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# REPORT TO THE LEGISLATURE ON THE STATUS OF INDIAN GAMBLING IN MINNESOTA

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## I. INTRODUCTION.

During the past decade Minnesota, like many states across the country, has experienced explosive growth in the area of legalized gambling. Since 1980, the state has legalized pull-tabs, pari-mutuel betting on horse races, a state lottery and off-track betting. Gross receipts for legalized gambling in 1985 were slightly under $200 million. By 1990, Minnesotans wagered slightly more than $2 billion on the various legal forms of gambling, ten times the amount wagered only five years earlier.1/ While pull-tabs continue to account for most of the 1990 gross wagers ($1.14 billion), during the past year, the fastest growing form of gambling in Minnesota has been Indian gambling. High stakes bingo, pull-tabs, blackjack and video gambling generated gross receipts of approximately $400 million in 1990 for the eleven Indian Bands and Communities in our state.

This report is intended to provide an overview of Indian gambling activities in Minnesota. It is submitted in response to a 1991 legislative requirement that the Governor, the Attorney General and the Governor's designated Tribal-State compact negotiators report semi-annually to the legislature on the status of Indian gambling and compact negotiations.2/ Because this is the first report of its kind, we have included a summary of the federal law that forms the basis for Indian gambling. In addition, we have identified areas of current concern and have tried to forecast what the future may hold for us in the area of Indian gambling.

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1/ A chart showing the growth of legalized gambling in Minnesota between 1985 and 1990 is attached.

2/ Minn. Laws 1991, ch. 336.

## II. THE LEGAL BASIS FOR INDIAN GAMBLING.

Indian gambling developed out of the complex relationship between the Federal government and the Indian tribes. Over the years, Indian tribes have retained significant aspects of their independence and sovereignty. Recognition of that independence and sovereignty has been an integral component in the federal government's policy toward Indian tribes over the past several decades. The federal courts addressing the issue of Indian gambling have repeatedly cited principles of Indian sovereignty as a basis for their decisions. Congress, when developing the Indian Gaming Regulatory Act, recognized and advanced the interests of Indian tribes in retaining significant governmental authority and control over gambling activities on their land. Hence, no discussion of Indian gambling is complete without a brief overview of Indian sovereignty.

### A. Indian Sovereignty.

Prior to the settling of America by Europeans, the Indian tribes occupying the territory were full sovereigns, and were recognized as such by European governments. The European countries that "discovered" America claimed exclusive title to the discovered lands--good against all other discovering countries, but subject to the sovereign rights of the tribes that already resided here. The discovering countries also had the exclusive legal right to negotiate with the Indian sovereigns for the acquisition of territory.

When the United States was formed, Indian tribes were considered to have been brought under the "overriding" sovereignty of the United States, but they still retained significant aspects of their independence and sovereignty. Some of the earliest U.S. Supreme Court opinions describe Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within

those boundaries, which is not only acknowledged, but guaranteed by the United States."3/ More recent Supreme Court opinions echo this fundamental principle:

> . . . it is nonetheless still true, as it was in the last century, that "[t]he relation of the Indian tribes living within the borders of the United States...[is] an anomalous one and of a complex character....They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." United States v. Kagama, 118 U.S. at 381-382.4/

Over the years, the sovereign powers of Indian tribes have been limited in two fundamental ways. First, some of the tribes' original sovereignty has been lost as a result of their incorporation into the territorial limits of the United States. In finding that tribes did not have inherent sovereign criminal jurisdiction over non-Indians on reservations, the Supreme Court concluded:

> Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.5/

Other aspects of sovereignty that were similarly lost included the fundamental rights to engage in foreign relations and to sell their land without the consent of the United States.

The second way that the sovereign powers of tribes were limited was through treaties or federal statutes. Congress has, within broad constraints, almost complete authority to alter or limit the retained sovereignty of Indian tribes. The Supreme Court has stated that "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."6/ In the same decision, the Supreme Court concluded that some of the tribes'

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3/ Worcester v. Georgia, 6 Pet. 515, 557, 8 L. Ed. 483, 499 (1832).

4/ McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 173 (1973).

5/ Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

6/ United States v. Wheeler, 435 U.S. 313, 319 (1978).

sovereign powers were given up by treaty, and that "by statute, in the exercise of its plenary control, Congress has removed still others."7/

Although Congress by federal statute can limit tribal powers of sovereignty, it is important to understand that states cannot do likewise. The general rule in the field of Indian law (subject to certain exceptions) is that unless there is a specific delegation of authority provided by Congress, state laws do not apply to Indians on reservations.

Thus, Indian tribes are "semi-sovereign" entities, or "distinct, independent political communities" within the borders of the states in which they reside. Tribes have significant governmental authority over people and land within their reservations. Their sovereign powers can be limited or defined by act of Congress or, in some cases, those powers may have been implicitly lost when tribes became subject to the overriding sovereignty of the United States. States, however, are very limited in the ways they can have any direct effect on Indian residents of reservations, or on the exercise of the tribal sovereign powers within reservations.

### B. Federal Policy Toward Indians.

Federal policy toward Indians and tribal governments has swung wildly over the past two centuries. Throughout much of the 1800's, the federal government sought to keep Indians separated from non-Indians, and relatively little attention was paid to how the tribes governed themselves. That policy changed in the late 1800's. For a variety of reasons, federal policy shifted and efforts were made to break down tribal relationships in general and tribal governments in particular. The goal during most of the years between 1880 and 1930 was to assimilate Indians into the dominant culture, and to end the reservation and tribal governmental system. In these years, reservations were surveyed, lands were deeded to individual Indians in 80 or 160 acre allotments, and lands "not needed" for individual allotments were sold to non-Indians who were encouraged to settle on them. During these years, tribal

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7/ Id. at 323.

land holdings were vastly diminished, tribal governments were greatly weakened or eliminated, and Indian social and economic problems expanded.

Federal policy was reversed in the 1930's. The federal government began to embark on a program which promoted tribal sovereignty, Indian culture, tribal government, and tribal ownership of land. The federal government again treated Indian communities as separate independent political entities. The Indian Reorganization Act, a federal statute passed in 1934, in many ways marked the beginning of this new era. This act repudiated the assimilation policies of the past, and ended all further allotments of reservation land to individual Indians and most sales to non-Indians. It authorized the Secretary of Interior to restore to tribal ownership any remaining unsold land. It appropriated money for the purchase of additional land for tribes. Finally, it provided for a process by which tribes could organize under federal supervision for purposes of self-government.

The policy of promoting tribal independence faced a temporary setback in the 1950's and early 1960's. For a short time, the federal government returned to the previous policy of trying to terminate reservations and tribal governments, and promoting assimilation of Indians into the dominant culture.

This policy, however, faced its own reversal in the late 1960's, when the federal government returned to its objective of promoting tribal independence and the exercise of tribal governmental authority. Several laws have been passed during the last 20 to 30 years which have furthered this policy, including the Indian Civil Rights Act of 1968, the Indian Financing Act of 1974, the Indian Self-Determination and Education Act of 1975, the Indian Child Welfare Act of 1978, and the Indian Tribal Government Tax Status Act of 1982. The Indian Gaming Regulatory Act of 1988 is an extension of the current federal policy toward the promotion of tribal governments and tribal independence.

Although federal Indian policy has bounced back and forth over the years, we are now in the third decade of relatively consistent federal encouragement of tribal independence. Congress and executive branch agencies have promoted tribal government, funded tribal

enterprises, and trained tribal personnel. As a result, tribal governments have become more sophisticated and more powerful. Tribal court systems have been established on many reservations and reservation residents and reservation lands are subject to greater tribal jurisdiction. This is the setting for the current growing involvement by Minnesota Indian tribes in large-scale gambling enterprises.

### C. State Authority Over Indians and Indian Gambling

As mentioned, the federal courts have consistently recognized that Indian tribes retain attributes of sovereignty over their members and territory. State laws may be applied to Indians on their reservations only if Congress has expressly so provided. In 1953, Congress granted six states, including Minnesota, jurisdiction over specified areas of Indian country. Minnesota was granted civil and criminal jurisdiction within all Indian country inside its borders except the Red Lake Reservation.8/

However, this broad congressional grant of authority, commonly referred to as Public Law 280, was narrowly interpreted in succeeding federal court decisions.9/ The first significant interpretation of Public Law 280 occurred in 1976 when the United States Supreme Court issued a landmark decision in the case of Bryan v. Itasca County.10/ In this case, the Court concluded that notwithstanding the apparent broad grant of civil jurisdiction given to the State of Minnesota by Public Law 280, Congress did not intend to grant general civil regulatory authority to states within Indian country. As a result, Minnesota was prohibited from applying its personal property tax to Indians within the Leech Lake Reservation. Subsequent federal court decisions created the general rule that only those state laws deemed "criminal" in nature could be enforced on Indian land. Thus, before a state may seek to enforce one of its laws

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8/ In 1975, the State retroceded criminal jurisdiction to the Nett Lake (Bois Forte) Band of Chippewa. Minn. Laws 1973, Ch. 625.

9/ Public Law 280 is codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360.

10/ Bryan v. Itasca County, 426 U.S. 373 (1976).

within an Indian reservation under the authority of Public Law 280, it must first be determined whether the law is criminal or civil in nature.

The ruling in the Bryan case was adopted and further expanded by the federal courts in a line of cases concerning the application of state bingo laws on Indian land. In 1981, the United States Court of Appeals for the Fifth Circuit concluded that the State of Florida could not enforce its charitable bingo statute on the Seminole Indian Reservation, even though violation of the law constituted a crime.11/ In deciding the case, the court created a distinction between "criminal/prohibitory" laws and "civil/regulatory" laws. Under the court's analysis, a law must be criminal in nature and prohibit a form of gambling as against the public policy of the state before it will be deemed a criminal/prohibitory law. In the case of bingo, Florida law permitted bingo, subject to strict regulation. Therefore, the court found Florida's bingo statute to be civil/regulatory and unenforceable on the Seminole Reservation.

The civil/regulatory and criminal/prohibitory test was applied in succeeding federal cases, including the Supreme Court's 1987 decision in California v. Cabazon Band of Mission Indians.12/ In the Cabazon case, the Court established the following test to determine if a state gambling law could be enforced on Indian land:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the state's public policy.13/

In finding California's bingo law civil/regulatory in nature, the Court stated what has become the most quoted passage of the Cabazon opinion. The Court said:

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11/ Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

12/ California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); Barona Group of Capitan Grande Band v. Duffy, 694 F.2d 1185 (9th Cir. 1982), cert. denied, 461 U.S. 929 (1983); Oneida Tribe of Indians v. Wisconsin, 518 F. Supp. 712 (W.D. Wis. 1981).

13/ California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987).

> In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular.14/

This single sentence provided the basis for tribal interests to argue that the Cabazon opinion surpassed bingo by applying the criminal/prohibitory and civil/regulatory dichotomy to other forms of "gambling". It is perhaps that one sentence, and the arguments that flowed from it, that finally, after years of debate, prompted Congress into action.

### C. The Indian Gaming Regulatory Act.

On October 17, 1988, President Reagan signed into law the Indian Gaming Regulatory Act (hereinafter the "IGRA"), codified at 25 U.S.C. §§ 2701-2721 (1988). The IGRA provides a regulatory scheme to govern various forms of gambling on Indian reservations. The law represents a Congressional compromise among conflicting interests to arrive at a mechanism for determining when, and under what circumstances, gambling may be conducted on Indian land. Congress declared the purposes of the IGRA to be: (1) to provide a statutory foundation for Indian gambling operations as a means of promoting economic development, self-sufficiency and strong tribal government; (2) to prevent the infiltration of organized crime and other corrupting influences; and (3) to establish federal regulatory authority, federal standards and a National Indian Gaming Commission.

In an attempt to accomplish these purposes, Congress divided gambling on Indian lands into three categories. Class I gaming consists of "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." Class II gaming includes bingo and, if played at the same location as bingo, "pull-tabs, lotto, punchboards, tip jars, instant bingo and other games similar to bingo" and certain non-banking card games, provided the gaming is located in a state that permits such gaming for any purpose by any person, organization or entity, and the gaming

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14/ California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

is not otherwise prohibited by federal law. The Act expressly excludes from the definition of Class II gaming any banking card games, including blackjack, and electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.15/ Class III gaming is defined as "all forms of gaming that are not Class I gaming or Class II gaming." Class III games are lawful on Indian lands only if the games are:

> (A) authorized by an ordinance or resolution that--
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> (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
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> (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.

Thus, not all Class III gaming is legal on Indian lands in every state. Only those games that a state permits for any purpose may be conducted on Indian lands within that state. This language has, however, been interpreted very broadly by the federal courts. The United States Court of Appeals for the Second Circuit concluded that because certain games of chance were permitted in Connecticut for charitable fundraising purposes, commercial casino gaming was permitted on the Mashantucket Pequot reservation.16/

An even broader and more troubling decision was issued on June 18, 1991 by a Federal District Court in Wisconsin. In that case, the court concluded that because Wisconsin does not expressly prohibit certain forms of Class III gaming, those games are permitted on Indian lands in Wisconsin. The court found that because of the amount of gambling permitted in

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15/ A banking card game is a game where the individual players play against the house rather than against each other. Blackjack, baccarat and chemin de fer are the most common banking card games.

16/ Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024 (2nd Cir. 1990), cert. denied, 111 S.Ct. 668 (1991).

Wisconsin, the policy of the State of Wisconsin toward gambling was regulatory rather than prohibitory in nature.17/

Class III games may not be conducted unless a Tribal-State compact (agreement) governing the specific form of gambling is in effect. A tribe desiring to conduct Class III gaming must ask the state (typically the Governor) to negotiate a Tribal-State compact governing the Class III games. The state must negotiate with the tribe in good faith to enter into such a compact.

A tribe may initiate a lawsuit in Federal District Court if, after 180 days from the tribe's request to negotiate, a compact has not been reached and the state has failed to negotiate or has failed to negotiate with the tribe in good faith. In determining whether the state has negotiated in good faith, the federal court may consider "public interest, public safety, criminality, financial integrity and adverse economic impacts on existing gaming activities." If the court finds that the state has failed to negotiate in good faith, the court must order the state and the tribe to conclude a compact within a sixty-day period. Failure to agree to a compact within the sixty-day period may result in the appointment of a mediator who is authorized to select from the last, best offer of both parties, the compact which best comports with the IGRA. Should the state fail to agree with the mediator's selected compact, the law permits the mediator to notify the Secretary of Interior who, "in consultation with the Indian tribe" shall prescribe procedures to govern Class III gaming on the lands over which the tribe exercises jurisdiction.18/

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17/ The gambling activities at issue were blackjack, roulette, slot machines, poker, craps, off-track betting and sports book. Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin, ___ F. Supp. ___, No. 90-C-408-C (W.D. Wis. June 18, 1991).

18/ This is precisely the situation in Connecticut between the State and the Mashantucket Pequot tribe. The State of Connecticut refused to negotiate with the tribe over Class III casino gaming arguing that the Connecticut law permitting highly regulated "casino nights" for charitable fundraising purposes did not form the basis for the full spectrum of commercial casino gambling on the Mashantucket Pequot reservation. The tribe sued the state under the IGRA and won. Connecticut is now faced with having to accept the regulatory procedures prescribed by the Secretary of Interior for the Class III casino under development on the tribe's reservation.

## III. REGULATION OF INDIAN GAMBLING.

The three classes of gaming contained in the IGRA provide the basis for a division of regulatory responsibility.19/ Tribes have exclusive authority to regulate Class I gaming. Class II gaming is also regulated by the tribes but falls under the jurisdiction of the National Indian Gaming Commission. Class III gaming, if not prohibited by state law and public policy, is subject to state regulation under the terms of a negotiated Tribal-State compact. A brief discussion of the regulatory responsibility of each governmental entity follows.

### A. Tribal Responsibilities.

The IGRA specifically allows Indian tribes to exercise regulatory authority over all forms of gambling on Indian lands, provided that the regulation is not: (1) inconsistent with the IGRA or the regulations adopted by the Commission; or (2) less stringent than the state laws or regulations made applicable to the Indian tribe by any Tribal-State compact. Indeed, the IGRA requires Indian tribes to adopt an ordinance governing the conduct of any gaming activity. The ordinance must ensure that the tribe will have the sole proprietary interest in and responsibility for the conduct of any gaming activity and must provide for the licensing of all gaming facilities, management officials and key employees. Licenses may only be issued after the completion of background investigations and after the results of the background investigations have been submitted to the National Indian Gaming Commission (hereinafter the "NIGC").

The ordinance must also provide for an annual outside audit of the gaming enterprise, which includes a review of all contracts for supplies, services or concessions in excess of $25,000

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19/ For purposes of this section, regulatory responsibility consists only of the civil requirements imposed on Indian gambling activities. Criminal enforcement is discussed in section IV of this report.

annually (except legal and accounting services). The results of the audit must be provided to the NIGC.

Finally, the ordinance must prohibit the use of net revenues from any gaming for purposes other than to: (1) fund tribal government; (2) provide for the general welfare of the tribe and its members; (3) promote tribal economic development; (4) donate to charity; (5) help fund local governmental agency operations. Payments to individual tribal members must meet the standards contained in the IGRA and must receive the prior approval of the Secretary of the Interior. Violations of the ordinance or the failure to enact such an ordinance fall within the jurisdiction of the National Indian Gaming Commission.

B. Federal Responsibility.

Under the IGRA, the Federal Government assumes the bulk of oversight over Indian gambling operations. Most of that authority rests with the NIGC. The NIGC is composed of three full-time members, two of whom must be enrolled members of an Indian tribe. Although authorized in 1988 by the passage of the IGRA, appointments to the NIGC were not completed until April, 1991.20/ Under the IGRA, the Commission has the authority and responsibility to:

(1) monitor Class II gaming;
(2) inspect the premises and audit books and records relating to Class II gaming;
(3) issue temporary or permanent orders closing a tribal gaming activity for violation of the IGRA or the regulations of the Commission; and
(4) issue civil fines up to $25,000 per violation.

The Commission is required to review and approve all tribal ordinances required by the IGRA, (including those authorizing Class III gaming), to receive the results of the annual tribal audits required by the IGRA and to receive the results of background investigations on

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20/ The three members of the NIGC are Anthony J. Hope, Chairman; Joel Frank; and Jana McKeag.

management officials and key employees and object to their employment if they do not meet the standards prescribed by the IGRA.21/

Although the IGRA requires that any gaming actually be owned and operated by the Indian tribe, the IGRA specifically permits tribes to enter into contracts with non-Indian entities for the management of Class II or Class III gaming activities.

Perhaps the most significant power of the Commission lies in its ability to approve or disapprove management contracts. Before approving a management contract for Class II gaming, the Commission is required to determine the identity of each person or entity having a direct financial interest in or management responsibility for the management contract, a description of such persons' previous involvement in the gaming industry, including Indian gaming, and a financial statement from each person.22/

Nevertheless, any management contract must provide for adequate accounting procedures, access to the daily gaming operations by appropriate tribal officials, a minimum guaranteed payment to the Indian tribe, and grounds for termination of the contract. A management contract may not exceed five years, except that the contract term may be extended to seven years if the Chairman of the NIGC is satisfied that the capital investment or income projections require the additional time.

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21/ A tribal license may not be issued to:

> . . . 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. . . . 25 U.S.C. § 2710(b)(2)(F)(II).

22/ The standards for approval of Class II management contracts are more stringent than the standards for approval of a contract governing Class III games. This same information is not required for approval of a Class III management contract. See 25 U.S.C. § 2710(d)(9) and § 2711.

Finally, no Tribal-State compact governing Class III gaming can be effective without the prior approval of the Secretary of the Interior. The Secretary may only disapprove a compact if it violates any provision of the IGRA or other federal law, or if the compact would violate the trust obligations of the United States to Indian tribes.

C. State Responsibilities.

The State may not regulate in any fashion Class I or Class II gaming conducted by an Indian tribe. Moreover, the IGRA specifically prohibits the State from assessing any fee, tax, charge or assessment on an Indian tribe except an assessment agreed to by the tribe for the purpose of defraying the costs of state regulation of Class III gaming.

The State may, however, regulate Class III gaming under the provisions of a Tribal-State compact negotiated and agreed to by the State and an Indian tribe. A compact negotiated under the IGRA may include provisions relating to: (1) the application of criminal and civil laws and regulations directly related to and necessary for the licensing and regulation of the gambling; (2) the allocation of civil and criminal jurisdiction necessary for the enforcement of those laws and regulations; (3) assessments by the state necessary to defray the costs of regulation; (4) taxation by the tribe; (5) remedies for breach of contract; (6) standards for the operation of the gambling; and (7) any other subjects directly related to the operation of the gambling.

The federal courts have indicated that Congress did not intend a Tribal-State compact to include the entire body of state law governing Class III gaming activities. Indeed, insistence on a strict application of state regulations may preclude the consummation of a compact and subject the state to a finding of bad faith in federal court.

1. Compact negotiations in Minnesota.

a. The video games of chance compacts.

On July 14, 1989, Governor Perpich appointed a three-member committee to negotiate with the Indian Bands and Communities. The committee consisted of State Senator Ron Dicklich, State Representative Becky Kelso and then Revenue Department Attorney Dorothy McClung.23/ The Attorney General was appointed legal counsel to the committee.

Representatives of Minnesota Indian bands met formally with the state negotiating committee on numerous occasions between August 2, 1989 and October 13, 1989. The negotiating committee indicated its willingness to negotiate and enter into compacts governing Class III video games of chance and, perhaps at a future date, lotteries. However, the committee indicated that Minnesota law, the state constitution or public policy prevented it from entering into Tribal-State compacts concerning any other form of Class III gaming.24/

On October 20, 1989, Governor Perpich signed Tribal-State compacts with seven Indian tribes regarding only the operation of Class III video games of chance. Subsequently, Governor Perpich signed two additional video compacts. Governor Carlson signed video compacts with the two remaining Indian bands in the spring of 1991. The eleven compacts, which are virtually identical, establish: (1) duration and procedures for renegotiation; (2) the allocation of regulatory and criminal jurisdiction; (3) regulatory standards for the operation of the games and the employment of staff; (4) qualifications for distributors and lessors of the video games; (5) extensive technical specifications for the video games; and (6) remedies for violation of the compact. An example of one such compact is attached.

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23/ Upon Dorothy McClung's departure from state service, Governor Perpich appointed Lottery Director George Andersen as Chair of the Tribal-State compact negotiating committee. Governor Carlson subsequently changed the composition of the Committee to include Tom Gilbertson as Chair, State Senators Charlie Berg and Pat McGowan, State Representative Gil Gutknecht and Lottery Director George Andersen.

24/ The tribes had requested sports bookmaking, casino gambling and off-track betting on horse races.

The compacts were designed to address two fundamental concerns shared by the members of the negotiating committee: the qualifications of the employees at any Indian gambling facility and the security of the video gambling equipment used at the reservation facilities. With these concerns in mind, the negotiating committee included in the video compact provisions relating to criminal jurisdiction, the licensing of employees, and the inspection and testing of the video gambling devices. Those compact terms may be summarized as follows:

(1) Jurisdiction: Although the allocation of jurisdiction varies slightly in the nine compacts depending on whether or not the tribal land is subject to state criminal jurisdiction pursuant to Public Law 280, in general, the Bands exercise exclusive civil jurisdiction over tribal members on the reservation and the tribe and the state exercise concurrent civil jurisdiction over non-tribal members. Unless specifically stated to the contrary, the state exercises criminal jurisdiction over the reservation.

(2) Regulation: Agents of the State Department of Public Safety may inspect, without notice or a warrant, all premises used for the operation or storage of video games of chance and may inspect all records, documents and other items related to the operation of the video games of chance. Any video games of chance which do not comply with the terms of the compact must be removed from play, tested, and approved by the Department of Public Safety before being returned to play. In addition, no video game of chance may be purchased or leased from anyone except a manufacturer or distributor holding a valid license from the tribe and from the States of Minnesota, New Jersey, Nevada or South Dakota.25/

(3) Licensing: Employees whose responsibilities include the operation or management of video games of chance must be licensed by the tribe, subjected to criminal background checks

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25/ The Minnesota licensing provisions for video games of chance were repealed by the 1990 legislature effective January 1, 1992. This created a serious gap in the state's ability to monitor and control the influx of video gambling devices into the state. Legislation was passed in 1991 to require the licensing of all manufacturers and distributors of gambling devices doing business in Minnesota, including with the governing body of any Indian Tribe. Minn. Laws 1991, ch. 336.

by the Department of Public Safety, and denied employment or dismissed if convicted of a felony within 5 years of employment, or ever convicted of a felony or gross misdemeanor involving fraud, misrepresentation or gambling.

(4) Technical Standards for Video Games of Chance: Before acquiring any video game of chance, the device, or a prototype thereof, must be subjected to testing and approved by an independent gaming test laboratory agreed to by the state and the tribe to determine compliance with the technical standards of the compact. The compact establishes procedures for the testing of the devices. At the conclusion of the test, a report must be filed with the state and the tribe. Once approved by the independent gaming test laboratory, no modifications may be made to the video games of chance.

The compacts require the tribes to purchase state-of-the-art gambling equipment and contain extensive hardware and software requirements for the video games of chance. The requirements were based on standards developed by the South Dakota lottery for comparable devices. In addition, the standards were reviewed by James Maida, president of an independent gaming test laboratory currently under contract with the State of South Dakota.

(5) Auditing: The tribe is required to engage a certified public accountant to audit the books and records of all video gaming conducted pursuant to the compact. The audit provision is designed to permit the state to review all sources of revenue to the tribe related to the video gambling, to disclose expenses and other operational costs and to provide the state with the ability to determine if the gambling proceeds are going to the tribe. The Gambling Enforcement Division in the Department of Public Safety has access to the audit results and the work papers of the accountant.

The Secretary of the Interior has approved all of the video compacts as required by the IGRA. Most of the tribes have recently completed the acquisition of complying video games of chance. All video devices operated on Indian lands were required to comply with the technical specifications of the compacts by July 1, 1991.

The Gambling Enforcement Division expects to begin conducting routine inspections of the gambling facilities and the video gambling equipment. The Division has purchased the necessary testing equipment and has the capacity to randomly test the computer chips in the devices to ensure that manipulation of the devices has not occurred.

**b. The blackjack compacts.**

Approximately one month after the consummation of the initial video game of chance compacts, the Lower Sioux Community filed a lawsuit in Federal District Court alleging that the state had failed to negotiate in good faith for a compact to govern the card game of blackjack. The Community alleged that because the state permits the playing of blackjack in conjunction with a private social bet (i.e. two individuals betting on the game against each other), blackjack is "permitted for any purpose by any person, organization or entity" in Minnesota, and thus can be the subject of a compact under the IGRA. The state argued that the Community was conducting commercial (banking) blackjack and that commercial blackjack is strictly prohibited in Minnesota. Therefore, the state contended that the blackjack game proposed by the Community was not legal under the IGRA and that no compact could be negotiated.

On December 20, 1990, by United States Magistrate Bernard Becker, ruled against the state and concluded that the state should be required to negotiate and conclude a compact permitting commercial blackjack on the Lower Sioux Community's reservation. Under the Magistrate's rationale, virtually any type of casino gambling, including sports betting, would be permitted on Indian land in Minnesota. A copy of the Recommendation is attached. On December 31, 1990, the state filed legal objections to the Magistrate's report. Those objections are also attached.

In early January, 1991, before filing a response to the state's objections, the Community approached the state for the purpose of discussing a settlement of the lawsuit. After several months of negotiation, the state and the Community agreed to settle the case. A Consent Judgment was signed and filed by Judge Murphy on August 1, 1991. The Consent Judgement:

(1) requires and approves intervention in the Lower Sioux lawsuit by the other ten Minnesota Indian Bands and Communities; (2) incorporates into the Consent Judgment the Tribal-State compacts negotiated and entered into by the state and all eleven Minnesota Indian Bands and Communities governing the game of blackjack and limiting the other kinds of Class III games which may be conducted; and (3) determines that in light of the Consent Judgment, consideration of the Report and Recommendation of Magistrate Becker is unnecessary. A copy of the Consent Judgment and a Tribal-State compact governing blackjack are also attached.

The blackjack compacts resulted in the settlement of the Lower Sioux lawsuit. The negotiation of the compacts was conducted by the Chair of the Tribal-State compact negotiating committee, and the Gambling Enforcement Division, with legal advice from the Attorney General's office. Representatives of all eleven Indian Bands and Communities were also involved. Before the Governor signed the compacts, the concurrence of the Governor's negotiating committee was obtained.

In negotiating the compacts, the state had three objectives in mind: (1) to control the expansion of other forms of Class III gaming on Indian land; (2) to regulate the individuals who operate the games and the manner in which the games are played; and (3) to obtain money from the tribes to defray the costs of state regulation.

The blackjack compacts contain several provisions designed to accomplish these objectives. Those terms may be summarized as follows:

(1) Waiver Provisions: As a condition of settlement and as part of the Tribal-State compacts, the eleven Minnesota Indian Bands and Communities agreed to waive any rights they may have under state or federal law to request the state to negotiate concerning a compact for any form of Class III gaming not specifically permitted by state statute for charitable, commercial or governmental purposes. In other words, the Indian Bands and Communities agreed to waive any rights they may have to request compact negotiations on such gambling as

craps, roulette, jai alai, dog racing, sports betting and other common casino games, unless the state specifically permits such games by statute.

In addition, the compacts contain a provision whereby the Indian Bands and Communities agreed to waive their rights to request compact negotiations governing pari-mutuel wagering on races conducted at any racetrack, inside or outside the state, and broadcast to a facility on a reservation, unless the state enacts a statute permitting such wagering at any site except a licensed racetrack in the state. Because the legislature authorized off-track betting on horse races during the 1991 legislative session, the effect of this provision is to prohibit only off-track betting on dog races or any other kind of races involving pari-mutuel wagering. With respect to horse races, the tribes may request negotiations for compacts governing off-track betting on horse races, but the state has no obligation to negotiate if the state has entered into compacts, the number of which is equal to the number of off-track betting facilities permitted under state law.

(2) Assessments: On or before October 1, 1991, each Indian Band and Community is required to pay the state the sum of $13,636.36 to help defray the cost of state regulation. The assessment amount was based on a projection that at least an additional $150,000 per year is necessary to regulate the gambling activity. The $150,000 figure translates into roughly three investigator positions for the Gambling Enforcement Division in the Department of Public Safety, the division primarily responsible for state regulation of Indian gambling under the compacts.

(3) Regulation of the play of blackjack: The compacts specifically set forth the manner in which a blackjack game must be played, including the type of cards used, the types of wagers allowed, the procedure for dealing the cards and the various betting options available to the player during the game. The compacts do not impose table or wagering limits, but specific staffing levels and video surveillance equipment are required for casinos with four or more tables and betting limits greater than or equal to $200.00. These restrictions are designed to prevent and detect cheating by casino employees and patrons. The standards are consistent

with those required by the State of New Jersey in Atlantic City casinos and are comparable to the rules imposed at the casinos in Nevada.

Before entering into a management contract under the IGRA, the Band or Community must obtain sufficient information and identification from each management official to enable the Department of Public Safety to perform a background check.26/ The compact prohibits the Band or Community from entering into a management contract if any management official 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 arrangement incidental thereto."

This provision is designed to fill the gap created by the IGRA. As discussed previously, the IGRA sets a lower threshold for federal approval of a Class III management contract than for a Class II management contract. This provision imposes on a tribe's Class III management contract the same restrictions required under federal law for approval of a Class II management contract and gives the state the ability to investigate outside management companies and officials.

All employees must be licensed by the Community and must submit to a background check by the Department of Public Safety. The compacts prohibit the employment of any person: (1) who has been convicted of a felony involving gambling; (2) who has been convicted of a felony within 5 years of employment; or (3) whose prior activities, criminal record, reputation, habits and associations pose a threat to the public interest or to the effective regulation of gambling, or create or enhance the danger of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gambling. The dealers, pit bosses and floor

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26/ A management official is any person who has a direct financial interest in, or management responsibility for any gambling conduct under the compact. In the case of a corporation, management officials are those who serve on the Board of Directors of the corporation and each stockholder, director indirectly holding 10% or more of the stock.

supervisors must receive a training course in blackjack which is similar in content to that required in other jurisdictions allowing blackjack.

(4) Auditing: As with the video compacts, the compacts require the Band or Community to engage a certified Public Accountant to conduct an annual audit of the books and records relative to blackjack gambling.

(5) Retention of Legal Arguments: The compacts also include a provision giving the State the right to renew its legal objections to the play of blackjack in the event the compacts become inoperative.

Because the settlement agreement was approved only one month ago, the Gambling Enforcement Division has only recently begun establishing a regulatory program to control blackjack. Agents need to be trained in techniques to detect cheating in the game of blackjack and the background checks in employees and management officials need to be completed.

## IV. CRIMINAL ENFORCEMENT OF INDIAN GAMBLING.

As mentioned previously, pursuant to Public Law 280, the State of Minnesota was given criminal jurisdiction over all Indian lands in Minnesota except the land located within the Red Lake and Nett Lake (Bois Forte) Reservations. The jurisdictional grant under Public Law 280 should provide the state with the ability to enforce its criminal laws, including criminal gambling laws, on Indian reservations in this state. Hence, gambling activity that is criminally prohibited in the state is equally prohibited on Indian land unless the gambling activity is "permitted" Class II gaming or Class III gaming conducted under a Tribal-State compact.

Congress, however, complicated the issue of state criminal jurisdiction by including in the IGRA the following language:

> 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.

At least one federal court has concluded that this language supersedes the grant of criminal jurisdiction given to the state under Public Law 280.27/ In that case, the court relied on the language of the IGRA to prohibit the state of Wisconsin from prosecuting members of the Lac du Flambeau Tribe for gambling in violation of Wisconsin state law. The court concluded that any prosecution must be initiated by the federal government, not the state. The case has recently been appealed to the United States Court of Appeals for the Seventh Circuit. A similar case out of Washington is pending before the United States Court of Appeals for the Ninth Circuit.

If the federal courts follow the position taken in Wisconsin, the state will be forced to rely on the federal government for the prosecution of state criminal gambling violations on Indian land. To date, the United States Department of Justice has initiated very few prosecutions.

The provisions of the IGRA relative to federal criminal jurisdiction do not apply if a tribe has consented to state criminal jurisdiction pursuant to a Tribal-State compact. Section 3.1 of the video game of chance compacts for those tribes covered by Public Law 280 provides:

> For purposes of this compact, the Band shall exercise exclusive civil jurisdiction over Band members, and the Band and the State shall exercise concurrent civil jurisdiction over non-Band members. The State pursuant to Public Law 280, 18 U.S.C. § 1162 may exercise criminal jurisdiction within the reservation.

Thus, notwithstanding the language of the IGRA, the state retains criminal jurisdiction within nine of the eleven Minnesota reservations, at least for purposes of gambling law violations related to video games of chance.

The blackjack compacts do not contain a comparable reference to state criminal jurisdiction. By the time the blackjack compacts were negotiated, the federal court decision from Wisconsin had been issued. Based on the language of that decision, the tribes refused to

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27/ Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645 (W.D. Wis. 1990).

acknowledge state criminal jurisdiction. The language of the blackjack compacts simply refers to Public Law 280 and the IGRA and gives criminal jurisdiction to the state to the extent permitted by either federal law.28/

In addition, it is unclear to what extent the language of the IGRA applies to limit state criminal jurisdiction over non-Indians conducting illegal gambling within a reservation. Because the IGRA applies only to tribally owned and operated gambling activity (the rest being illegal), it is reasonable to conclude that the state retains criminal jurisdiction over non-tribal gambling and certainly over gambling conducted by non-Indians.29/

One thing is clear: the federal government clearly has criminal jurisdiction over gambling activities on Indian land. Indeed, the full panoply of federal criminal law applies to all activities, including gambling activities, on Indian lands. For example, the use of video gambling equipment that does not comply with the terms of a Tribal-State compact violates 15 U.S.C. 1175 (use of gambling devices on Indian land). Gambling activity conducted in violation of the definition of Class II gaming or not conducted pursuant to a Tribal-State compact violates 18 U.S.C. 1166 (state criminal gambling laws). Theft from an Indian gambling establishment and theft by an employee from an Indian gambling establishment are separate federal crimes punishable by imprisonment of up to ten to twenty years respectively (18 U.S.C. § 1167 and 1168). Thus, the United States Attorney has the authority to criminally prosecute anyone who operates a game not permitted by a compact in Minnesota (craps, roulette, sports bookmaking, etc.). In addition, the United States Attorney has jurisdiction to

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28/ The State of Washington, in the course of negotiations with the Spokane Tribe, insisted upon a grant of state criminal jurisdiction as a precondition to further negotiations. The tribe sued the state in federal court alleging a failure to negotiate in good faith. The case is pending.

29/ The Gambling Enforcement Division and the Cass County Attorney instituted criminal proceedings against a non-Indian resort owner operating video gambling at his resort on the Leech Lake Reservation. The jurisdictional issue was not raised because the case was resolved before trial when the Leech Lake Band passed a tribal ordinance prohibiting the operation of video gambling devices outside of the tribal gambling facility.

prosecute casino-like games which are passed off as "bingo" games under the definition of Class II gaming.

Finally, the United States Department of Justice may utilize other federal criminal laws to prosecute persons associated with Indian gambling enterprises. For example, the Racketeer Influenced and Corrupt Organizations Act, (RICO) (18 U.S.C. § 1961), and statutes governing the illegal interstate transportation of gambling devices (15 U.S.C. §§ 1171-1174) are all applicable on Indian lands. Violations of any of these statutes may be criminally prosecuted by the United States Attorney.

Because the ultimate responsibility for criminally prosecuting gambling violations on Indian lands may rest with the federal government, it is critical that the United States Attorney for Minnesota take these responsibilities seriously. Most importantly, the United States Department of Justice, at its highest levels, must make a commitment to vigorously enforce laws related to Indian gambling throughout the nation, including in Minnesota.

## V. GAMBLING ON NEWLY ACQUIRED INDIAN LANDS.

Tribal governments may conduct gambling only on "Indian lands" as that term is defined by the IGRA. Section 4(4) of the IGRA provides:

> 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.

This language is significant because the Secretary of the Interior has the authority to take land into trust for the benefit of an Indian tribe and to give reservation status to newly acquired land. Gambling may be conducted on such newly designated lands, provided the lands are

designated in conformity with Section 20 of the IGRA. The most significant part of that section provides:

> The Secretary [of Interior], 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 . . . .

Thus, before the Secretary may designate new lands as Indian lands for gambling purposes, the Governor's concurrence in the determination is required.30/ Secretary Lujan has recently proposed regulations for trust land designations for gambling purposes.31/

To date, no requests for new trust lands for gambling purposes have been submitted for the Governor's consideration. Evidence has surfaced, however, of proposals to create Indian gambling facilities in Mendota, Mankato, and Minneapolis. Each proposal would require a request to the Secretary for trust land status, as well as the Governor's concurrence in the Secretary's designation. However, the Minnesota Indian Gaming Association, which includes all eleven Minnesota Indian Bands and Communities, has adopted a resolution in opposition to the acquisition of new trust lands for gambling purposes.

A related, although slightly different matter, involved an attempt by the Wisconsin Winnebago Tribe to build and operate a gambling casino on land owned by the Littlejohn family near LaCresent, Minnesota. The land is individually owned by the Littlejohn family, members of the Wisconsin Winnebago Tribe, subject to restriction by the United States against

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30/ This provision does not apply to lands taken into trust by the Secretary as part of: (1) a settlement of a land claim; (2) the initial reservation of an Indian tribe acknowledged by the Secretary under the federal acknowledgment process; or (3) the restoration of lands for an Indian tribe that is restored to federal recognition. The Red Lake Band is apparently considering building a gambling facility in Thief River Falls. The Band claims that the land may be taken into trust by the Secretary under one of these exceptions, thereby eliminating the need for the Governor's concurrence.

31/ Comments may be submitted on the proposed regulations until September 13, 1991. The Attorney General's Office will be submitting comments along with several other states on behalf of the North American Gaming Regulators Association.

alienation. Apparently, the Littlejohn family agreed to lease the land to the Winnebago Tribe and allow the Winnebago Tribe to own and operate the gambling facility. Profits would have innured to the Tribe and would have been dispersed in the form of lease payments to the Littlejohn family.

A little over one year ago, the Winnebago Tribe requested compact negotiations for Class III gaming on that land. The negotiation committee responded that it did not believe the lands were "Indian lands" under the IGRA because it did not appear that the Winnebago Tribe exercised governmental power over the land. The Winnebago Tribe's constitution precludes it from exercising governmental authority over any land outside the boundaries of the State of Wisconsin. The Department of the Interior concurred in the state's conclusion.

Nevertheless, in the early spring of 1991, a mobile home was moved onto the Littlejohn land which contained approximately fifteen gambling devices not approved for use in Minnesota. Shortly after the "gambling facility" became operational, the Division of Gambling Enforcement instituted an investigation. The U.S. Attorney's office convinced the manager of the facility to remove the devices from Minnesota and cease operation of the gambling activity on the land. No criminal prosecution was initiated.

## VI. PENDING NEGOTIATIONS.

As discussed previously, the IGRA requires any tribe desiring to conduct any form of Class III gaming to request negotiations with the State for a Tribal-State compact governing the particular form or forms of gambling. The IGRA requires that upon receipt of a request for negotiation, the State must negotiate in good faith. In deciding its position at the negotiation table, the State may consider "public interest, public safety, criminally, financial integrity, and adverse economic impacts on existing gaming activities."

A. Lotteries.

In late 1989, the Lower Sioux Community and the Bois Forte Band of Chippewa requested the state to negotiate a compact governing tribal lotteries. Preliminary negotiations occurred in the spring of 1990, but no agreement was reached. The tribes appear to want a multi-reservation lottery, a telephone (900-number) lottery or the ability to sell their lottery tickets off the reservations. The proposals may conflict with the IGRA and the laws of this state. However, at the present time, no requests for further negotiations on tribal lotteries have occurred.

B. Paddlewheels.

The Prairie Island and Shakopee Mdewakanton Sioux Communities and the Mille Lacs Band of Chippewa have requested negotiations for compacts permitting the operation of paddlewheels. Paddlewheels are one of the five forms of lawful (charitable) gambling in Minnesota and therefore, a Tribal-State compact may be negotiated under the IGRA. An initial meeting was held with the Shakopee Sioux Community on October 10, 1990, where it was decided that the Community would submit a proposed compact. No such draft has been received, largely because the legislature considered prohibiting the operation of paddlewheels throughout Minnesota during the 1991 legislative session. After considerable debate, paddlewheels, including a form of paddlewheel called the "Minnesota Tri-Wheel" were retained as a legal form of lawful gambling.

Since the end of the legislative session, the tribes have renewed their requests for paddlewheel negotiations. The tribes have been directed by Governor Carlson to contact Tom Gilbertson, Chair of the Governor's Negotiation Committee, to arrange a time to meet with the committee to discuss paddlewheels.

C. Off-Track Betting.

With the passage of the off-track betting bill during the 1991 legislative session, most impediments to Indian sponsored off-track betting have been eliminated. While no formal requests have been received regarding negotiations, several informal inquiries have been made.

At this time, the eleven Minnesota Indian tribes are limited to a total of four off-track betting operations, one for every such facility authorized for non-Indian entities in the state. To the extent possible, it would be advisable for the state to get a regulatory system in place for off-track betting before embarking on negotiations for any Tribal-State compacts.

## VII. AREAS OF CONCERN AND FUTURE ISSUES.

As we have attempted to demonstrate, the issues surrounding Indian gambling are varied and complex. It is likely that as Indian gambling continues to expand, the issues facing the State will expand as well. The following is a summary of issues that merit attention and a forecast of what the future may hold in the area of Indian gambling.

### A. Financing Arrangements.

The IGRA requires a tribe to have the sole proprietary interest in and responsibility for the conduct of any gaming activity. The only exception to this requirement is that a tribe may enter into a management contract with a non-tribal entity, provided the management contract is approved by the Chairman of the NIGC. This means that no person or entity other than the Indian Tribe may own, have a financial interest in, or operate (except under an approved management contract) any gambling activity. These requirements apply equally to Class II and Class III gaming operations.

The IGRA does not, however, restrict or limit the ability of an Indian tribe to borrow or otherwise acquire financing for the establishment of a gambling facility. While one of the stated purposes of the IGRA is to shield Indian gaming from "organized crime and other corrupting influences," the IGRA does not limit the tribe to conventional financing arrangements with established and reputable concerns. Indeed, the IGRA does not even address the issue of financing. This oversight creates a serious gap in the ability of the State to control or prevent the infiltration of corrupting influences.

B. Bingo-Derivative Games.

The broad definition of bingo under the IGRA has opened the door to several casino-like games bearing bingo names. Bingo-lette (roulette) and Bingo-craps (craps) are two of the Class III casino games that have sprung up nationally under the guise of Class II bingo.

The IGRA defines bingo (whether or not electronic, computer, or other technologic aids are used) as a game of chance:

> [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, punchboards, tip jars, instant bingo, and other games similar to bingo . . .32/

There are basically three ways to address the problem of bingo-derivative games. First, and perhaps the most effective, would be for the NIGC to promulgate regulations which more specifically define Class II gaming in general and bingo in particular. Specifically excluding casino games, even if played with some "bingo" component, from the definition of Class II gaming would eliminate the uncertainty over the legality of the games and would clarify the legal issues should enforcement action be necessary. Unfortunately, Tony Hope, Chairman of the NIGC, has voiced reluctance to further define bingo by regulation. As a result, it is likely that the battle over bingo-derivatives will of necessity be fought in the courtroom.

Two avenues of legal action exist. First, to the extent that a bingo-derivative game falls outside the definition of Class II bingo, the United States Attorney's office has jurisdiction to criminally prosecute those operating the game for violating state and federal law.

A second enforcement avenue exists under the IGRA. The state may initiate a civil action in federal court to "enjoin a Class III gaming activity located on Indian lands and

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32/ 25 U.S.C. § 2703.

conducted in violation of any tribal-state compacts" in existence in Minnesota. The recently completed blackjack compacts preclude the tribes from operating any form of Class III gaming except blackjack and video games of chance. Thus, any bingo-derivative game constituting Class III gaming may be prohibited and subject to the injunctive provisions of the IGRA.33/

Recently, the Prairie Island Sioux Community installed a craps-like game called "Bingo-Bones" at the Treasure Island casino. A letter from the Gambling Enforcement Division informing the tribe of the illegality of the game was sufficient to cause the Community to temporarily withdraw the game from the casino. However, the Community has questioned the conclusion reached by the Gambling Enforcement Division and may resist permanent removal of the game. The Gambling Enforcement Division is investigating to determine the extent to which other bingo-derivative games exist in Minnesota. The Tribal-State compact negotiating committee intends to review the results of the investigation.

C. Mega-Bucks.

International Games Technology (IGT) a large slot machine/video gambling device manufacturing concern from Nevada in conjunction with a South Dakota distributor named Sodak Gaming attempted to contract with six Minnesota Indian Bands and Communities to develop a multi-reservation progressive video slot system. The system, called mega-bucks, is operated in Nevada and Atlantic City casinos and involves a series of large jackpots based on the progressive play of the several electronically linked devices. The various gambling devices would also be electronically linked to a central monitoring computer located somewhere in Minnesota. Under the proposal, IGT and Sodak would operate the central computer, service the gambling devices and award the progressive jackpots. After reviewing the proposal, the

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33/ The legal issues involved in such cases are not always clear. The State of Washington, for example, discovered video-bingo devices on the Spokane Tribe's reservation. The United States Attorney for the Western District of Washington instituted a criminal enforcement action against the Tribe alleging that the devices were Class III video gambling devices rather than "electronically aided Class II bingo." The United States prevailed in the Federal District Court but the Tribe appealed to the United States Court of Appeals for the Ninth Circuit. The circuit court stayed the enforcement action and permitted the tribe to continue operating the devices pending resolution of the case on appeal.

Attorney General and the Division of Gambling Enforcement concluded that the proposal violated the IGRA and Minnesota law. Accordingly, development of the system has been delayed. However, the proponents of the system continue to press for its installation. A copy of the memo describing and addressing the legality of the proposal is attached.

D. Minnesota 900 - T.V. Bingo.

Two Bands, the Leech Lake Chippewa and the Bois Forte Chippewa, have proposed the development of a televised bingo game. The game would be produced on one of the reservations' gambling facilities. Participants could obtain game cards from retailers throughout the state free of charge. In order to win the major prizes, however, the participants would be required to call a 900 number, paying $3.00 for the call, to register the serial number of their card. Participants could play the game at home in front of the television, but a computer on the reservation would be capable of independently determining if a player wins a bingo.

The Attorney General's Office is currently evaluating the legality of the proposal. Three significant legal issues exist: (1) is the proposal gambling; (2) if so, is the proposal Indian gambling (owned and operated by an Indian tribe on Indian land); and (3) if so, is the proposal Class II bingo over which the state exercises no control or is it a Class III lottery which requires the negotiation of a Tribal-State compact.

E. New Technology.

As technology advances and demand for the wagering dollar becomes more competitive, it is likely that additional proposals will be offered for consideration or additional forms of sophisticated gambling offered at the existing Indian gambling facilities.

Proposals making use of "telephone account wagering" will likely arise as will the technologically advanced concept of interactive wagering through the use of cable or commercial television. Indeed, it is currently technologically, although not yet commercially, possible to purchase lottery tickets, bet on horse races or engage in other forms of gambling

simply by manipulating a television remote control device. As technology advances in the gambling industry outside the reservations, proposals will likely surface for comparable gambling activities on Indian lands.

## VIII. CONCLUSION.

We hope this report adequately addressed your questions and concerns regarding the status of Indian gambling in this State. In considering the issues of Indian gambling, it is important to bear in mind that continued expansion of gambling in this state for non-Indian entities will likely result in more gambling on Indian lands. Adoption of statutes legalizing card games, limited sports boards and riverboat gambling will likely give the Indian Bands and Communities in Minnesota the legal authority to expand into these other gambling activities as well. The already overtaxed regulatory system, without a significant commitment of resources, simply cannot keep up with this continued expansion.

## ATTACHMENTS

1. THE GROWTH OF LEGALIZED GAMBLING (Chart)
2. TRIBAL-STATE COMPACT CONCERNING VIDEO GAMES OF CHANCE
3. REPORT AND RECOMMENDATION
4. OBJECTION TO REPORT AND RECOMMENDATION
5. CONSENT JUDGMENT
6. TRIBAL-STATE COMPACT CONCERNING BLACKJACK
7. IGT/SODAK MEMO CONCERNING MEGA-BUCKS

## II. THE GROWTH OF LEGALIZED GAMBLING IN MINNESOTA. (IN MILLIONS)

| | 1985 | 1986 | 1987 | 1988 | 1989 | 1990 |
|---|---|---|---|---|---|---|
| Lawful (Charitable) Gambling | 111.3 | 386.7 | 587.8 | 888.5 | 1,219 | 1,283 |
| Horse Racing | 84.2 | 133.6 | 120 | 120.9 | 102.2 | 101.8 |
| Lottery | | | | | | 258.8** |
| Indian Gambling | N/A | N/A | N/A | N/A | 100.* | 400.* |
| Total: | $195.5 | $520.3 | $707.8 | $1,009.4 | $1,421.2 | $2,043.6 |

*estimates
**Partial year only

**TRIBAL-STATE COMPACT**
**FOR CONTROL OF CLASS III VIDEO GAMES OF CHANCE ON**
**THE WHITE EARTH BAND OF CHIPPEWA RESERVATION**
**IN MINNESOTA**

**WHEREAS**, the State of Minnesota (hereinafter "State") and the White Earth Band of Chippewa (hereinafter "Band") are separate sovereigns, and each respects the laws of the other sovereign; and

**WHEREAS**, the Band exercises governmental authority within the White Earth Reservation (hereinafter "Reservation"), which, for purposes of this Compact, means those lands within the current boundaries of the White Earth Reservation and any other "Indian lands", as defined by the Indian Gaming Regulatory Act, over which the Band exercises governmental authority; and

**WHEREAS**, the Congress of the United States has enacted the Indian Gaming Regulatory Act (hereinafter "IGRA"), Public Law 100-497, 102 Stat. 2467, 25 U.S.C. Sections 2701 to 2721 (1988) creating a mechanism through which the several States and Indian tribal governments may allocate jurisdiction and control of Class III gaming activity which occurs on their lands; and

**WHEREAS**, the State of Minnesota pursuant to Minnesota Statute Section 3.9221 (1990), authorized the Governor or his representatives to negotiate with regard to compacts with the several Indian tribal governments in the State of Minnesota;

**NOW THEREFORE**, in consideration of the mutual undertakings and agreements hereinafter set forth, the Band and the State enter into the following compact.

## Section 1. Findings and Declaration of Policy

### 1.01 Findings

As the basis for this Compact, the State and the Band have made the following findings:

1.02 This Compact shall govern the licensing, regulation and operation of video games of chance within the Reservation. Video games of chance are defined as electronic or electromechanical video devices that simulate games commonly referred to as poker, blackjack, craps, hi-lo, roulette, line-up symbols and numbers, or other common gambling forms, which are activated by the insertion of a coin, token, or currency, and which award game credits, cash, tokens, or replays, and contain a meter or device to record unplayed credits or replays.

1.03 The purposes of this Compact include providing the Band with the opportunity to operate video games of chance in a way that will benefit the Band economically, that will insure fair operation of the games, and that will minimize the possibilities of corruption and infiltration by criminal influences.

1.04 The Band has the right to license and regulate gaming activity on its lands in accordance with the IGRA and this compact.

1.05 A principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government;

1.06 The State and the Band find it to be consistent with the IGRA, and the public health, safety and welfare to regulate video games of chance pursuant to this Compact.

1.07 The Band will operate video games of chance pursuant to this compact.

**1.1 Declaration of Policy**

1.2 In the spirit of cooperation, the State and the Band hereby set forth in joint effort to carry forward and implement the terms of the IGRA regarding video games of chance within the Reservation.

1.3 The State recognizes the positive impacts that gaming may provide to the Band. The Band may utilize gaming generated financial resources to fund programs that provide various vital services to Reservation residents. These programs may include education, health and human resources, housing development, road construction and bmaintenance, sewer and water projects, and economic development. The State also recognizes that the positive economic effects of such gaming enterprises may extend beyond tribal governments to the tribe's neighbors and surrounding communities, and may help to foster mutual respect and understanding among Indians and non-Indians.

1.4 The Band and the State, through this compact, and the regulations incorporated herein, shall attempt, in good faith, to address the legitimate common concerns of both parties.

## Section 2. Duration and Renegotiation

### 2.1 Duration

This compact shall become effective upon execution by the Governor of the State, ratification by the Band, approval by the Secretary of the Interior and publication of that approval in the Federal Register pursuant to the IGRA. This compact is entered into pursuant to the IGRA, State law and Band law. Minnesota Statute Section 3.9221 (1990) is incorporated herein by reference. It is the intent of the State that, if the Minnesota Legislature prohibits the operation or use of video games of chance for all purposes as against public policy and as a matter of criminal law, this section shall not be construed to provide for continued operation by the Band of video games of chance pursuant to this compact. It is the intent of the Band that, if the Minnesota Legislature prohibits the use of video games of chance for all purpose as against public policy and as a matter of criminal law, this section shall not be construed to prohibit the continued operation by the Band of video games of chance pursuant to this compact. As provided in Minnesota Statute Section 3.9221 (1990), in the event of a request for a renegotiation or a new compact, the existing compact will remain in effect until renegotiated or replaced.

### 2.2 Renegotiation

The State or the Band may, by appropriate and lawful means, request negotiations to amend, replace or repeal this compact. In the event of a request for renegotiation or the negotiation of a new compact, this compact shall remain in effect until renegotiated or replaced. Such requests shall be in writing and shall be sent by certified mail to the Governor of the State or the Chairman of the Band at the appropriate governmental office. If such a request is made by the Band, it shall be treated as a request to negotiate pursuant to the IGRA. The parties shall have 180 days to negotiate, and all further procedures and remedies available under the IGRA shall thereafter apply. The State and the Band may agree to extend the 180 day period without prejudice to the rights of either party under this section.

## Section 3. Allocation of Jurisdiction

### 3.1 Tribal and State Jurisdiction Over Video Games of Chance

This compact shall not be construed to limit any jurisdiction or remedies available to either party pursuant to the terms of the IGRA or other applicable law.

## Section 4. Regulatory Standards for Video Games of Chance

### 4.1 Common Interest

In recognition of the valid public policy interests of the State, which are similarly appreciated as desirable by the Band, the following regulatory standards are established for video games of chance operated and played within the federally recognized boundaries of the Reservation.

### 4.2 No Credit Extended

All gaming shall be conducted on a cash basis. Except as herein provided, no person shall be extended credit for gaming by any video gaming facility operated within the Reservation, and no operator shall permit any person or organization to offer such credit for a fee. This restriction shall not apply to credits won by players who activate play on video games of chance after inserting coins or currency into the game, and shall not restrict the right of the Band or any other person to offer check cashing or to install or accept bank card or credit card transactions in the same manner as would be normally permitted at any retail business within the State.

### 4.3 Minimum Age for Players

No person below the age of 18 on the date of gaming shall be permitted to play any video game of chance. If any person below the age of 18 plays and otherwise qualifies to win any video game which requires notice and payout by the operator of the facility, the prize shall not be paid, and the estimated amount wagered during the course of the game shall be returned to the minor.

### 4.4 Inspection

Agents of the Department of Public Safety of the State of Minnesota, or their designated representatives, shall upon the presentation of appropriate identification, have the right to gain access, without notice during normal business hours, to all premises used for the operation of video games of chance, or the storage of video games of chance or equipment related thereto, and may inspect all premises, equipment, daily records, documents, or items related to the operation of video games of chance in order to verify compliance with the provisions of this compact. Inspections made pursuant to this section shall not be conducted in a manner which disrupts normal business operations and shall be conducted by agents who maintain the highest security clearance available within the

Department of Public Safety. Agents of the State Department of Public Safety, or their designated representatives, shall also have the right, upon the presentation of appropriate identification and with reasonable notice, to inspect other records or documents associated with the operation of video games of chance and maintained by the Band.

**4.5 Non-Complying Video Games of Chance**

The following are declared to be non-complying video games of chance:

(1) all video games of chance to which the agents of the Department of Public Safety of the State of Minnesota or their designated representatives have been denied access for inspection purposes;

(2) all video games of chance operated in violation of this compact.

**4.6 Demand for Remedies for Non-Complying Video Games of Chance**

Video games of chance believed to be non-complying shall be so designated, in writing, by the Commissioner of the Department of Public Safety. Within 5 days of receipt of such written designation, the Band shall either:

(1) accept the finding of non-compliance, remove the video games of chance from play, and take appropriate action to ensure that the Band, manufacturer, distributor or other responsible party cures the problem; or

(2) contest the finding of non-compliance by so notifying the Commissioner of Public Safety in writing, and arrange for the inspection of the contested equipment or single example thereof, by an independent gaming test laboratory as provided in section 6 within three days of the receipt of the finding of non-compliance. If the independent laboratory finds that the video game of chance or related equipment is non-complying, the non-complying video game of chance and related equipment shall be permanently removed from play unless modified to meet the requirements of this Compact. Video games and related equipment removed from play and modified pursuant to this section may be returned to play only after inspection by the Department of Public Safety, under the guidance of the independent gaming test laboratory; or

(3) contest the finding of non-compliance by: (1) filing an appropriate action in federal district court; or

(2) if the court declines jurisdiction, contest the finding of non-compliance before the National Indian Gaming Regulatory Commission; or (3) if the Commission declines jurisdiction, contest the finding of non-compliance in a court of competent jurisdiction. If a court or the commission finds that the video game or related equipment is non-complying, it shall be removed from play. Video games or related equipment removed from play pursuant to this section may be returned to play only after inspection by the Department of Public Safety or an independent laboratory performing such services for the State.

Nothing in this section shall limit the rights or remedies available to the parties under the IGRA.

## Section 5. Background Investigations and Licensing of Employees and Managers

### 5.1 Background Investigations Prior to Employment

The Band, prior to placing a prospective employee whose responsibilities include the operation or management of video games of chance, shall obtain a release and other information from the applicant to permit the State to conduct a background check on the applicant. This information shall be provided in writing to the State Commissioner of Public Safety, along with the standard fee, who shall conduct the background check and provide a written report to the Band regarding each applicant within 30 days of receipt of the request, if possible. The Band may employ any person who represents in writing that he or she meets the standards set forth in this section, but must not retain any person who the Department of Public Safety reports has been: (a) convicted of a felony within five years of the commencement of employment with the Band; or (b) convicted of a felony or gross misdemeanor involving fraud, misrepresentation, or gambling. Criminal history data compiled by the Bureau of Criminal Apprehension of the State Division of Gambling Enforcement on prospective employees shall, subject to applicable state or federal law, be released to the Band as part of the report regarding each applicant.

### 5.2 Background Investigations of Employees During Employment

Each person whose responsibilities include the operation or management of video games of chance shall be subject to periodic review comparable to that required for initial employment as provided in section 5.1 by the State Department of Public Safety, which review shall take place at least annually commencing with the date of employment.

The Band shall provide sufficient information to the State Commissioner of Public Safety to permit the State to conduct the background check on the employee. The Department of Public Safety shall conduct the necessary investigation within 30 days of written request therefor, if possible, subject to the standard fee, and shall provide a written report regarding each employee. Employees found to have been convicted of violations described in Section 5.1 shall be dismissed.

**5.3 Licensing and Discipline of Employees**

All personnel employed by the Band whose responsibilities include the operation or management of video games of chance shall be licensed by the Band. The Band shall publish and maintain a procedural manual for such personnel, which includes disciplinary standards for breach of the procedures.

**5.4 Qualifications of Lessors of Video Games of Chance**

(1) Prior to entering into any lease agreement, the Band shall obtain any necessary releases and other information sufficient from the proposed lessor and all persons holding any direct or indirect financial interest in the lessor or the lease agreement to permit the State to conduct a background check on those persons. The information shall be provided in writing, along with the standard fee, to the State Commissioner of Public Safety, who shall conduct the background check and provide a written report to the Band regarding each applicant within 30 days of receipt of the request, if possible.

(2) The Band shall not enter into any lease agreement for video games of chance or related equipment with any person or entity if the State Department of Public Safety determines that the lessor, or any manager or person holding a direct or indirect financial interest in the lessor or the proposed lease agreement, has been convicted of an offense listed in Section 5.1. Notwithstanding the foregoing, existing lease agreements shall be subject to section 5.4 within six months of the effective date of this compact.

**Section 6. Technical Standards For Video Games of Chance**

**6.1 Testing and Approval of Video Games of Chance**

No video game of chance may be purchased, leased or otherwise acquired by the Band unless: (1) the video game of chance is purchased, leased or acquired from a

manufacturer or distributor licensed to sell, lease or distribute video games of chance by the Band pursuant to Section 6.13; and (2) the video game of chance, or a prototype thereof, has been tested, approved or certified by a gaming test laboratory as meeting the requirements and standards of this compact. For purposes of this compact, a gaming test laboratory is a laboratory agreed to and designated in writing by the State Commissioner of Public Safety and the Band as competent and qualified to conduct scientific tests and evaluations of video games of chance and related equipment. A laboratory operated by or under contract with the states of Minnesota or Nevada, or New Jersey, or South Dakota constitutes a designated gaming test laboratory.

**6.2 Application for Approval of Prototype Video Game of Chance**

The Band shall provide or require that the manufacturer provide to the gaming test laboratory two copies of video game of chance illustrations, schematics, block diagrams, circuit analyses, technical and operation manuals, program object and source codes, hexadecimal dumps (the compiled computer program represented in base 16 format) and any other information requested by the gaming test laboratory.

**6.3 Testing of Video Game of Chance**

If required by the gaming test laboratory, the Band shall require the manufacturer to transport, not more than two working models of the video game of chance and related equipment to a location designated by the laboratory for testing, examination and analysis. The Band shall require the manufacturer to pay for any and all costs for the transportation, testing, examination, and analysis. The testing, examination, and analysis may include the entire dismantling of the video games of chance and related equipment and some tests may result in damage or destruction to one or more electronic components of the devices. If required by the laboratory, the Band must require the manufacturer to provide, specialized equipment or the services of an independent technical expert to assist with the testing, examination and analysis.

**6.4 Report of Test Results**

At the conclusion of each test, the laboratory shall provide to the State Commissioner of Public Safety and the Band a report that contains findings, conclusions and a determination that the video game of chance and related equipment conforms or fails to conform to the technical requirements and standards set forth in this compact. If modifications can be made which would bring the video game

or related equipment into compliance, the report may contain recommendations for such modifications.

**6.5 Modifications of Approved video games of chance**

The manufacturer or distributor shall assemble and install all video games of chance and related equipment in a manner approved and licensed by the Band. No modification to the assembly or operational functions of any video game of chance or related equipment may be made after testing and installation unless a gaming test laboratory certifies to the State Department of Public Safety and the Band that the modified video games of chance conforms to the standards of this Compact. All proposed modifications shall be described in a written request made to the State Commissioner of Public Safety, the gaming test laboratory and the Band, which contains information describing the modification, the reason therefor and all documentation required by the laboratory. In emergency situations where modifications are necessary to prevent cheating or malfunction, the laboratory may grant temporary certification of the modifications for up to 15 days pending compliance with this section.

**6.6 Conformity to Technical Standards**

The Band shall require the manufacturer or distributor to certify, in writing, to the Band and to the State Commissioner of Public Safety that, upon installation, each video game of chance placed in a gaming facility within the reservation: (1) conforms precisely to the exact specifications of the video game of chance prototype tested and approved by the gaming test laboratory; and (2) operates and plays in accordance with the technical standards set forth in sections 6.9 and 6.10 of this compact.

**6.7 Existing Video Games Of Chance**

Video games of chance, or prototypes thereof, operated within the reservation on or before the effective date of this compact must be tested and approved by a gaming test laboratory as required in section 6 on or before the effective date of this compact. Notwithstanding the foregoing, if the existing video games of chance cannot comply with the technical standards of this compact on or before the effective date of this compact due to circumstances beyond the control of the Band, the existing video games of chance shall be brought into compliance or replaced with complying equipment at the earliest date possible, but in no instance later than June 1, 1991.

## 6.8 Information to be Provided

Prior to the installation of any video game of chance acquired by the Community after the effective date of this compact, and for any video game of chance operated within the Reservation on or before the effective date of this compact, the Band shall provide, or require that the manufacturer or distributor provide to the State Commissioner of Public Safety:

(1) a list of all states in which the distributor or manufacturer from whom the video games of chance were acquired or leased is licensed, the license numbers (if license numbers are issued) and operative dates of the license(s); and

(2) identification numbers or codes for each video game of chance placed in the Reservation.

## 6.9 Hardware Requirements for Video Games of Chance

Video games of chance operated within the reservation must be licensed by the Band and meet the following specifications:

(1) No Physical Hazard. Electrical and mechanical parts and design principals may not subject a player to any physical hazards.

(2) Surge Protectors. A surge protector must be installed for all power which is fed to the device.

(3) Battery Back-up. A battery back-up, or an equivalent, for the electronic meters must be capable of maintaining accurate readings for 180 days after power is discontinued from the device for all information regarding:

(a) current and total tallies of amounts wagered and paid out;
(b) records of access to the logic board compartment;
(c) records of access to the cash and coin compartment;
(d) such other data as may be required by written regulation of the Band.

The back-up device shall be located within the locked logic board compartment and shall not be accessible to the manufacturer or distributor after the initial installation of the equipment.

(4) Power Switch. A power switch must be located in an accessible place within the interior of the game which

controls the electrical current used in the operation of the game.

(5) Resistance to Electromagnetic Interference. The operation of the video game of chance, including the coin drop and other such component parts, must not be adversely affected by static discharge, radio frequency interference or other electromagnetic interference.

(6) Approved Coin and Bill Acceptors. At least one electronic or mechanical coin acceptor must be installed in or on each video game of chance. The devices may also contain bill acceptors for denominations determined by the Band. Prior to operation within the reservation, all models of coin and bill acceptors installed must have been tested and approved in writing by a gaming test laboratory as provided in Section 6.

(7) Secure Cabinets. The internal space of the video game of chance shall not be readily accessible when the door is closed and sealed.

(8) Secure Electronic Components. Logic Boards and software Electronically programmable read only memory chips (hereinafter EPROMS) and other logic control components shall be located in a separate compartment within the video game of chance and that compartment shall be locked with a different key or combination than that used for the main cabinet door.

(9) Secure Cash Compartment. The coin and currency compartment shall be secured with a different key or combination than that used for the main cabinet door, except that a separate cash compartment shall not be required for coins necessary to pay prizes in a machine which pays prizes through a drop hopper.

(10) No hardware Modification of Pay Tables or Payouts. No hardware switches (DIP Switches) may be installed which alter the pay tables or payout percentages for the game.

(11) Printed Record of Credits and Payouts Required. A single printing mechanism which must be capable of printing an original ticket and retaining an exact, legible copy, either within the game or in a slot management/reporting system approved by the gaming test laboratory, that provides permanent sequential tracking, and which permits monitoring of error conditions on a printed medium for future use, and which records the following information: (a) the number of credits; (b) value of the credits in dollars and cents; (c) the cash paid by the device and (d) any other data required by

the Tribe. Video games of chance utilizing coin drop hoppers are permitted, provided they are monitored by a slot management/reporting system of the type described in this paragraph which has been approved by an independent gaming test laboratory.

(12) Identification Plates Required. Each video game of chance shall have an unremovable identification plate on the exterior of the cabinet which contains the following information:

(a) Manufacturer;
(b) Serial Number;
(c) Model Number;
(d) License stamp and number issued by the Band certifying compliance with the technical standards set forth in this compact.

(13) Rules of Play and Possible Winnings Displayed. The rules of play for each game must be prominently displayed on the game screen or the cabinet face. The Band shall not permit the display of any rules of play which are incomplete, confusing, or misleading. Each game must display the coins or credits wagered and the credits awarded for the occurrence of each possible winning combination based on the amount wagered. All information required by this section must be kept under glass or other transparent substance and at no time shall stickers or other such materials be placed on the machine face which obscure the rules of play or the operational features of the game.

(14) Operation as Part of Telecommunications Network. The hardware requirements above shall not be construed to prevent the operation of the video game of chance as part of a local or telecommunications area network with an aggregate prize or prizes. A video game of chance capable of bidirectional communication with external associated equipment must utilize communication protocol which insures that erroneous data or signals will not adversely affect the operation of the device.

(15) Security Tape for EPROMS. Upon installation, the Band shall affix or cause to be affixed to the EPROM of each video game of chance a strip of security tape, capable of evidencing the removal of the EPROM if the EPROM is removed from the circuit board. The security tape shall be secured and available only to the authorized personnel of the Band. The Band shall maintain accurate and complete records of the identification number of each EPROM installed in each video game of chance.

(16) No Credit Card Meters Permitted. No video game of chance may be equipped with a device which permits the player to use a credit card rather than currency or coin to activate the game.

## 6.10 Software Requirements for Video Games of Chance

Video games of chance operated within the reservation must meet the following specifications:

(1) Software Requirements for Randomness Testing. Each video game of chance must have a true random number generator which will determine the occurrence of a specific symbol or a specific number to be displayed on the video screen where such symbol, card, or number is wholly or partially determinative of the outcome of a game. A selected process will be considered random if:

(a) Chi-Square analysis.
Each symbol, card, stop position, or number position which is wholly or partially determinative of the outcome of a game, satisfies the 99 percent confidence limit using the standard chi-square analysis.

(b) Runs Test.
Each symbol, card, stop position or number does not as a significant statistic produce detectable patterns of game elements or occurrences. Each symbol, card, stop position or number will be regarded as random if it meets the 99 percent confidence level with regard to the "runs test" or any generally accepted pattern testing statistic.

(c) Correlation Analysis.
Each symbol, card, stop position or number is independently chosen without regard for any other symbol, card or number drawn within that game play. Each pair of symbol, card or number positions is considered random if it meets the 99 percent confidence level using standard correlation analysis.

(d) Serial Correlation Analysis.
Each symbol, card, stop position or number is independently chosen without reference to the same symbol, card, stop position or number in the previous game. Each symbol, card, stop position or number position is considered random if it meets the 99 percent confidence level using standard serial correlation analysis.

(e) Live game correlation.
Video games of chance that are representative of live gambling games must fairly and accurately depict the play of the live game.

(2) Software Requirements for Percentage Payout.
Each video game of chance must meet the following maximum and minimum theoretical percentage pay out during the expected lifetime of the game.

(a) Games Not Affected by Player Skill.
Video games of chance with game outcomes not affected by player skill shall payout a minimum of 80 percent and not more than 95 percent of the amount wagered, including replays. For the video game of keno and other similar games, the theoretical payout percentage requirements apply to each number of spots marked, but in no instance less than 75 percent for each wager.

(b) Video Games That Are Affected by Player Skill.
Video games that are affected by player skill, such as draw poker and blackjack, shall payout a minimum of 83 percent and no more than 98 percent of the amount wagered, including replays. This standard is met when using a method of play which will provide the greatest return to the player.

(3) Minimum Probability Standard for Maximum Payout.
Each video game of chance must have a probability of obtaining the maximum payout which is greater than 1 in 17,000,000 (ONE IN SEVENTEEN MILLION) for each play.

(4) Software Requirements for Continuation of Game After Malfunction.
Each video game of chance must be capable of continuing the current game with all current game features after a game malfunction is cleared automatically or by an attendant.

(5) Software Requirements for Play Transaction Records.
Each game shall maintain electronic accounting meters. Such meters shall be maintained at all times, whether or not the game is being supplied with external power. The following information must be recorded and stored on meters capable of maintaining totals no less than eight digits in length:

(a) Total number of coins inserted (the meter must count the total number of coins, or the equivalent value if a bill acceptor is used, which are inserted by players);

(b) Number of Credits Wagered;
(c) Number of Credits Won;
(d) Credits paid out by Printed Ticket Voucher or cash paid by the device.

The following information must be recorded and stored on meters capable of maintaining totals no less than six digits in length:

(e) Number of Times the Logic Area was accessed;
(f) Number of Coins or Credits Wagered in the Current Game;
(g) Number of Coins or Credits Wagered in the last complete, valid game; and
(h) Number of cumulative credits representing credits won and money inserted by a player but not collected, commonly referred to as the credit meter.

(6) No Automatic Clearing of Accounting Meters. No video game of chance shall have a mechanism or program which will cause the electronic accounting meters to automatically clear. The electronic accounting meters may be cleared only after written records of the readings before and after the clearing process are taken by the Band, which shall also record the reason the meter was cleared.

**6.11 Accounting and Audit Procedures.**

The Band shall engage an independent certified public accountant to audit the books and records of all video gaming conducted pursuant to this compact and shall make copies of the audit and all current internal accounting and audit procedures available to the State upon written request. The Band shall permit the State to consult with the auditors before or after any audits or periodic checks on procedures which may be conducted by the auditors, and shall allow the State to submit written or oral comments or suggestions for improvements regarding the accounting and audit procedures. Within 30 days of receipt of any written or oral comments, the Band shall: (a) accept the comments and modify the procedures accordingly; or (b) respond to the comments with counterproposals or amendments. The State shall pay for any additional work performed by the auditors at the request of the State.

**6.12 Amendments to Hardware and Software Requirements for Video Games of Chance.**

The technical standards set forth in section 6.9 and 6.10 shall govern the operation of video games of chance unless

amended pursuant to Section 2 of this compact or pursuant to the procedures set forth in this section. For purposes of this section, amendments to sections 6.9 and 6.10 may be made only upon the written recommendation for, and detailed explanation of, the proposed amendment by the gaming test laboratory designated pursuant to section 6.1. The State Commissioner of Public Safety and the Chairman of the Band may thereafter, by mutual written agreement, amend the technical standards contained in sections 6.9 and 6.10 of this compact.

**6.13 Band Licensing.**

The Band shall only issue licenses to manufacturers of video gaming equipment with valid licenses from the states of Minnesota, New Jersey, Nevada, or South Dakota. The Band shall only issue licenses to distributors of video gaming equipment with valid licenses from the states of Minnesota, New Jersey, Nevada, or South Dakota. In the event that the State of Minnesota, or the States of New Jersey, Nevada, or South Dakota, suspend, revoke, or refuse to renew a license of a manufacturer or distributor similarly licensed by the Band, the Band shall accept the state's determination and shall require the suspension, revocation, or non-renewal of the license issued by the Band.

**6.14 Definitions**

(1) "Chi-squared analysis" is the sum of the squares of the difference between the expected result and the observed result.

(2) "Runs test" is a mathematical statistic which determines the existence of recurring patterns within a set of data.

(3) "Symbol position" means first symbol drawn, second symbol drawn, in sequential order, up to the 20th number drawn.

(4) "Video games of chance" means electronic or electomechanical video devices that simulate games commonly referred to as poker, blackjack, craps, hi-lo, roulette, line-up symbols and numbers, or other common gambling forms, which are activated by the insertion of a coin, token, or currency, and which award game credits, cash, tokens, or replays, and contain a meter or device to record unplayed credits or replays.

**Section 7. Reservation of Rights Under the IGRA**

The State and Band agree that by entering into this compact, the Band shall not be deemed to have waived its right to initiate and pursue the procedure provided by section 11(d)(7) of the IGRA with respect to the State's refusal to enter into a compact on other forms of Class III gaming, and neither the State nor the Band shall be deemed to have waived any rights, arguments or defenses applicable to such a procedure.

**Section 8. Severability**

Each provision, section, and subsection of this compact shall stand separate and independent of every other provision, section, or subsection. In the event that a court of competent jurisdiction shall find any provision, section, or subsection of this compact to be invalid, the remaining provisions, sections, and subsections of the compact shall remain in full force and effect.

Dated: _____

**STATE OF MINNESOTA**

**ARNE H. CARLSON**
**GOVERNOR**

Dated: 5-15-91

**WHITE EARTH BAND OF CHIPPEWA**

**CHAIRMAN**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**
**FOURTH DIVISION**

LOWER SIOUX INDIAN COMMUNITY OF MINNESOTA,

Plaintiff,

v.

STATE OF MINNESOTA,

Defendant.

Civil No. 4-90-936

**REPORT AND RECOMMENDATION**

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Plaintiff Lower Sioux Indian Community ("Community") seeks an order compelling defendant State of Minnesota ("state") to enter into a Tribal-State compact concerning blackjack operations pursuant to the Indian Gaming Regulatory Act ("Act"), 25 U.S.C. Sections 2701-2721 (1989).

## I. BACKGROUND

The Community, situated in Redwood County, Minnesota, is a federally recognized Indian tribal government organized under the provisions of 25 U.S.C. Section 476 (1988). In the early summer of 1988, the Community commenced gambling operations which included gaming similar to blackjack in its on-site reservation facility Jackpot Junction. On October 20, 1988, the Community requested negotiations with the state to enter into a Tribal-state compact concerning video games of chance and blackjack. After several formal meetings and numerous exchanges of correspondence, however,

no such agreement was reached as to blackjack.[1] Specifically, in a letter dated September 22, 1989, the state concluded that due to the absolute proscription of blackjack gaming under state law, it lacked any authority to negotiate such gaming.[2] Consequently, on October 24, 1989, the Community filed a complaint contending that, inter alia, its blackjack gaming was legal under state law and that the state failed to negotiate the Tribal-state compact in good faith. The Community also sought to compel the state to enter into a compact concerning blackjack gaming.

The Act, enacted on October 17, 1988, establishes a tripartite (class) scheme in regulating gambling operations on Indian lands. Significantly, each class of gaming "differ[s] in the degree of federal, state, and tribal oversight." U.S. v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 359 (8th Cir. 1990). Class I gaming constitutes "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." 25 U.S.C. Section 2703(6). Any Class I gaming falls "within the exclusive jurisdiction of the Indian tribes and shall not be subject to this Act." Id. at Section 2710(a)(1).

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[1]An agreement regarding video games of chance was consummated between the state and the Community on October 20, 1989 and ratified by the Community on November 27, 1989.

[2]The letter dated September 22, 1989 stated, in pertinent part: "It is the conclusion of the negotiating committee that video games of chance are the only forms of Class III gaming within the purvue of the committee. In all other cases of Class III gaming, Minnesota law, the state constitution, or public policy precludes such gaming in Minnesota."

Class II gaming is defined as "any game of chance known as bingo" or certain nonbanking card games but excludes "any banking card games, including...blackjack (21)[.]"[3] Id. at Section 2703(7)(A)-(D). While the Act also places Class II gaming within the jurisdiction of the Indian tribes, such gaming, unlike Class I gaming, is subject to the Act's provisions. Id. at Section 2710(a)(2).

Class III gaming is simply "all forms of gaming that are not class I gaming or class II gaming." Id. at Section 2703(8). Class III gaming shall be lawful if such activities are--

> (A) authorized by an ordinance or resolution that--
> (i) is adopted by the governing body of the Indian 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.

Id. at Section 2710(d)(1)(A)-(C). For the purposes of this action, both parties agree that the gaming at issue is Class III gaming.

The Act requires any Indian tribe conducting Class III gaming operations on its lands to request the state in which such land is situated to enter into a Tribal-State compact. Id. at 2710(3)(A). Upon request, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." Id. The fulfillment of

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[3]Nonbanking card games are "those games where players play against each other rather than the house" whereas banking card games are games in which "players play against the house and the house acts as the banker." S.Rep.No.446, 100th Cong., 2nd Sess. 9, reprinted in 1988 U.S. Code Cong. & Admin.News 3071, 3079.

any of the conditions of lawfulness, however, is not a condition precedent to tribal negotiations. See generally Mashantucket-Pequot Tribe v. Connecticut, 913 F.2d 1024, 1028 (2nd Cir. 1990). But "if a state does not permit 'such gaming,' the matter is at an end." Id. at 1028-29.

If, during the course of negotiations, a tribe deems that a state is not discharging its statutory obligation to negotiate in a good faith manner, the Act provides a tribe recourse in the form of a two pronged prima facie test to, if established, shift the burden of proof to the state to explain its conduct. Id. at 2710(d)(7)(A)-(B). Failure of state to rebut a tribe's prima facie case will result in a court order mandating that both parties enter into a compact within a 60-day period. Id. at 2710(d)(7)(B)(iii).

## II. DISCUSSION

Preliminarily, since the state has indicated that the lawfulness of the Community's proposed gaming is suspect under 2710(d)(1)(B), this claim will be addressed first. Obviously, if such gaming is indeed unlawful, discussion of the good faith issue would be unnecessary. Furthermore, since the state has not taken issue with subsections (A) and (C), a failure of the state's claim on the subsection (B) issue will necessarily trigger a discussion of the good faith issue. The following will thus proceed in this context.

The state generally argues that its obligation to negotiate in good faith never arises unless the requirements of Section 2710(d)(1)(B) are met. Specifically, it contends that since the state criminally proscribes commercial blackjack, such gaming is not permitted by the state and, as such, its obligation to negotiate with the Community never arose. This general line of reasoning rests on the following legal theory.

First, the state underscores the difference between blackjack and commercial blackjack. In particular, the state asserts that the Community's gaming proposal constituted the latter rather than the former. On this assumptiopn, "such gaming" as contemplated by Section 2710(d)(1)(B) then constitutes commerical blackjack. As such, the state makes the following observation: because state law provides no exception to commercial blackjack, state law expressly proscribes commercial blackjack.[4] Based on this observation, the

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[4]Since Section 2710(d)(1)(B) defers to state law, a brief review of state law is necessary. In general, Minnesota law proscribes any form of betting (such as with blackjack) except when the bet is "(5)a private social bet not part of or incidental to organized, commercialized, or systematic gambling." M.S.A. Section 609.75(3)(5). The state contends that since the Community's proposal is one of commercial blackjack, this type of gambling constitutes commercial gambling which renders the above exception inapplicable.

As a further note, a similar line of reasoning was posited in Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1029 (2nd Cir. 1990). In Mashantucket, Connecticut argued that its state laws did not permit "such [casino type] gambling" and thus "such gaming" did not fall under Section 2710(d)(1)(B)'s language. The Second Circuit, however, rejected Connecticut's contention on grounds that a specific state law--Conn.Gen.Stat. Section 7-186(a)-(p)--expressly permitted "Las Vegas nights" or the type of gaming at issue. In contrast, no Minnesota counterpart to Connecticut's "Las Vegas nights" law exists. Quite clearly, if the state is successful in characterizing the Community's proposal as commercial blackjack (as opposed to blackjack in general), it will prevail in

state concludes that since the state does not permit "such gaming [commercial blackjack]" "for any purpose" as set forth in Section 2710(d)(1)(B), such gaming is unlawful. Such permission would be, in its view, "a quantum leap from the concept of a private social bet."

Initially, the state's distinction between blackjack and commercial blackjack is misplaced. Paragraph 15 of the parties' stipulation of facts indicates that the Community requested Tribal-state negotiations of "both video games of chance and banking card games." Pargagraph 22 of the stipulation shows that the parties understood that "the banking card game...was substantially identical to the card game commonly known as 'Blackjack' or '21'." Significantly, the stipulation and the record are conspicuously devoid of any evidence lending credence to the state's observation that "such gaming" constitutes commercial blackjack. Its distinction thus is devoid of merit.

As set forth above, Section 2710(d)(1)(B) states that Class III gaming activities shall be lawful if "(B)located in a state that permits such gaming **for any purpose by any person, organization, or entity** (emphasis supplied)." As the plain meaning of the statute suggests, if a state permits a tribe's proposal for Class III gaming "for any purpose," the tribe will have satisfied the requirements of Section 2710(d)(1)(B). Pursuant to Paragraph 24 of the parties' stipulation, the parties agree that

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its view that the Community's proposed gaming does not fall under Section 2710(d)(1)(B).

> In the State of Minnesota gambling is prohibited as a matter of criminal law, except that certain forms of gambling are permitted by statute, if conducted under limited circumstances. The playing of "Blackjack" or "21" is not permitted if the play is part of or incidental to organized, commercialized or systematic gambling, **but is permitted if the play involves a private social bet or if the gambling is not conducted as any part of the game.**

Clearly, based on the parties understanding of the law, Minnesota does permit "such [blackjack] gaming" if played in a social betting context. Thus, under the plain terms of the statute, the Community fulfills the requirements of Section 2710(d)(1)(B).[5]

As a result, the only obstacle to good faith negotiations has been removed. Thus, upon being requested to enter into compact negotiations on October 20, 1988, the Act conferred upon the state a duty to negotiate in good faith. In this context, the Community argues that an inference or prima facie showing of the state's lack of good faith is evinced by the state's cursory justification for the discharge of its responsibility to negotiate in good faith as set forth in its letter dated September 22, 1989.

As a precondition to asserting a prima facie case of a state's lack of good faith, a tribe must wait until "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)" to initiate any cause of action "arising from the failure of a State to enter into negotiations with the Indian tribe"

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[5]The parties also dispute the use of the Supreme Court's ruling in California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) as an instructive guide in this analysis. Due to the dispositive nature of parties' stipulation, however, such dispute need not be addressed.

concerning Tribal-state compact negotiations. 25 U.S.C. Section 2710(d)(7)(B)(i) and Id. at Section 2710(d)(7)(A)(i).

Sections 2710(d)(7)(B)(ii)(I)-(II) provide that "upon the introduction of evidence that" a tribal-state compact has not been entered into and the state did not either respond or respond in good faith, the burden of proof shall shift to the state to prove good faith. In determining whether the state has acted in good faith, a court may consider, inter alia, factors of public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities[.]" Id. at Section 2710(d)(7)(B)(iii)(I).

In establishing its prima facie case, the Community proffers evidence of lack of a compact and the letter dated September 22, 1989. The first prong of the prima facie case is clearly met by the Community's former proffer of evidence. However, a question remains as to whether the Community's latter proffer of evidence satisfies the "introduction of evidence" threshold in order to shift the burden of proof to the state. That is, the evidentiary threshold is unclear when it is applied to the Community's second proffer of evidence. Therefore, in order to facilitate this inquiry (concerning the "introduction of evidence" threshold), a brief review of the legislative history is warranted.

S.Rep.446 sets forth the rationale in allocating the burden of proof as to good faith in compact negotiations. Specifically, the Committee observed that an unequal balance of power existed between a tribe and a state in compact negotiations: on the one hand,

tribes "may be required to give up any legal right they may now have to engage in Class III gaming [as a result of the Act]," but, on the other hand, states are not required to forego any such rights save those that are conceded in a compact. S.Rep.446, 100th Cong., 2d Sess.14, reprinted in 1988 U.S.Code Cong. & Admin.News 3071, 3084. Thus, in an effort to rectify this imbalance, the Committee selected a good faith standard to govern such negotiations which required a state to explain its [good faith] conduct upon a preliminary showing of a lack of good faith. S.Rep.446, supra, at 14, 1988 U.S.Code Cong. & Admin.News 3084. The Committee concluded that "it is States not tribes, that have crucial information in their possession that will prove or disprove tribal allegation of failure to act in good faith." S.Rep.446, supra, at 14-15, 1988 U.S.Code & Admin.News 3084-85.

Based on the Committee's report, it appears that the evidentiary threshold of "introduction of evidence" is not a very weighty one. Hence, while the letter submitted by the state could be susceptible to more than one interpretation concerning good or bad faith, such evidence does sufficiently constitute an "introduction of evidence" warranting a shifting of the burden of proof to the state to either prove good faith or rebut the prima facie showing by the Community.

In its attempt to defuse the Community's prima facie case, the state submits evidence that formal and informal negotiations extending over a year took place. Such showing, however, is unpersuasive. Specifically, the state fails to address the issue

of whether its conclusory remarks in its letter dated September 22 initially precluded it from entering into negotiations. If so, the state clearly could never have entered into any agreement concerning blackjack. This, of course, does not pass muster as a "negotiation" since a status of negotiations exists when there is view to reach an agreement. See NLRB v. Montgomery Ward, 133 F.2d 676, 686 (9th Cir. 1943) ([Good faith] is the obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement, and a sincere effort must be made to reach a common ground...[A] mere formal pretence at [negotiating] with a completely closed mind and without this spirit of co-operation and good faith is not a fulfillment of this duty"). In other words, if the state could not have entered into an agreement, its previous meetings with the Community were not "negotiations." In light of this ambiguity (i.e., its conclusory remark in its letter could have been interpreted several ways), the state's evidence rebutting the Community's prima facie case should fail in light of this court's duty to "interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes." S.Rep.446, 100th Cong., 2d Sess.15, reprinted in 1988 U.S.Code Cong. & Admin.News 3071, 3085.

## III. CONCLUSION

It is therefore **RECOMMENDED** that (1) Plaintiff's Motion for Summary Judgment be **GRANTED**; (2) Defendant's Motion for Summary Judgment be **DENIED**; (3) the District Court order both parties to enter into a Tribal-state compact within the prescribed 60-day period as set forth in 25 U.S.C. Section 2710(d)(7)(B)(iii).[6]

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[6]Upon a court's finding that a state failed to negotiate in good faith a Tribal-state compact, "the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. Section 2710(d)(7)(b)(iii). If after the 60-day period, the parties fail to consummate a Tribal-state compact

> [T]he 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.

Id. at Section 2710(d)(7)(b)(iv). Subsequently, the mediator shall submit to both parties "the compact selected by the mediator under clause (iv)." Id. at Section 2710(d)(7)(b)(v).

The Act then allows a state to either accept or reject ("not consent") the mediator's decision within a sixty day period commencing on the date on which the proposed compact was submitted by the mediator. Id. at Sections 2710(d)(7)(b)(vi)-(vii). If a state accepts the mediator's decision, such decision will be treated as compact as provided for under Section 2710(d)(3)(A). Section 2710(d)(7)(b)(vi). However, if a state "does not consent" to the decision, "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.

Id. at Section 2710(d)(7)(vii).

DATED: December 20, 1990.

BERNARD P. BECKER
United States Magistrate

Pursuant to Local Rule 16C(2), any party may object to this Report and Recommendation by filing with the Clerk of Court and serving all parties, within ten days, a writing which specifically identifies those portions of this Report to which objection is made and the legal and factual basis for that objection. All memoranda and other documents to be submitted in support of this Report must be filed within seven days of the making of any objection. Failure to comply with this provision shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lower Sioux Community of Minnesota,

Plaintiff,

v.

State of Minnesota,

Defendant.

Civil File No. 4-89-936

**OBJECTION OF DEFENDANT TO THE REPORT AND RECOMMENDATION OF MAGISTRATE BECKER**

Defendant State of Minnesota objects to the Report and Recommendation (hereinafter "the Recommendation") of Magistrate Bernard P. Becker filed in the above-entitled matter on December 20, 1990. The Defendant submits that the factual and legal conclusions reached in the Recommendation are erroneous. The Recommendation ignores critical facts contained in the record and is inconsistent with the intent and wording of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (the "IGRA"), its legislative history and relevant case law. Accordingly, Defendant urges the Court to reject the Recommendation and issue a decision granting summary judgment in favor of the Defendant.

## INTRODUCTION

This case involves the IGRA and its application to the commercial gambling enterprise operated by the Plaintiff on its reservation near Morton, Minnesota. A summary of the IGRA is contained in Defendant's initial memorandum at 2-4. The case involves the legality of a banking card game called "blackjack" or "21" under section 2710(d)(1) of the IGRA and the State's obligation, if any, to permit by Tribal-State Compact, the play of blackjack at Plaintiff's commercial gambling facility.

The case was submitted by the parties on stipulated facts. The Stipulation and supporting exhibits (hereinafter "Stip." and "Stip. Exh." respectively) were filed with the Court on July 10, 1990. Lengthy memoranda and reply memoranda were submitted, and oral argument was held on November 5, 1990.

In a Report and Recommendation filed on December 20, 1990, Magistrate Becker recommended that the Plaintiff's Motion for Summary Judgment be granted and the Defendant's like motion denied. As the basis for his recommendation, the Magistrate concluded: (1) the State failed, as a factual matter, to establish that the blackjack game operated by the Plaintiff was commercial in nature; (2) blackjack gambling is a permitted form of gambling in Minnesota; (3) the State failed to negotiate in good faith

a Tribal-State compact concerning the play of blackjack at Plaintiff's gambling facility; and (4) the State should be required to negotiate and conclude such a compact. For all the following reasons, the Recommendation must be rejected.

## ARGUMENT

### A. The Stipulation and Record are Replete with Evidence Establishing that Plaintiff Conducts Commercial Blackjack at its Gambling Facility.

The Recommendation correctly summarizes the State's primary legal theory:

> First, the State underscores the difference between blackjack and commercial blackjack. In particular, the State asserts that the Community's gaming proposal constituted the latter rather than the former. In this assumption, 'such gaming' as contemplated by Section 2710(d)(1)(B) then constitutes commercial blackjack.

See the Recommendation at 5. (Footnote omitted). The State argued that because commercial blackjack is prohibited as a matter of criminal law in Minnesota, the blackjack gambling operated by Plaintiff is not permitted under Section 2710(d)(1)(B).1/ The Recommendation correctly concludes:

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1/ The Recommendation summarizes the State's position as: "As such the State makes the following observation: because State law provides no exception to commercial blackjack, State law expressly proscribes commercial blackjack." (Emphasis added). This statement is not quite accurate. Minnesota law strictly prohibits commercial blackjack. See generally Minn. Stat. § 609.75-.76 (1990).

"Quite clearly, if the State is successful in characterizing the Community's proposal as commercial blackjack (as opposed to blackjack in general), it will prevail in its view that the Community's proposed gaming does not fall under Section 2710(d)(1)(B)." See the Recommendation at 5-6, note 4. (Emphasis added).

However, the Recommendation goes on to conclude that the "Stipulation and the record are conspicuously devoid of any evidence lending credence to the State's observation that 'such gaming' [the Community's blackjack game] constitutes commercial blackjack. . . . Its distinction thus is devoid of merit." Here the Magistrate clearly erred. The stipulation and the record are replete with evidence establishing that the Community's blackjack operation is a commercial gambling enterprise.

For example, Paragraph 5 of the Stipulation of Facts states:

> The Community is the owner and operator of a commercial gambling facility, bearing the name Jackpot Junction, which facility is located on the Lower Sioux Indian Reservation near Morton, Minnesota.

(Emphasis added). The Plaintiff advertises its gambling facility, calling it a "casino" and featuring "Las Vegas Style '21'" as a gambling attraction. Stip. ¶ 5 and Stip. Exh. 4. The Plaintiff touts its "professional dealers," "18 tables," "4 or 6 Deck Shoes," "Double Down Any 2 Cards," and

"Betting" of $2-$25." Stip. Exh. 4. The casino is open for gambling purposes 24 hours per day on Fridays through Sunday and other days until 2:00 a.m. Id.

Gambling is conducted on the Plaintiff's reservation pursuant to a tribal ordinance entitled 'Gaming Control Code.' Stip. Exh. 3. The specific rules for the "blackjack" or "Las Vegas Style '21' game" are contained in the Gaming Control Code. Stip. ¶ 4. Section 5 of the Gaming Control Code sets forth the Rules and Restrictions governing the game of blackjack or "21" in a "Gaming Enterprise." A "Gaming Enterprise" is defined in the Plaintiff's own Gaming Control Code as "any commercial business owned by the Community and operated, in part or in whole, for the conduct of bingo, the sale of pull-tabs, and the conduct of other games of chance." Stip. Exh. 3.

The specific rules of play for the blackjack game are substantially similar, if not nearly identical to, the rules of play governing casino blackjack. Compare, Stip. Exh. 3 to Stip. Exh. 18. The game of blackjack as played at Jackpot Junction, is a banking card game: the individual players play against the house (the commercial establishment) rather than against each other. Stip.¶ 14. The game is played through the use of four or more decks of "bingo cards" bearing the designation of B-1 to B-10. Stip. Exh. 3. The cards are placed in a dealing shoe located on a

playing table having five or seven marked and distinct betting spaces. Stip. Exh. 3, 4 and 18. As in casino blackjack, the cards are dealt from the shoe by a dealer to the house and to no more than seven players. Stip. Exh. 3 and 18. The object of the game is for the player to obtain a higher point total than the dealer [the house] without exceeding the number "21". Stip. ¶ ¶ 18 and 23; Stip. Exh. 3 and 18.

Betting at Jackpot Junction, like in most casinos, is accomplished through the use of die-cut clay chips imprinted with the value of the chip and the name of the gambling enterprise. Stip. Exh. 3 and 18. Plaintiff offers betting options typically offered in casino blackjack games: split wagering, double down wagering and insurance. Stip. Exh. 3 and 18. Likewise, as in casino blackjack, the dealer is required to stand on 17 and draw on cards totalling 16 or less. Stip. Exh. 3 and 18.

Finally, and perhaps most importantly, gambling at Jackpot Junction is conducted for the purpose of financial gain or profit. See Stip. ¶ 6.2/ In fact, 28% of the

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2/ In determining what does or does not constitute commercial blackjack, it is appropriate to review the common and accepted usage of the term "commercial". The dictionary defines "commercial" as an activity "made, done or operating primarily for profit". The American Heritage Dictionary 267 (1982). "Commercialize" is defined as an activity "to engage in or make use of mainly for profit." Id.

gross profits derived from Jackpot Junction are attributable to the blackjack operation. The adherence to general casino blackjack rules, the use of the term "casino," the availability of 18 separate blackjack tables, each staffed with a "professional dealer" and open 14 to 24 hours per day are obviously designed to maximize profits for Plaintiff's "commercial gambling facility." See Stip. ¶ 3.

In light of these facts, the Magistrate was plainly mistaken in his conclusion that the stipulation and record are "devoid of any evidence lending credence to the State's observation" that the Plaintiff conducts commercial blackjack gambling. A careful review of the record leads to the inescapable conclusion that the blackjack game conducted at Jackpot Junction is commercial blackjack.

**B. Because the Plaintiff Operates Commercial Blackjack, the Gambling is not Lawful Under Section 2710(d)(1)(B) of the IGRA.**

As mentioned above, the Recommendation states:

> Quite clearly, if the State is successful in characterizing the Community's proposal as commercial blackjack (as opposed to blackjack in general), it will prevail in its view that the Community's proposed gaming does not fall under Section 2710(d)(1)(B).

See the Recommendation at 5-6, note 4. By making this conclusion, it appears that the Magistrate recognized and accepted the legal distinction between commercial blackjack and blackjack played only in conjunction with a private

social bet.3/ The Magistrate rejected the distinction only on the grounds that the facts and record were "devoid" of evidence demonstrating that the Plaintiff's blackjack operation constituted commercial blackjack. However, in light of the above discussion of the facts, it is clear that such a factual conclusion is not supported by the record. Plaintiff clearly conducts commercial blackjack.

The legal distinction between commercial blackjack, like that played at Plaintiff's facility, and the type of blackjack card game legal in Minnesota is critical. There is a substantial difference between the blackjack gambling conducted at Plaintiff's facility and the type of blackjack that may be played without criminal penalty in Minnesota. Of particular significance is the distinction between a "banking" blackjack game and a "nonbanking" game. The Plaintiff plays a banking card game--the players bet against the commercial establishment rather than against each other. Stip. ¶ 4. In Minnesota, commercial participation in any casino game, including blackjack, is strictly prohibited. See Minn. Stat. § 609.75, subd. 3 (1990). Accordingly, the only method by which gambling could occur in conjunction with the game of blackjack in Minnesota is if the game was

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3/ As discussed in detail in the State's initial memorandum, such an interpretation of the law is consistent with the plain language of the statute as well as Congressional intent. See, Defendant's Initial Memorandum at 13-30.

played with a "private social bet" not part of or incidental to organized or commercialized or systematic gambling. Id. In other words, in Minnesota, blackjack is strictly prohibited if the game involves play against a house (i.e., a commercial establishment or person acting for profit), or is part of or incidental to organized or systematic gambling.4/

The distinction between banking and nonbanking card games is significant for purposes of the IGRA and must be taken into account under Section 2710(d)(1)(B). For example, the IGRA defines Class II gaming as including:

> (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.

Section 2703(7)(A)(ii). The definition of Class II gambling expressly excludes "any banking card games, including baccarat,

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4/ Thus, even private non-banking blackjack games are illegal if part of or incidental to organized or systematic gambling. For example, in United States v. Shursen, 649 F.2d 1250 (8th Cir. 1981), the Court held a private "floating blackjack" game to be illegal under state and federal law because, among other things, the amounts wagered were substantial.

chemin de fer, blackjack (21) . . . ." (Emphasis added). Section 2730(7)(13)(i). The definition of Class II gambling underscores the congressional distinction between commercial (banking) blackjack and non-commercial card games.

Thus, the State urges this Court to reject the recommended finding that the record is devoid of evidence demonstrating that plaintiff conducts 'commercial blackjack'. The only realistic conclusion that can be made from the facts is that Plaintiff's banking card game of 'Las Vegas Style "21"', complete with advertising and casino-like attributes, is commercial blackjack. Consistent with this factual conclusion, the State urges the Court to conclude that for purposes of this case and Section 2710(d)(1) of the IGRA, that "such gaming" constitutes commercial blackjack, and because commercial blackjack is not permitted in Minnesota, the State was not required to negotiate a Tribal-State Compact with the Plaintiff to govern the game.

### C. Blackjack, Commercial or Otherwise, is not Permitted Gambling in Minnesota Within the Meaning and Intent of Section 2710(d)(1)(B) of the IGRA.

Section 2710(d)(1) of the IGRA provides:

> Class III gaming activities shall be lawful on Indian lands only if such activities are--
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> * * *
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity. . . .

The State submits, and the Magistrate agrees that commercial blackjack is not permitted gambling in Minnesota. On that basis, the State is not required to enter a compact allowing the operation of Plaintiff's blackjack game. Nevertheless, the State submits that even beyond this, blackjack gambling, whether commercial or not, is not permitted gambling in Minnesota within the meaning and intent of Section 2710(d)(1)(B). Thus, regardless of how Plaintiff's operation is characterized, a compact is not required. The Magistrate apparently disagrees with this, and the State contends the Magistrate is in error here as well.

As discussed in detail in the State's initial memorandum, blackjack gambling is not expressly permitted, or even mentioned, in Minnesota law. Blackjack gambling is not permitted for commercial purposes (Minn. Stat. §§ 609.75-.76 (1990)); blackjack gambling is not permitted for charitable purposes (Minn. Stat. § 349.12, subd. 2 (1990)); and blackjack gambling is not permitted if the game involves play against a "house" in the form of a banking card game (Minn. Stat. §§ 609.75-.76 (1990)). In fact, blackjack, as is all betting, is generally criminally proscribed.5/ Minn. Stat. § 609.75-.76 (1990).

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5/ The exceptions to this general criminal prohibition are for charitable gambling (Minn. Stat. §§ 349.11-.214

Footnote Cont. Next Page

However, Minnesota law does include a narrow exception to its general criminal prohibition against gambling for "a private social bet not part of or incidental to organized, commercialized or systematic gambling." Minn. Stat. § 609.75, subd. 3. Although no Minnesota court has interpreted or defined a private social bet, courts that have addressed the issue in other states have generally held that private social gambling is limited to a private, casual bet between friends. See, Houston v. Younghans, 580 P.2d 801 (Colo. 978); State v. Owens, 703 P.2d 989 (N. Mex. 1984); State v. Allen, 638 P.2d 514 (Hawaii 1981).

The Recommendation does not define or discuss private social betting. Instead, based on an extreme and unjustifiably broad reading of the law and the Stipulation, the Magistrate, without discussion or rationale, apparently concludes that because the card game of blackjack may be played in Minnesota and a private social bet made as part of the game without fear of criminal prosecution, blackjack gambling is permitted in Minnesota "for any purpose by any person, organization or entity." Section 2710(d)(1)(B). Thus, the Recommendation concludes, the narrow exception in

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Footnote 5 Cont.
(1990)); the Minnesota State Lottery (Minn. Stat. §§ 349A.01-.15 (1990)); and pari-mutuel horse racing (Minn. Stat. §§ 240.01-.29 (1990)). Blackjack is not permitted under any of these exceptions.

Minnesota law for a private, social bet is tantamount to the express legalization of any kind of blackjack gambling and, therefore, is sufficient to form the basis for the play of high-stakes, commercial blackjack at Plaintiff's gambling casino.

Such a conclusion is completely inconsistent with the intent of Congress in drafting the IGRA.6/ In the Senate Report on S.555, the precursor to the IGRA, the Select Committee on Indian Affairs indicates:

> There are five states (Arkansas, Hawaii, Indian, Mississippi and Utah) that criminally prohibit any type of gaming, including bingo. S.555 bars any tribe within those states, as a matter of federal law, from operating bingo or any other type of gaming.

S. Rep. No. 100-446, 100 Cong., 1st Sess. 1-5; 1988 U.S. Code Cong. & Admin. News 3071-3076. This statement is significant because Hawaii, like Minnesota, carves out a narrow exception for social gambling. See HRS § 712-1231 (1989). Thus, there was clearly no congressional intent to permit Plaintiff to conduct blackjack or "Las Vegas style '21'" on its reservation simply because the State created a narrow private social betting exception to its general criminal prohibition against gambling.

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6/ Further arguments regarding Congressional intent may be found in Defendant's initial memorandum at 22-28.

Moreover, the broad interpretation of section 2710(d)(1) contained in the Recommendation goes far beyond the test employed by the IGRA for determining the legality of the less sophisticated Class II games. Indeed, the test proffered in the Recommendation exceeds even the test adopted by the United States Court of Appeals for the Second Circuit in Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Cir. 1990).

Under the Magistrate's test, a state need not expressly permit or even mention, a particular form of gambling before it is deemed to be "permitted" under 2710(d)((1)(B). Instead, the Recommendation concludes that if a state does not absolutely criminally prohibit the activity on which an isolated social bet could be legally conducted, the activity is permitted and constitutes permitted Class III gambling under the IGRA. Congress expressly indicated that such a test would not apply for purposes of determining the legality of the less controversial Class II games, and it is incomprehensible that Congress would have intended such a broad test to apply to the more controversial Class III games.

The Congressional finding set forth in Section 2701(5) of the IGRA provides that "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 in a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." See, Mashantucket Pequot, 913 F.2d at 1029. The Court in Mashantucket Pequot underscored the significance of the Congressional finding by observing that the finding is consistent with the Supreme Court's pre-IGRA ruling in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), which, in delineating the extent of a state's jurisdiction under Public Law 83-280, articulated the following test:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within [the area] of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory. . . . The shorthand test is whether the conduct at issue violates the state's public policy.

Mashantucket Pequot, 913 F.2d at 1029, citing Cabazon, 480 U.S. at 209. (Emphasis added.) The Senate Report specifically adopted the Cabazon test for the purpose of determining the legality of Class II gaming under Section 2710(b)(1)(A). Mashantucket Pequot, 913 F.2d at 1029. Given the controversial nature of Class III gaming, it is inconceivable that Congress would have intended that a significantly more liberal and literal, test be used for purposes of Class III gaming.

The Court in Mashantucket Pequot went on to conclude that because the language of Section 2710(b)(1)(A) is identical to the language of section 2710(d)(1)(B), both provisions must be construed to have the same meaning. Id. at 1030. Thus, the Court concluded that in determining the legality of Class III gaming under Section 2710(d)(1)(B), the Cabazon test should be employed. The State has argued throughout this litigation that application of the Cabazon test to Class III gaming goes beyond the intent of Congress by making forms of commercial gambling not otherwise permitted in the State legal on Indian lands. See, Defendant's initial memorandum at 20-31.

However, even if this Court were to reject the State's proferred interpretation of Section 2710(d)(1)(B) and conclude, as did the Second Circuit, that the Cabazon standard is applicable to a determination of whether blackjack is permitted Class III gambling in Minnesota, the Court must conclude that blackjack gambling is not permitted gambling in Minnesota. Under the Cabazon rationale, State law must generally permit, subject to regulation, the play of blackjack before the law will be deemed to be a civil/regulatory law. Minnesota law does not generally permit, or even mention, the game of blackjack. Likewise, Minnesota has never established a regulatory system to govern the game of blackjack. Unlike Connecticut, Minnesota

does not affirmatively permit any person or organization to play or conduct blackjack under limited circumstances for charitable purposes. As discussed in the State's initial memorandum, the State of Minnesota strictly prohibits the playing of blackjack as a banking card game as a matter of criminal law. Defendant's initial memorandum at 13-16.

The only exception to this general criminal prohibition involves the play of the card game of blackjack in conjunction with a private social bet, not part of or incidental to commercialized, systematic or organized gambling. Minn. Stat. § 609.75, subd. 3 (1988 and 1989 Supp.). However, a narrow exception to an otherwise criminal prohibition does not constitute an express grant of permission to operate, subject to regulation, the game of blackjack. Such an exception does not, under Cabazon, render the law civil/regulatory and blackjack gambling therefore permitted gambling in Minnesota. See United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977) discussed in Defendant's initial memorandum at 33.

The Recommendation contains no such analysis, but rather, concludes that the Stipulation of Facts is dispositive. See the Recommendation at 7, note 5. The Magistrate attributes far too much significance to his reading of certain words in the Stipulation and seems to

conclude that semantics override the IGRA, congressional intent and Minnesota law.

The parts of the Stipulation used by the Magistrate constitute only a recitation of Minnesota law and must be read consistently with Minnesota law. The Stipulation cannot, as the Magistrate appears to suggest, be read more broadly than Minnesota law. As previously mentioned, the game of blackjack may be legally played in Minnesota only if the game includes nothing more than a private social bet, not part of or incidental to organized, commercialized or systematic gambling. If the game consists of anything more than a few individuals playing a private game of blackjack without the use of a "house," or "bank" the game violates the general prohibition against betting in Minn. Stat. § 609.75. Whether the law is contained in the Stipulation or merely recited from the statute books, the result is the same. The social gambling exception in Minnesota law simply cannot, consistent with the IGRA, form the basis for the commercial blackjack operated by the Plaintiff.

Thus, the interpretation of Section 2710(d)(1)(B) contained in the Recommendation goes far beyond the intent of Congress in enacting the IGRA, is inconsistent with relevant decisional authority, and renders Minnesota laws related to gambling unrecognizable. For these reasons, the

interpretation of Section 2710(d)(1)(B) as set forth in the Recommendation must be rejected.

D. The State Negotiated With The Plaintiff In Good Faith.

The Recommendation concludes that the burden of proving that the state negotiated in good faith rests with the state because the Plaintiff met the requirements of Section 2710(d)(7)(B)(ii).7/ The Recommendation views the State's response to Plaintiff's request to negotiate far too narrowly, and erroneously overlooks several months of discussion between the State and the Plaintiff.

Plaintiff requested negotiations regarding "Class III gaming" on October 20, 1988. Stip. ¶ 10. The state responded to the request by engaging in numerous formal and informal meetings and communications concerning the negotiation process and the scope of the Class III gaming compact requested. Stip. ¶ ¶ 11, 14. After

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7/ Section 2710(d)(7)(B)(ii) provides:

> 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 a 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.

meeting and discussing the specific forms of Class III gaming requested, the state responded in a letter that a tribal-state compact would be negotiated but that Minnesota law, the state constitution or public policy precluded compacts on other forms of Class III gaming. Stip. ¶ 16. The Recommendation concludes that, while "susceptible to more than one interpretation", the letter, in and of itself, is apparently sufficient to establish that the state failed to respond to the Plaintiff's request to negotiate in good faith. See the Recommendation at 9.

The Recommendation incorrectly discounts the several months of meetings and communications by relying only upon the letter as a sufficient "introduction of evidence" to warrant shifting the burden of proof. Clearly, the actions of the state between October, 1988 and September 22, 1989 [the date of the letter] evidence considerable good faith on the part of the state. In light of these efforts, the mere "introduction" of the letter is not sufficient to override the State's substantial good faith efforts and demonstrate a lack of good faith on the part of the state. Thus, the Magistrate erroneously concluded that the Plaintiff made a prima facie showing sufficient to shift the burden of proof to the State.

Moreover, with respect to whether the State established that it negotiated in good faith, the Magistrate takes the position that "if the state could not have entered into an agreement, its previous meetings with the community were not 'negotiations'". See

the Recommendation at 10. Such a conclusion, views the scope of class III negotiations far too narrowly.

The State approached the negotiation process in the context of all Class III games (which was what the community requested) and attempted, through discussion, to define the scope of the compact. The process encompassed more than just specific regulatory provisions and required the parties to consider, consistent with the IGRA, matters of law and public policy in the context of the negotiation process.

The negotiating committee approached the table with the state's law and public policy in mind. Consistent with the "give and take" of the negotiation process, the state "gave" on the video games of chance but did not give in casino gambling, including blackjack. The state correctly considered the "good faith factors" contained in Section 2710(d)(7)(B)(iii)(I), particularly criminality and public interest, and concluded that because blackjack as proposed by the plaintiff was criminally prohibited in Minnesota and contrary to the state's public policy, a compact should not be consummated governing blackjack gambling.

The law does not require the consummation of a compact. The IGRA requires only negotiations in good faith concerning Class III gaming. The state, through months of discussions, meetings and negotiation sessions more than met any obligation it had to negotiate with the Plaintiff. Therefore, the conclusion that the state failed to negotiate must be rejected.

## CONCLUSION

This case is significant, not only for the Plaintiff and the state, but for the other states and tribes across the country grappling with the same issues. To let the Magistratet's Recommendation stand is to accept a principal of law that undermines state law, exceeds the intent of Congress and goes far beyond the decisions of any other court addressing these issues.

At the heart of the Magistrate's Recommendation, is a rule of law that requires the state to allow by compact virtually every kind of gambling imaginable on Indian lands in the state.8/ While this case addresses only blackjack gambling, the effect of the decision is to open the gates to all forms of casino gambling, as well as any other type of gambling the tribe may develop, even though such forms of gambling are not permitted within the state. Had Congress intended to so overwhelmingly override the law and public policy of this and other States it would have done so explicitly. Congress could have simply permitted class III gaming on Indian lands. Congress refused to do so. Instead, Congress created a mechanism that gives the state the opportunity to make these significant decisions in light

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8/ The exception to Minnesota's criminal prohibition for gambling for a "private social bet" is not limited to blackjack. A "private social bet" may be made in the context of many activities.

of its law and public policy. The effect of the Magistrate's Recommendation is to completely vitiate Congressional efforts to allow the the states to exercise a meaningful role in controlling the evolution of Class III gambling. Accordingly, the Recommendation should be rejected.

The State urges the Court to accept the Magistrate's basic legal framework but rectify his overly ambitious attempts to find a factual basis for allowing the Lower Sioux Community to do what it wishes. The Magistrate was correct in concluding that if "such gaming" under § 2710(d)(1)(B) is not permitted by the State, the matter is at an end--further negotiations need not be conducted and discussion of the good faith issue is unnecessary. Recommendation at 4. Furthermore, the Magistrate was correct in concluding that "Quite clearly, if the State is successful in characterizing the Community's proposal as commercial blackjack (as opposed to blackjack in general), it will prevail in its view that the Community's proposed gaming does not fall under Section 2710(d)(1)(B)". Recommendation at 5-6, n.4. Where the Magistrate erred was in somehow concluding that plaintiff's highly advertised, highly profitable, self-acknowledged "banking" card game is not commercial blackjack. With the correction of this error, the Court can issue a reasoned opinion, consistent

with the intent of the IGRA, that Minnesota need not be forced to permit by Compact a commercial blackjack enterprise at the Lower Sioux Community.

Dated: December 21, 1990

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANT**
**STATE OF MINNESOTA**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Lower Sioux Community of Minnesota,

Plaintiff,

v.

State of Minnesota,

Defendant.

Civil File No. 4-89-936

CONSENT JUDGMENT AND ORDER

This action was filed October 24, 1989, pursuant to the Indian Gaming Regulatory Act (102 Stat. 2467, 25 U.S.C. §§ 2701-2721 (1988)), by the Lower Sioux Indian Community against the State of Minnesota. The Lower Sioux Community sought an order directing the State of Minnesota to negotiate in good faith concerning a Tribal-State Compact permitting the banking card game of blackjack to be played at a commercial gambling facility owned and operated by the Community on the reservation.

The issues in the lawsuit were argued before Magistrate Bernard P. Becker on November 5, 1990, after briefs had been submitted by all parties. Magistrate Becker issued his Report and Recommendation to this Court on December 20, 1990. Objections were filed by the State of Minnesota on December 31, 1990.

Prior to the deadline for filing a response to the State's Objections, counsel for the Lower Sioux Community sought an extension of time for such filing, based on the possibility that the parties might be able to negotiate a settlement prior to this Court having to make a final decision on the merits of the lawsuit. An extension was granted to allow the parties to continue negotiations for settlement. It was proposed that the State and the eleven Minnesota Indian Bands enter into Tribal-State Compacts that would become part of a Consent Judgement entered by this Court after all Bands had intervened in the lawsuit. In brief summary, the Compacts would permit only the operation of the game of blackjack and would

prohibit the Bands from requesting compacts on every other form of Class III gaming, as defined by the Indian Gaming Regulatory Act, that is not specifically permitted by statute in the State of Minnesota for commercial, charitable or governmental purposes.

Compacts were signed by the Governor on May 8, 1991 and by the eleven Indian Bands between May 9, 1991 and June 11, 1991. By the terms of the Compacts, their legal effectiveness is contingent upon this Court:

1. Allowing intervention by all Minnesota Indian Bands in this lawsuit; and
2. Incorporating the Compacts into a Consent Judgment ordered by the Court; and
3. Determining that in light of the Consent Judgment, consideration of the Report and Recommendation of Magistrate Becker in this action is unnecessary.

Accordingly, the following motions have been made:

1. Motions by the Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, Red Lake, and White Earth Bands of Chippewa Indians to intervene as plaintiffs in this action;

2. Motions by the Prairie Island, Shakopee Mdewakanton, and Upper Sioux Communities to intervene as plaintiffs in this action;

3. Motions by the State of Minnesota, the Lower Sioux Community, and all Intervenor-Applicants asking the Court to enter a Consent Judgment and Order incorporating the signed Tribal-State Compacts and determine that, in light of the Consent Judgment, consideration of the Report and Recommendation of Magistrate Becker is unnecessary.

Based upon all the files, records, exhibits, memoranda, and the proceedings herein,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

I.

The motions of all Intervenor-Applicants to intervene as plaintiffs in this action are granted.

II.

The motions of the State of Minnesota, the Lower Sioux Community and all Intervenor-Applicants for a Consent Judgment and Order are granted. The signed Tribal-State Compacts attached hereto are made part of the Judgment of the Court in this action; and each of the parties is hereby directed to implement and perform the terms of this Judgment which incorporates all provisions of said Tribal-State Compacts.

III.

This Judgment shall be binding upon plaintiffs and defendants, their officers, agents, servants, employees, members, and attorneys, and upon those persons in active concert or participation with them.

IV.

The terms of this Judgment may be enforced upon proper application to this Court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: 8/1/91

Diana E. Murphy

JUDGE DIANA E. MURPHY
United States District Court

# TRIBAL-STATE COMPACT
# FOR CONTROL OF CLASS III BLACKJACK
# ON THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY RESERVATION
# IN MINNESOTA

**WHEREAS,** the State of Minnesota (hereinafter "State") and the Shakopee Mdewakanton Sioux Indian Community, (hereinafter "Community") are separate sovereigns, and each respects the laws of the other; and

**WHEREAS,** the Community exercises governmental authority within the Shakopee Mdewakanton Sioux Indian Community Reservation (hereinafter "Reservation"), which, for purposes of this compact, means those lands within the current boundaries of the Shakopee Mdewakanton Sioux Community Reservation and any other "Indian lands", as defined by the Indian Gaming Regulatory Act, over which the Community exercises governmental authority; and

**WHEREAS,** the Congress of the United States has enacted the Indian Gaming Regulatory Act (hereinafter "IGRA"), Public Law 100-497, 102 Stat. 2467, 25 U.S.C. Sections 2701 to 2721 (1988) creating a mechanism through which the several States and Indian tribal governments may allocate jurisdiction and control of Class III gaming activity which occurs on their lands; and

**WHEREAS,** the Community is a federally recognized Indian tribal government which is duly qualified to conduct certain types of Class III gaming on its lands;

**WHEREAS,** the State of Minnesota pursuant to Minnesota Statute Section 3.9221 (1990), authorizes the Governor or his representatives to negotiate with regard to compacts with the several Indian tribal governments in the State of Minnesota; and

**NOW THEREFORE,** in consideration of the mutual undertakings and agreements hereinafter set forth, the Community and the State enter into the following compact.

## Section 1. Findings and Declaration of Policy

### 1.01 Findings

As the basis for this compact, the State and the Community have made the following findings:

1.02 This compact shall govern the licensing, regulation and play of the banking card game of "Blackjack" or "Twenty-one (21)" (hereinafter "Blackjack") within the Reservation. Blackjack is a banking card game which involves the use of one or more decks of playing cards, the purpose of which is to reach the number "21" (or as close thereto as possible without exceeding the number "21") through the cumulative addition of cards dealt to the players and the house. The game shall be played as described in Section 4 of this compact.

1.03 The purposes of this compact generally are to provide the Community with the opportunity to offer Blackjack in a way that will benefit the Community economically, that will insure fair operation of the game, and that will minimize the possibilities of corruption and infiltration by criminal influences.

1.04 The Community has the right to license and regulate gaming activity on its lands in accordance with the IGRA and this compact.

1.05 A principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government;

1.06 The State and the Community find it to be consistent with the IGRA, and the public health, safety and welfare to regulate Blackjack pursuant to this compact.

1.07 The Community has operated various forms of Class II gaming continuously since 1982, has operated Class III video games of chance pursuant to a Tribal-State compact since 1989, and has implemented controls satisfactory to the Community for the responsible operation and regulation of the games.

1.08 The Community will operate Blackjack pursuant to this compact and contemporaneously with its Class II and Class III gaming operations.

1.09 Nothing herein shall in any way affect or alter the terms of the Tribal-State compact for control of Class III video games of chance on the Shakopee Mdewakanton Community Reservation in Minnesota, executed by the Community and the State in 1989 and approved by the Secretary of the Interior.

## 1.1 Declaration of Policy

1.2 The State recognizes the positive impacts that gaming may provide to the Community. The Community may utilize gaming-generated financial resources to fund programs that provide various vital services to Community residents. These programs may include education, health and human resources, housing development, road construction and maintenance, sewer and water projects, and economic development. The State also recognizes that the positive economic effects of such gaming enterprises may extend beyond tribal governments to the tribe's neighbors and surrounding communities, and may help to foster mutual respect and understanding among Indians and non-Indians.

1.3 The Community and the State, through this compact and the regulations incorporated herein, shall attempt, in good faith, to address the legitimate common concerns of both parties.

## Section 2. Duration, Renegotiation and Effect on Right to Request Compacts under the IGRA for Class III Gaming

## 2.1 Duration

Subject to the provisions of Section 9, this compact shall become effective upon execution by the Governor of the State, ratification by the Community, approval by the Secretary of the Interior and publication of that approval in the Federal Register pursuant to the IGRA. This compact is entered into pursuant to the IGRA, State law and Community law. Minnesota Statutes Section 3.9221 (1990) is incorporated herein by reference. It is the intent of the State that, if the Minnesota Legislature prohibits the play of Blackjack for all purposes as against public policy and as a matter of criminal law, this compact shall not be construed to provide for the continued play of Blackjack by the Community pursuant to this compact. It is the intent of the Community that, if the Minnesota Legislature prohibits the play of Blackjack for all purposes as against public policy and as a

matter of criminal law, this compact shall not be construed to prohibit the continued play of Blackjack by the Community pursuant to this compact. As provided in Minn. Stat. § 3.9221, subd. 4 (1990), in the event of a request for a renegotiation under section 2.2 of this compact the existing compact will remain in effect until renegotiated or replaced.

2.2 Renegotiation

(1) Except as provided in subsection (2) below, the State or the Community may, by appropriate and lawful means, request negotiations to amend, replace or repeal this compact. In the event of a request for renegotiation, this compact shall remain in effect until renegotiated or replaced. Such requests shall be in writing and shall be sent by certified mail to the Governor of the State or the Chairman of the Community at the appropriate governmental office. If such a request is made by the Community, it shall be treated as a request to negotiate pursuant to the IGRA. The parties shall have 180 days to negotiate and all further procedures and remedies available under the IGRA shall thereafter apply. The State and the Community may agree to extend the 180 day period without prejudice to the rights of either party under this section.

(2) Subsection (1) shall not permit the Community to request negotiations to amend, replace or repeal the provisions of section 2.3 (1) and (2) of this compact and, by entering into this compact, the Community waives any right it may have under state or federal law to request such negotiations.

2.3 Effect on Right to Request Compacts Under the IGRA for Class III Gaming

(1) By entering into this compact, the Community waives any right it may have under state or federal law to request the State to negotiate a compact for any form of Class III gaming that is permitted by the State only in conjunction with a private social bet. However, nothing in this section shall affect the right of the Community to request the State to negotiate a compact governing any other form of Class III gaming which the State permits for charitable, commercial or governmental purposes. In the event such negotiations are requested, all provisions of the IGRA shall apply.

(2) From the effective date of this compact, the Community also waives any right it may have under state or federal law to request the State to negotiate a compact governing pari-mutuel wagering (or any other form of wagering) on races conducted at any racetrack, inside or outside the State of Minnesota, and broadcast to a facility on the Community's reservation. However, if the State enacts a statute to permit such wagering at any site, other than a licensed racetrack within the State, the Community may request such a compact, but the State has no obligation under state or federal law to negotiate or enter into such a compact if the State has entered into such compacts in a number equal to the number of such facilities authorized under state law for non-Indians or non-Indian entities.

## Section 3. Allocation of Jurisdiction

### 3.1 Tribal and State Jurisdiction

This compact shall not be construed to limit any jurisdiction or remedies available to either party pursuant to the terms of the IGRA or other applicable law.

## Section 4. Regulatory Standards For Blackjack.

### 4.1 Assessment to Assist State Administration.

In order to assist the State's administration of its responsibilities under this compact, the Community agrees to pay the State Department of Public Safety, Gambling Enforcement Division the sum of thirteen thousand six hundred thirty-six dollars and thirty-six cents ($13,636.36) within thirty (30) days of the effective date of this compact or on October 1, 1991, whichever is later. The Community agrees that on July 1, 1992 and each July 1 thereafter during the term of this compact, the Community will pay a like sum to the State.

### 4.2 No Credit Extended

All gaming shall be conducted on a cash basis. Except as herein provided, no person shall be extended credit for gaming by any gaming facility operated within the Community, and no operator shall permit any person or organization to offer such credit for a fee. This section shall not restrict the right of the Community or any other person to offer check cashing or to install or accept bank card or credit card transactions in the same manner as would be normally permitted at any retail business within the State.

### 4.3 Minimum Age for Players

No person below the age of 18 on the date of gaming shall be permitted to play Blackjack. If any person below the age of 18 plays and otherwise qualifies to win, the prize shall not be paid, and the estimated amount wagered during the course of the game shall be returned to the minor.

### 4.4 Inspection

Agents of the Department of Public Safety of the State of Minnesota, or their designated representatives, shall upon the presentation of appropriate identification, have the right to gain access, without notice during normal business hours, to all premises used for the play of Blackjack or the storage of equipment related thereto, and may inspect all premises, equipment, records, documents, or items related to the play of Blackjack in order to verify compliance with the provisions of this compact. Inspections made pursuant to this section shall not be conducted in a manner which disrupts normal business operations and shall be conducted by agents who maintain the highest security clearance available within the Department of Public Safety.

### 4.5 Game Regulations

The game of Blackjack shall be played in accordance with the following regulations.

(1) **Definitions:**

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

A. "A Blackjack" shall mean an ace and any card having a point value of 10 dealt as the initial two cards to a player or a dealer, provided that if the player has a ten value card and an Ace after splitting a pair of Aces or Tens, that is not a blackjack.

B. "Dealer" shall mean the person responsible for dealing the cards in the game of Blackjack.

C. "Hard Total" shall mean the total point count of a hand which contains no aces or which contains aces that are each counted as 1 in value.

D. "Soft Total" shall mean the total point count of a hand containing an ace when the ace is counted as 11 in value.

E. "Propositional Wager" or "Proposition Bet" shall mean an additional wager that is placed at the sole discretion of the player but would not affect the normal play of a hand, as specified in sections 4.5(9) through 4.5(13).

F. "Game" shall mean the game of Blackjack as defined in section 1.02 of this compact.

(2) **Cards; Number of Decks; Value of Cards:**

A. Blackjack shall be played with at least one bordered deck of cards with backs of the same color and design and one colored cutting card. Before being put into play, the cards shall arrive at the gaming location sealed and wrapped.

B. The value of the cards contained in each deck shall be as follows:

1. Any card from 2 to 10 shall have its face value;
2. Any Jack, Queen or King shall have a value of ten;
3. An ace shall have a value of eleven unless that would give a player or the dealer a score in excess of 21, in which case, it shall have a value of 1.

(3) **Wagers:**

A. No more than seven players shall be allowed to make wagers at any single gaming table for any given hand.

B. Prior to the first card being dealt for each round of play, each player at the game of Blackjack shall make a wager against the dealer which shall win if:

1. The score of the player is 21 or less and the score of the dealer is in excess of 21;
2. The score of the player exceeds that of the dealer without either exceeding 21; or

3. The player has achieved a score of 21 with the first two cards (i.e. a Blackjack) and the dealer has achieved a score of 21 with more than two cards.

C. Except as otherwise provided in section 4.5(3)(B)(3), a wager made in accordance with this subsection shall be a push when the score of the player is the same as the dealer, provided, however, that a player's wager shall be lost when the dealer has a blackjack and the player has a simple 21 which is not a blackjack, unless the Community chooses to permit the casino to consider a player's 21 (that is not a blackjack) a tie (push) when the dealer has an ace under this 10 up card.

D. Except as otherwise provided in these regulations, no wager shall be made, increased or withdrawn after the first card of the respective round has been dealt.

E. All wagers shall be made by placing gaming chips or plaques on the appropriate areas of the table layout. Cash may be accepted provided that the such acceptance of cash is limited to an exchange of cash for chips and is confirmed by the dealer and a casino supervisor.

F. The Community shall establish minimum wagers and maximum wagers permitted at each blackjack table in the casino. The minimum and maximum wagers shall be conspicuously posted at each table. The Community, at its discretion, may change the minimum and (or) maximum at any table, provided that the players that are already playing at the table shall not be required to abide with the new minimum. Any player may chose to bet the new maximum. If the maximum bet at any given table is greater than or equal to $200, the Community shall provide the increases surveillance required under section 4.5(7)(B).

G. Except for a blackjack all winning wagers made in accordance with subsection A of this section shall be paid at odds of 1 to 1. At the discretion of the Community a blackjack shall be paid at the minimum odds of 3 to 2, and the maximum odds of 2 to 1. The odds for the payment of a Blackjack shall be conspicuously posted at the gaming table.

H. Once the first card of any hand has been dealt by the dealer, no player shall handle, remove or alter any wagers that have been made unless the dealer approves such an alteration or removal of a wager in accordance with these regulations.

I. Once a wager on the insurance line, a wager to double down, a wager on an over under 13, or a wager to split pairs has been made and confirmed by the dealer, no player shall handle, remove or alter such wagers unless the dealer approves such a removal or alteration in accordance with these regulations.

J. The Community may preclude a person who has not made a wager on the first round of play from entering the game on a subsequent round of play prior to a reshuffle of the cards occurring. Any person permitted by the Community to enter the game after the first round of cards is dealt may be limited by the Community to a wager of the minimum limit posted at the table until the cards are reshuffled and a new deal is commenced.

K. Any player who, after placing a wager on any given round of play, declines to place a wager on any subsequent round of play may be precluded by the Community from placing any further wagers until that deck or shoe of cards is completed and a new deck or shoe is commenced.

**(4) Opening of Table for Gaming:**

A. After receiving the one or more decks of cards at the table, the dealer shall sort and inspect the cards and the floor person assigned to the table shall verify the inspection.

B. After the cards are inspected, the cards shall be spread out face upwards on the table for visual inspection by the first player or players to arrive at the table. The cards shall be spread out in horizontal fan shaped columns by deck according to suit and in sequence.

**(5) Shuffle and Cut of the Cards:**

A. Immediately prior to commencement of play and after any round of play as may be determined by the Community, the dealer shall shuffle the cards so that they are randomly intermixed.

B. After the cards have been shuffled, the dealer shall offer the stack of cards, with backs facing away from him, to the players to be cut.

C. The player designated by subsection D of this section or the dealer as designated in subsection E of this section shall cut the cards by placing the cutting card in the stack at least 10 cards in from either end.

D. The player to cut the cards shall be:

1. The first player to the table if the game is just beginning;
2. The player on whose box the cutting card appeared during the last round of play;
3. The player at the farthest point to the right of the dealer if the cutting card appeared on the dealer's hand during the last round of play.
4. The player at the farthest point to the right of the dealer if the reshuffle was initiated at the discretion of the Community.

E. If the player designated in section 4.5(5)D refuses the cut, the cards shall be offered to each other player moving clockwise around the table until a player accepts the cut. If no player accepts the cut, the dealer shall cut the cards.

**(6) Procedure for Dealing Cards from a Shoe:**

The following procedures shall govern those gaming tables where the election has been made to deal from a shoe:

A. All cards used to game at blackjack shall be dealt from a multideck dealing shoe specifically designed for such purpose and located on the table to the left of the dealer.

B. Each dealer shall remove cards from the shoe with his left hand, turn them face upwards, and then place them on the appropriate area of the layout with his right hand, except that the dealer has the option to deal hit cards to the first two positions with his/her left hand.

C. After each full set of cards is placed in the shoe, the dealer shall remove the first card there from face downwards and place it in the discard rack which shall be located on the table immediately to the right of the dealer. Each new dealer who comes to the table shall follow the same procedure as described in this subsection before the new dealer deals any cards to the players. The first card which has been placed face down in the discharge rack, otherwise known as the "burn card," shall be disclosed if requested by a player.

D. At the commencement of each round of play, the dealer shall, starting on his left and continuing around the table toward his right, deal the cards in the following order:

1. One card face upwards to each box on the layout in which wager is contained;
2. One card face down to himself;
3. A second card face upwards to each box in which a wager is contained;
4. A second card face down, turning his original card face up.

E. After two cards have been dealt to each player and the dealer, the dealer shall, beginning from his left, indicate each player's turn to act. Such player shall indicate to the dealer whether he wishes to double down, split pairs, stand or draw as provided in these regulations.

F. As each player indicates his decision(s), the dealer shall deal face upwards whatever additional cards are necessary to effectuate such decision consistent with these regulations and shall announce the new point total of such player after each additional card is dealt. At no time shall a player be allowed to touch the cards.

G. At the conclusion of a round of play, all cards still remaining on the layout shall be picked up by the dealer in order and in such a way that they can be readily arranged to indicate each player's hand in case of questions or dispute. The dealer shall pick up the cards beginning with those of the player to his far right and moving counter-clockwise around the table. After all the players' cards have been collected the dealer shall pick up his cards and place them in the discard rack on top of the players' cards.

H. Whenever the cutting card is reached in the deal of the cards, the dealer shall continue dealing the cards until that round of play is completed after which he shall reshuffle the cards. If at the beginning of a new round, the first card to be dealt is the cutting card, the dealing stops and the dealer shuffles the pack.

I. No player or spectator shall handle, remove or alter any cards used to game at blackjack except as explicitly permitted by these regulations.

J. Each player at the table shall be responsible for correctly computing the point count of his hand and no player shall rely on the point counts to be announced by the dealer under this section without himself checking the accuracy of such announcement.

K. At any time when all players leave a table before play may be resumes the dealer must repeat the procedures contained in subsections 4.5(4)(B) and subsection 4.5(5).

**(7) Procedure for Dealing Cards from the Hand:**

The following procedures shall govern those gaming tables where the election has been made to deal from the hand:

A. Other than that the cards are dealt from the hand rather than a shoe the procedures described in sections 4.5(4), 4.5(5), and 4.5(6) shall apply.

B. At any table from which the cards are dealt from the hand there must be a camera capable of providing pan, tilt, and zoom surveillance at that table, and one pit boss or floor supervisor for every two such tables.

**(8) Payment of a Blackjack:**

A. If the first face up card dealt to the dealer is 2, 3, 4, 5, 6, 7, 8, or 9 and a player has a blackjack, the dealer shall announce and pay the winner at odds in play at that table, either immediately or at hand's conclusion.

B. If the first face up card dealt to the dealer is an Ace, King, Queen, Jack or Ten and a player has a blackjack, the dealer shall announce the blackjack but shall make no payment nor remove any cards until all other cards are dealt to the players and the dealer receives his second card. If, in such circumstances, the dealer's second card does not give him a blackjack, the player having a blackjack shall be paid at odds in play at that table. If, however, the dealer's second card gives him a blackjack, the wager of the player having a blackjack shall constitute a tie or a push.

**(9) Surrender:**

A. The Community may, at its discretion, allow a player to elect to surrender. A surrender allows the player to discontinue play on his hand for that round by surrendering one half of his wager after the first two cards are dealt to the play and the player's point total is announced.

B. The Community shall promulgate rules specifically governing the play of surrender. Such rules shall be made available to any player upon request. The basic rules governing surrender shall be conspicuously posted at the location where blackjack is being played.

**(10) Insurance:**

A. The Community may, at its discretion, allow a player to elect to place an insurance wager. A player may elect to place an insurance wager anytime the first card dealt to the dealer is an ace.

B. The Community shall promulgate rules specifically governing the placing of insurance wagers. Such rules shall be made available to any player upon request. The basic rules governing the placing of insurance wagers shall be conspicuously posted at the location where blackjack is being played.

(11) **Doubling Down:**

A. The Community may, at its discretion, allow a player to double down. Doubling down allows the player the option of making an additional wager not in excess of his original wager after the first two cards have been dealt to him, and to make such an additional wager on any first two cards of any split pair.

B. The Community shall promulgate rules specifically governing the placing of double down wagers. Such rules shall be made available to any player upon request. The basic rules governing doubling down shall be conspicuously posted at the location where blackjack is being played.

(12) **Splitting Pairs:**

A. The Community may, at its discretion, allow a player to elect to split pairs. Splitting pairs allows a player who has been dealt two cards identical in value may elect to split the single hand into two separate hands provided that the player makes a wager on the separately formed second hand equal to the value of the original wager.

B. The Community shall promulgate rules specifically governing the splitting of pairs. Such rules shall be made available to any player upon request. The basic rules governing the splitting of pairs shall be conspicuously posted at the location where blackjack is being played.

(13) **Over and Under 13:**

A. The Community may, at its discretion, allow a player to place a wager on the point total of the player's first two cards, as follows: before the commencement of each round of play, a player may wager that the point total of the first two cards will be twelve or less; and the player may wager that the point total of the first two cards will be fourteen or more. Aces shall count as "1". The amount thus bet shall not exceed the amount of the original wager.

B. The Community shall promulgate rules specifically governing the play of over and under 13. Such rules shall be made available to any player upon request. The basic rules governing the play of over and under 13 shall be conspicuously posted at the location where blackjack is being played.

(14) **Drawing of Additional Cards by Players and Dealers:**

A. A player may elect to draw additional cards whenever his point count total is less than 21 except that:

1. A player having a Blackjack or a hard total of 21 may not draw additional cards;

2. A player electing to double down may draw up to the posted limit; and
3. A player splitting aces shall only have one card dealt to each ace and may not elect to receive additional cards.

B. Except as provided in C below, a dealer shall draw additional cards to his hand until he has a total, as posted on the layout, at which point no additional cards shall be drawn.

C. A dealer shall draw no additional cards to his hand, regardless of the point count, if decisions have been made on all players' hands and the point count of the dealer's hand will have no effect on the outcome of the round of play.

(15) **A Player Wagering on More Than One Box:**

A. The Community may permit a player to wager on more than one box at the blackjack table provided, however, that the Tribal Council and its agents shall have the authority and discretion to prohibit this during hours when there are insufficient seats in a casino to accommodate patrol demand.

(16) **Blackjack Tournament:**

A. The Community may allow the play of blackjack tournaments where, in addition to the wager, players may win other prizes as provided for in the rules of that particular tournament. Any such blackjack tournament must be played in accordance with these regulations. The rules of such a blackjack tournament must be made readily available to players or potential players on request.

(17) **Distribution of Blackjack Tips:**

A. All tip bets won by a dealer and all other tips shall be deposited in a locking tip box in the dealer's pit area, and shall be pooled with all tips and tip bets accumulated by all other dealers and shall be divided not more frequently than weekly between dealers and supervisory management personnel as defined by the casino upon a formula established by the Community. Cash tipping shall be prohibited.

(18) **Staffing & Surveillance Requirements:**

The following staffing and surveillance requirements shall apply to the game of blackjack:

A. At all times during the conduct of blackjack games the following staff and surveillance equipment must be present:

(i) for casinos which have four or fewer tables:

(a) at least one cashier;
(b) at least one pit boss or floor supervisor for each pit area open;
(c) one dealer per table.

(ii) for casinos which have more than four tables:

(a) at least one cashier;
(b) at least one pit boss or floor supervisor for each four tables or fraction thereof;
(c) one dealer per table; and
(d) video surveillance equipment that will enable the casino to provide surveillance at any given table, provided that for any casino where cards are dealt from the hand, or where the limits are greater than or equal to $200, the requirements of section 4.5(7) shall apply.

B. Except as otherwise provided, each dealer, pit boss and floor supervisor must be licensed by the Community before beginning work. As a condition of licensure each dealer, pit boss or floor supervisor must complete a training course prescribed by the Community. Such training course shall be similar in content and testing to other jurisdictions allowing blackjack. The course of training shall be of not less than 30 hours in duration, and the content of the curriculum shall be developed in conjunction with the State Department of Public Safety. Officials of the Department of Public Safety may participate in any training programs offered by the Community without cost. Upon licensure each dealer, pit boss and floor supervisor shall be issued a photographic identification card. Such identification card shall display the name of the Community issuing authority, the date of expiration, and the name of the dealer or pit boss.

C. Each dealer, pit boss and floor supervisor shall be required to wear the photographic identification card described in subsection B of this section during all times when they are working. Such identification card shall be reissued no less frequently than annually.

## Section 5. Background Investigations and Licensing of Employees and Managers

### 5.1 Background Investigations of Management Officials

Prior to entering into a management contract under Section 12 of the IGRA, the Community shall obtain sufficient information and identification from each management official to permit the State to conduct a background check. This information shall be provided in writing to the State Commissioner of Public Safety, along with the standard fee, who shall conduct the background check and provide a written report to the Community regarding each person within 30 days of receipt of the request, if possible. The Community shall not enter into a management contract if any management official 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.

### 5.2 Background Investigations of Employees Prior to Employment

Prior to placing a prospective employee whose responsibilities include dealing Blackjack, serving a cashier in connection with Blackjack or supervising dealers or cashiers, the Community shall obtain sufficient information and identification from the applicant to permit the State to conduct a background check. This information shall be provided in writing to the State Commissioner of Public Safety, along with the standard fee, who shall conduct the background check and

provide a written report to the Community regarding each applicant within 30 days of receipt of the request, if possible. The Community may employ any person who represents in writing that he or she meets the standards set forth in this section, but must not retain any person if (a) the Community determines that the applicant's prior activities, criminal record, if any, reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the danger of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming; (b) the applicant has ever been convicted of a felony involving gambling; or (c) the applicant has been convicted of a felony within five years of starting employment with the Community. The restriction of subsection (c) shall not disqualify the applicant from employment if the Community by governmental resolution waives such a restriction after the applicant has demonstrated to the Community evidence of sufficient rehabilitation and present fitness.

5.3 Background Investigations of Employees During Employment

Each person in the Community whose responsibilities include dealing Blackjack, serving as a cashier in connection with Blackjack, or supervising Blackjack dealers or cashiers shall be subject to periodic review comparable to that required for initial employment as provided in section 5.2 by the State Department of Public Safety, which review shall take place at least annually commencing with the date of employment. The Community shall provide sufficient information to the State Commissioner of Public Safety to permit the State to conduct the background check on the employee. The Department of Public Safety shall conduct the necessary investigation within 30 days of written request therefor, if possible, subject to the standard fee, and shall provide a written report regarding each employee. Employees who do not meet the requirements of Section 5.2 shall be dismissed.

5.4 Criminal History Data

Criminal history data compiled by the Bureau of Criminal Apprehension of the State Department of Public Safety on management officials, prospective employees, and employees shall, subject to applicable state or federal law, be released to the Community as part of the report regarding each person.

5.5 Licensing and Discipline of Employees

All personnel employed by the Community whose responsibilities include dealing blackjack, serving as a cashier in connection with Blackjack, or supervising Blackjack dealers or cashiers shall be licensed by the Community. The Community shall publish and maintain a procedural manual for such personnel, which includes disciplinary standards for breach of the procedures.

Section 6. Accounting and Audit Procedures.

The Community shall engage an independent certified public accountant to conduct an annual audit of the books and records of all Blackjack gaming conducted pursuant to this compact and shall make copies of the audit and all current internal accounting and audit procedures available to the State upon written request. To the extent possible under state law, the State shall not disclose any information obtained pursuant to such a request. Also upon written

request, the Community shall make the accountant's work papers available for review at the office of the accountant or the Community. The Community shall permit the State to consult with the auditors before or after any audits or periodic checks on procedures which may be conducted by the auditors, and shall allow the State to submit written or oral comments or suggestions for improvements regarding the accounting and audit procedures. Within 30 days of receipt of any written or oral comments, the Community shall: (a) accept the comments and modify the procedures accordingly; or (b) respond to the comments with counterproposals or amendments. The State shall pay for any additional work performed by the auditors at the request of the State.

Section 7. Amendments to Regulatory and Technical Standards for Blackjack.

The regulatory and technical standards set forth in section 4 of this compact shall govern the play of Blackjack on the Community's reservation unless those standards are amended pursuant to Section 2 of this compact or pursuant to the procedures set forth in this section. For purposes of this section, amendments to sections 4 may be made only upon the written recommendation for, and detailed explanation of the proposed amendment by either party. The State Commissioner of Public Safety and the Chairman of the Community may thereafter, by mutual written agreement, amend the technical and regulatory standards contained in section 4 of this compact.

Section 8. Definitions.

8.1. Class III gaming.

For purposes of this compact, Class III gaming has the meaning given it by section 4(8) of the IGRA, 25 U.S.C. § 2703, subsection 4(8) (1988).

8.2 Private social bet.

A "private social bet" is a bargain in which the parties mutually agree to gain or loss by one to the other of money, property or benefit dependent on chance, although the chance is accompanied by some element of skill, which is made in a private, social context not part of or incidental to organized, commercialized or systematic gambling.

8.3 Gaming for charitable purposes.

For purposes of this compact, "gaming for charitable purposes" is any gambling conducted pursuant to Minnesota Statutes sections 349.11 to 349.23 or any comparable state law which permits certain forms of gambling to be conducted by nonprofit organizations and requires that the proceeds be contributed to charity or other specifically designated lawful purposes.

8.4 Gaming for governmental purposes.

For purposes of this compact, "gaming for governmental purposes" is gambling conducted pursuant to Minnesota Statutes sections 349A.01 to 349A.15 or any other state law which permits the State of Minnesota or any of its political subdivisions to operate any form of gambling.

8.5 Gaming for commercial purposes.

For purposes of this compact, "gaming for commercial purposes" is gambling conducted pursuant to a Minnesota law which permits gambling to be conducted by persons, organizations or entities and which permits those persons, organizations or entities to profit or obtain direct financial benefit from the gambling. "Gaming for commercial purposes" does not include gaming for charitable or governmental purposes or a private social bet.

8.6 Management Officials

For purposes of this compact, a management official is any person who has a direct financial interest in, or management responsibility for any gambling conducted pursuant to this compact, and in the case of a corporation, shall include 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 or outstanding stock.

Section 9. Effectiveness Contingent Upon Federal Court Judgment.

This compact and all obligations hereunder shall be contingent upon (1) the Bois Forte, Fond du Lac, Grand Portage, Leech Lake, Mille Lacs, Red Lake, and White Earth Bands of Chippewa Indians, and the Prairie Island, Shakopee Mdewakanton, and Upper Sioux Communities intervening as plaintiffs in the lawsuit entitled Lower Sioux Indian Community v. State of Minnesota (U.S. District Court, District of Minnesota, No. 4-89-936); and (2) the court in the above Lower Sioux lawsuit entering a Consent Judgment incorporating the compact and its terms; and (3) the court in the above Lower Sioux lawsuit determining that consideration of the Report and Recommendation of Magistrate Bernard P. Becker, dated December 20, 1990, is unnecessary.

Section 10. Effect of Breach.

In the event that any federally recognized Indian tribal government bound by the consent judgement described in Section 9 breaches the consent judgment or a compact incorporated therein, the State shall direct any legal action at the breaching tribal government only, and such action shall not affect the validity of the remaining compacts between the state and any nonbreaching party.

Section 11. Retention of Legal Arguments.

In the event this compact becomes inoperative or the conditions of Section 9 are not satisfied, nothing in this compact shall be construed as a concession by any party of any legal position or argument it might have had concerning any form of Class III gaming in the absence of this compact, and no party shall be deemed to be estopped by the terms of this compact from making any argument it might have had in the absence of this compact.

Dated: May 8, 1991

STATE OF MINNESOTA

ARNE H. CARLSON
Governor

Dated: 6-10-91

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

Chairman

**MINNESOTA ATTORNEY GENERAL - Bremer**

**M E M O R A N D U M**

**TO** : THOMAS G. BROWNELL
Director
Division of Gambling Enforcement

**FROM** : MARY B. MAGNUSON
Special Assistant
Attorney General

**DATE** : March 27, 1991

**PHONE** : 296-7862

**SUBJECT** : The proposal by International Gaming Technologies and Sodak Gaming Supplies to install progressive payoff video gambling devices in Minnesota.

You requested that I examine the legality of a proposal by International Gaming Technologies (hereinafter "IGT") and and Sodak Gaming Supplies, (hereinafter "Sodak") to enter into agreements with several Minnesota Indian bands under which IGT and Sodak would own, install and operate progressive payoff video gambling devices on Indian lands, link these devices by computer to one another, to similar devices on other reservations, and to a central computer located somewhere in Minnesota outside Indian country. IGT and Sodak would provide the progressive jackpot prizes. The title to all of the equipment would remain the sole property of Sodak.1/ Given these facts, it is our conclusion that the proposed arrangement is impermissible under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1988).

As you know, gambling by Indian tribes is governed by the IGRA. The IGRA divides gambling on Indian lands into three categories, Class I, Class II and Class III gaming, and prescribes different regulatory schemes for each form of gaming. The proposed IGT/Sodak "mega-link" system clearly falls within the definition of Class III gaming.

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1/ This information is taken from the proposed agreements between Sodak and the Indian bands.

Before an Indian tribe may conduct or permit Class III gaming on Indian lands, the tribe must adopt an ordinance or resolution that "meets the requirements of subsection (b)" of Section 11 of the IGRA. 25 U.S.C. §§ 2710(a)(1)(A)(ii) and (d)(2)(A). Specifically, section (d)(2)(A) provides:

> 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 [of the National Indian Gaming Commission] an ordinance or resolution that meets the requirements of subsection (b).

Subsection (b) requires that the chairman may only approve a resolution or ordinance which provides that:

> [E]xcept as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity.

Under the proposed agreement between IGT/Sodak and several Minnesota Indian bands, it is clear that the tribes will not have the sole proprietary interest in and responsibility for the gaming activity. Indeed, based on the written agreements, as well as the verbal representations of Mike Wordemann, it appears that the tribes will have no proprietary interest and little, if any, responsibility for the gaming activity. Accordingly, the proposed arrangement violates the IGRA.

Section 11(b)(4)(A) of the IGRA, however, creates a narrow exception from the requirement that all gambling activity be tribally owned and operated. Under this exception, a tribal ordinance or resolution may provide for the licensing or regulation of Class III gaming activities that are:

> 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 subparagraphs (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.

25 U.S.C. § 2710(b)(4)(A) (emphasis added). The exception further states:

> 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.2/

25 U.S.C. § 2710(b)(4)(A) (emphasis added.) This section was further explained in the Report of the Senate Select Committee. The report provides:

> It is the Committee's intent that all gaming, other than tribally owned gaming, on Indian lands be operated under state law.

Report of the Senate Select Committee on Indian Affairs, Aug. 3, 1988.

Neither Sodak or IGT could legally obtain a tribal license under the provisions of Section 11(b)(4)(A) to operate the proposed "mega-link" system.3/ Video gambling devices which pay cash or other prizes of value to the player are illegal in Minnesota. Minn. Stat. § 609.76, subd. 1(7) (1990). It is a crime to collect the proceeds of a gambling device in this state, to participate in the income of a gambling place, or to set up for the purpose of gambling any gambling device. Minn. Stat. § 609.76, subd. 1(2) and (4) (1990). Thus, the provisions of state law would bar Sodak or IGT from obtaining a tribal license to own or operate the proposed "mega-link" system within this state.

Moreover, because the proposed gambling activity would not be legal under state law, neither Sodak or IGT would "be eligible to receive a state license to conduct the same activity" as required by section 11(b)(4)(A) of the IGRA.

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2/ Although the language of subsection (4)(A) refers to class II gaming, the language of section 11(d)(2)(A) indicates that the tribal ordinance requirement applies to class III gaming activities as well.

3/ Although unclear from the facts, it appears that the IGT/Sodak proposal may not qualify under Section 11(b)(4)(B)(i)(III) either.

No such license exists under state law. Accordingly, no tribal resolution or ordinance could legally authorize Sodak or IGT to engage in the proposed gaming activity. Indeed, operation of the proposed "mega-link" system may subject Sodak and/or IGT to criminal prosecution under Minnesota law.4/

Thus, in order to place the proposed activity within the provisions of the IGRA, the participating tribes must have the sole proprietary interest and responsibility for the gambling activity.5/ Even then, however, the proposal must be analyzed to determine if it is permitted under the Tribal-State compacts currently in place in this state. The only provision of the compacts that even touches on progressive payoff devices is section 6.9(14) which provides:

> The hardware requirements above shall not be construed to prevent the operation of the video game of chance as part of a local or telecommunications area network with an aggregate prize or prizes. A video game of chance capable of bidirectional communication with external associated equipment must utilize communication protocol which insures that erroneous data or signals will not adversely affect the operation of the device.

While the compacts appear to contemplate progressive devices, the compacts do not adequately address the technical requirements of such systems, including the associated equipment. Thus, even if the IGT/Sodak proposal could be fashioned in such a way that it would fall within the parameters of the IGRA, the video game of chance compacts would need to be amended to include technical provisions to specifically address the necessary equipment.

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4/ If a criminal prosecution is initiated, the equipment would be subject to seizure and forfeiture under Minn. Stat. § 609.762 (1990).

5/ It is my understanding that Mike Wordemann recently represented that, contrary to the proposed agreements, the video gambling devices would be sold to the participating bands. No written confirmation of the sale has been received and, in any event, given the language of Section 11(b)(2)(A) and 11(b)(4)(A) of the IGRA, the sale of the video gambling devices to the participating bands would not materially change our conclusion.

In sum, it is our conclusion that the "mega-link" proposal is not permitted by the IGRA because the sole proprietary interest and responsibility for the gaming activity would not rest with the participating Indian tribes.6/ However, even if the proposal could be altered to overcome this obstacle, the mega-link system does not appear to be sufficiently authorized by the existing Tribal-State compacts. Thus, before any such operation could occur, amendments to the technical provisions of the compacts would be required.

If you have any question or if you would like additional information, please do not hesitate to contact me.

MBM/psft7

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6/ It is also questionable whether the proposal constitutes gambling on "Indian lands" as required by the IGRA because of the pervasive operational and managerial activities taking place outside the reservations. See IGRA § 11(d)(1).