambling Devices, 231 F.3d 712 (10th Cir. 2000) and the Ninth Circuit in United States v. 103 Electronic Gambling Devices, 223 F.3d 1091 (9th Cir. 2000) found that the IGRA did permit the use of gambling devices as technologic aids. The Supreme Court's denial of certiorari on this issue in the Santee Sioux and Seneca Cayuga cases did not resolve this issue. In an earlier case, the D.C. Circuit in Diamond Game Enterprises, Inc. v. Reno, 230 F.3d 367, 367 (D.C. Cir. 2001) stated that the National Indian Gaming Commission (NIGC) “regulations and this court have interpreted IGRA as limiting the Johnson Act's prohibition to devices that are neither Class II games approved by the Commission nor Class III games covered by tribal-state compacts.”

There is a great need to clarify what gambling devices may be used in Class II gaming. Due to advances in technology, there may be machines that fall both within the definition of a gambling device under the Johnson Act and within the definition of a technologic aid under IGRA as some courts have interpreted this term. Additionally, while some machines that are claimed to be technological aids may internally differ from slot machines, the external appearance, including graphics, of such machines to the players and the speed of play of such machines has become virtually indistinguishable from machines that are classified as Class III gaming.

Section 5 of the bill creates a new subsection within 15 U.S.C. § 1175 that provides an exception to permit the use of gambling devices in Indian country under certain circumstances. Section 1175(d)(1)(A) sets forth an exception for the use of gambling devices in Class III gaming pursuant to a Tribal-State compact. This exception already exists in IGRA at 25 U.S.C. §

2710(d)(6) but no conforming amendment to the Johnson Act was made at the time of the IGRA's enactment in 1988. Thus, this exception is repeated in the Johnson Act solely for clarity and to eliminate the need to refer to another statute in order to find an exception to the Johnson Act.

Section 1175(d)(1)(B) creates a new exception for the use of gambling devices as technologic aids in Class II gaming. This exception, however, does not apply to all gambling devices. Rather, this exception only permits the use of gambling devices as technologic aids where the gambling device is certified as meeting the requirements set forth in regulations adopted by the National Indian Gaming Commission pursuant to this Act.

Section 1175(d)(1)(B) also allows for the transportation of devices for the purpose of seeking certification. This exception is not intended to permit the use of such machines by patrons or the display of such machines to patrons. Pursuant to this Act, the National Indian Gaming Commission may promulgate regulations that may include the process for certification. Entities that may be permitted to submit machines for certification may include manufacturers, suppliers, game developers, and Tribes. Thus, there may be instances where a Tribal authority may be in possession of a machine or transporting a machine prior to such a machine being certified as a Class II technologic aid.

Section 1175(d)(2) provides a grandfather clause for existing machines if there is a prior judicial opinion or written advisory opinion from the National Indian Gaming Commission ruling that the machine was a Class II machine. If the machine is a gambling device and it does not meet the requirements set forth in this bill, then the Tribes may continue to use the machine for a period of eighteen months after enactment only if there was a prior judicial decision or an advisory opinion from the NIGC holding that such machine constituted Class II gaming.

Section 6. Prohibited Act

Section 6 of the bill creates a new subsection 1175(e) that makes it unlawful to alter any technologic aids after certification by the National Indian Gaming Commission, unless, of course, the alterations are upgrades or fixes that have themselves been certified. This provision is necessary because most gambling devices today are software based machines, and because of the ease with which the software on the machine can be changed. The National Indian Gaming Commission has experience with game software where one version is Class II and another, not all that different is Class III. This provision prohibits the alteration of machines, including alteration of software, without a certification that the altered game is a Class II game.

Section 7. Administration

Section 7 of the bill creates a new subsection 1175(f) which requires the National Indian Gaming Commission to issue or amend regulations to conform to the requirements of this act. This provision is included to make it clear that the NIGC has the authority to issue such

regulations given that the Johnson Act is not a statute within the purview of the Commission.

Further, such regulations shall maintain a distinction between the gambling devices used in Class II gaming and those used in Class III gaming based upon the internal and external characteristics of the gambling devices and the manner in which the games utilizing such gambling devices are played. Thus, such regulations are to include specific requirements for gambling devices that are to be used as technologic aids.

Section 8. Penalties

Section 8 of the bill amends Section 1176 to increase the amount of a fine for a violation from \$5,000 to “fined under title 18, United States Code.” Since the Johnson Act is in title 15, United States Code, the amount of the fine for a violation has not been changed since this section was enacted in 1951. While \$5,000 was a substantial sum in 1951, it is not a significant sum in the gaming business in 2006. Indeed, the amounts of fines set forth in 18 U.S.C. § 3571 range from not more than \$250,000 for a felony violation to not more than \$10,000 for a Class B or C misdemeanor that does not result in death. Additionally, the National Indian Gaming Commission currently has the authority under IGRA to impose civil penalties of \$25,000 per violation. Thus, the amount of the fine in Section 1176 is increased to a fine “under title 18, United State Code” in order to provide a sufficient deterrent for violations.

Section 9. Conforming Amendments

Section 9 of the bill contains conforming amendments to IGRA. While the purpose of this bill is to amend the Johnson Act, there would still be some language in IGRA that might preclude the use of these machines. The first conforming amendment revises 25 U.S.C. § 2703(7)(B)(ii) to add “unless the use of the slot machine of any kind is permitted by the exception set forth in 15 U.S.C. § 1175(d)(1)(B).” This addition is made because it is unclear if the term “slot machine of any kind” is limited to slot machines that employ drums or reels. If not, then gambling devices permitted under the Johnson Act by this bill would not be permitted under IGRA because they would be “slot machines of any kind.” The second conforming amendment is intended to clarify that the Johnson Act applies to Class II gaming. This bill permits the use of gambling devices as Class II technologic aids if the machines meet the requirements set forth in subsection 1175(d). The use on Indian lands of any machine that is a gambling device and does not meet these requirements set forth in Section 1175(d) is still prohibited under Section 1175 of the Johnson Act.