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## Opinion of the Court

of the §107 claim.

"We ordinarily do not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 534 U. S. 103, 109 (2001) (*per curiam*) (internal quotation marks omitted). Although we have deviated from this rule in exceptional circumstances, *United States v. Mendenhall*, 446 U. S. 544, 551-552, n. 5 (1980), the circumstances here cut against resolving the §107 claim. Both the question whether Aviall has waived this claim and the underlying §107 question (if it is not waived) may depend in part on the relationship between §§107 and 113. That relationship is a significant issue in its own right. It is also well beyond the scope of the briefing and, indeed, the question presented, which asks simply whether a private party "may bring an action seeking contribution pursuant to CERCLA Section 113(f)(1)." Pet. for Cert. i. The §107 claim and the preliminary waiver question merit full consideration by the courts below.

Furthermore, the parties cite numerous decisions of the Courts of Appeals as holding that a private party that is itself a PRP may not pursue a §107(a) action against other PRPs for joint and several liability. See, e.g., *Bedford Affiliates v. Sills*, 156 F. 3d 416, 423-424 (CA2 1998); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F. 3d 344, 349-356 (CA6 1998); *Pneumo Abex Corp. v. High Point, T. & D. R. Co.*, 142 F. 3d 769, 776 (CA4 1998); *Pinal Creek Group v. Newmont Mining Corp.*, 118 F. 3d 1298, 1301-1306 (CA9 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F. 3d 1116, 1120-1124 (CA3 1997); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F. 3d 1489, 1496, and n. 7 (CA11 1996); *United States v. Colorado & E. R. Co.*, 50 F. 3d 1530, 1534-1536 (CA10 1995); *United Technologies Corp. v. Browning-Ferris Industries*, 33 F. 3d 96, 98-100 (CA1 1994). To hold here that Aviall may pursue a §107 action, we would have to consider whether these decisions are correct, an issue that Aviall has flagged but not briefed. And we

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might have to consider other issues, also not briefed, such as whether Aviall, which seeks to recover the share of its cleanup costs fairly chargeable to Cooper, may pursue a §107 cost recovery action for some form of liability other than joint and several. We think it more prudent to withhold judgment on these matters.

In view of the importance of the §107 issue and the absence of briefing and decisions by the courts below, we are not prepared—as the dissent would have it—to resolve the §107 question solely on the basis of dictum in *Key Tronic*. We held there that certain attorney's fees were not “necessary costs of response” within the meaning of §107(a)(4)(B). 511 U. S., at 818–821. But we did not address the relevance, if any, of *Key Tronic*'s status as a PRP or confront the relationship between §§107 and 113. In discussing §107, we did not even classify it precisely as a right of cost recovery or a right of contribution, as the dissent's descriptions of the decision reveal. *Post*, at 1–2 (opinion of GINSBURG, J.) (describing *Key Tronic* as recognizing a right to “seek recovery of cleanup costs” (quoting 511 U. S., at 818), but in the following paragraph saying that *Key Tronic* identified a “right to contribution”). “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” *Webster v. Fall*, 266 U. S. 507, 511 (1925). Aviall itself recognizes the need for fuller examination of the §107 claim; it has simply requested that we remand for consideration of that claim, not that we resolve the claim in the first instance.

## C

In addition to leaving open whether Aviall may seek cost recovery under §107, Part III–B, *supra*, we decline to decide whether Aviall has an implied right to contribution under §107. Portions of the Fifth Circuit's opinion below might be taken to endorse the latter cause of action, 312

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F. 3d, at 687; others appear to reserve the question whether such a cause of action exists, *id.*, at 685, n. 15. To the extent that Aviall chooses to frame its §107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery),<sup>6</sup> we note that this Court has visited the subject of implied rights of contribution before. See *Texas Industries*, 451 U. S., at 638-647; *Northwest Airlines*, 451 U. S., at 90-99. We also note that, in enacting §113(f)(1), Congress explicitly recognized a particular set (claims "during or following" the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law. Cf. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U. S. 11, 19 (1979). Nonetheless, we need not and do not decide today whether any judicially implied right of contribution survived the passage of SARA.

\* \* \*

We hold only that §113(f)(1) does not support Aviall's suit. We therefore reverse the judgment of the Fifth Circuit and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

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<sup>6</sup>As noted above, we do not address whether a §107 cost recovery action by Aviall (if not waived) may seek some form of liability other than joint and several.

GINSBURG, J., dissenting

**SUPREME COURT OF THE UNITED STATES**

No. 02-1192

**COOPER INDUSTRIES, INC., PETITIONER v. AVIALL  
SERVICES, INC.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT**

[December 13, 2004]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins,  
dissenting.

Aviall Services, Inc., purchased from Cooper Industries, Inc., property that was contaminated with hazardous substances. Shortly after the purchase, the Texas Natural Resource Conservation Commission notified Aviall that it would institute enforcement action if Aviall failed to remediate the property. Aviall promptly cleaned up the site and now seeks reimbursement from Cooper. In my view, the Court unnecessarily defers decision on Aviall's entitlement to recover cleanup costs from Cooper.

In *Key Tronic Corp. v. United States*, 511 U. S. 809, 818 (1994), all Members of this Court agreed that §107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. §9607, “unquestionably provides a cause of action for [potentially responsible persons (PRPs)] to seek recovery of cleanup costs.” The Court rested that determination squarely and solely on §107(a)(4)(B), which allows *any* person who has incurred costs for cleaning up a hazardous waste site to recover all or a portion of those costs from any other person liable under CERCLA.<sup>1</sup>

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<sup>1</sup> Key Tronic, a PRP, asserted a cost-recovery claim under §107(a) to recoup approximately \$1.2 million in costs that it allegedly incurred

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The *Key Tronic* Court divided, however, on the question whether the right to contribution is implicit in §107(a)'s text, as the majority determined, or whether §107(a) expressly confers the right, as the dissenters urged. The majority stated: Section 107 "implies—but does not expressly command—that [a PRP] may have a claim for contribution against those treated as joint tortfeasors." 511 U. S., at 818, and n. 11 ((emphasis added)). The dissent maintained: "Section 107(a)(4)(B) states, as clearly as can be, that '[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person.' Surely to say that A shall be liable to B is the *express* creation of a right of action." *Id.*, at 822. But no Justice expressed the slightest doubt that §107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.

In its original complaint, Aviall identified §107 as the federal-law basis for an independent cost-recovery claim against Cooper, and §113 as the basis for a contribution claim. App. 8A, 16A–17A. In amended pleadings, Aviall alleged both §§107 and 113 as the federal underpinning for its contribution claim. *Id.*, at 27A, 48A. Aviall's use of §§113 and 107 in tandem to assert a contribution claim conformed its pleading to then-governing Fifth Circuit precedent, which held that a CERCLA contribution action arises through the joint operation of §107(a) and §113(f)(1). See *Geraghty and Miller, Inc. v. Conoco, Inc.*, 234 F. 3d 917, 924 (2000) ("[W]hile section 113(f) is the

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cleaning up its site "at its own initiative." *Key Tronic Corp. v. United States*, 984 F. 2d 1025, 1026 (CA9 1993). Although *Key Tronic* settled a portion of its liability with the Environmental Protection Agency (EPA), the claim advanced in *Key Tronic's* §107(a) suit rested on remedial action taken before the EPA's involvement, remediation that did not figure in the settlement. *Id.*, at 1026–1027; *Key Tronic Corp. v. United States*, 511 U. S. 809, 811–812 (1994).

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vehicle for bringing a contribution action, it does not create a new cause of action or create any new liabilities. Rather, it is a mechanism for apportioning costs that are recoverable under section 107." (footnote omitted)). A party obliged by circuit precedent to plead in a certain way can hardly be deemed to have waived a plea the party could have maintained had the law of the Circuit permitted him to do so. But cf. *ante*, at 9–10.

In the Fifth Circuit's view, §107 supplied the right of action for Aviall's claim, and §113(f)(1) prescribed the procedural framework. 312 F.3d 677, 683, and n. 10 (2002) (stating that §107 "impliedly authorizes a cause of action for contribution" and §113(f) "govern[s] and regulate[s]" the action (citing *Geraghty and Miller*, 234 F.3d, at 924) (internal quotation marks omitted)); see §113(f)(1) (calling for the governance of "Federal law" and the application of "the Federal Rules of Civil Procedure," and specifying that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate"). Notably, Aviall expressly urged in the Court of Appeals that, were the court to conclude that §113(f)(1)'s "during or following" language excluded application of that section to this case, Aviall's suit should be adjudicated independently under §107(a). See Response of Appellant Aviall Services, Inc., to the *Amicus Curiae* Brief of the United States in No. 00–10197 (CA5), p. 24 ("[P]arties who are excluded from seeking contribution under section 113(f)(1) must therefore have available to them the broader right of cost recovery [covering both full recovery and contribution] under section 107(a)."); cf. *Key Tronic*, 511 U. S., at 816 ("[T]he statute now expressly authorizes a cause of action for contribution in §113 and impliedly authorizes a similar and somewhat overlapping remedy in §107.").

I see no cause for protracting this litigation by requiring

GINSBURG, J., dissenting

the Fifth Circuit to revisit a determination it has essentially made already: Federal courts, prior to the enactment of §113(f)(1), had correctly held that PRPs could "recover [under §107] a proportionate share of their costs in actions for contribution against other PRPs," 312 F. 3d, at 687;<sup>2</sup> nothing in §113 retracts that right, *ibid.* (noting that §113(f)'s saving clause preserves all preexisting state and federal rights of action for contribution, including the §107 implied right this Court recognized in *Key Tronic*, 511 U. S., at 816). Accordingly, I would not defer a definitive ruling by this Court on the question whether Aviall may pursue a §107 claim for relief against Cooper.

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<sup>2</sup>The cases to which the Court refers, *ante*, at 12, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77 (1981), do not address the implication of a right of action for contribution under CERCLA. *Texas Industries* concerned the Sherman and Clayton Acts, 451 U. S., at 639-646; *Northwest Airlines*, the Equal Pay Act and Title VII, 451 U. S., at 90-99. A determination suitable in one statutory context does not necessarily carry over to a different statutory setting.

Westlaw

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H

Supreme Court of Alaska  
**FEDERAL DEPOSIT INSURANCE  
 CORPORATION**, as statutory successor to the  
 Resolution  
 Trust Corporation, in its capacity as Receiver for  
 Sun Savings and Loan  
 Association, Plaintiff,  
 v.  
**LIDLAW TRANSIT, INC.** d/b/a Laidlaw Transit  
 (AK), Inc., Burton Carver & Co., K  
 Beach Parts & Equipment, Peninsula Sanitation  
 Co., Inc., Defendants.  
 No. S-8540.

April 12, 2001.

Current landowner brought action against former landowner and its tenants, seeking to recover hazardous waste cleanup costs. The United States District Court for the District of Alaska, James K. Singleton Jr., J., certified questions. The Supreme Court, Bryner, J., held that: (1) statute imposing strict liability on polluters for the release of hazardous substances provides a private cause of action for the owner of private property damaged by a release; (2) affirmative defenses, such as the statute of limitations, may be applied to such an action; (3) an action for contribution accrues after the direct action is concluded; and (4) current landowner's action could not be characterized as one for continuing nuisance or trespass.

Questions answered.

West Headnotes

[1] **Federal Courts** ⇨392  
 170Bk392 Most Cited Cases  
 Because the Supreme Court addresses questions of law and essentially stands in the shoes of the certifying court, it must exercise its independent judgment when answering certified

questions. Rules App.Proc., Rule 407.

[2] **Action** ⇨3

13k3 Most Cited Cases

Statute imposing strict liability on polluters for the release of hazardous substances provides a private cause of action for the owner of private property damaged by a release. AS 46.03.822(a).

[3] **Environmental Law** ⇨444

149Ek444 Most Cited Cases

Actions.

(Formerly 199k25.5(5.5) Health and Environment)  
 Statute imposing strict liability on polluters for the release of hazardous substances allows a potentially responsible party who denies responsibility to pursue a direct cause of action for joint and several strict liability against other potentially responsible parties. AS 46.03.822(a), (j).

[4] **Environmental Law** ⇨461

149Ek461 Most Cited Cases

(Formerly 199k25.15(5) Health and Environment)

[4] **Environmental Law** ⇨669

149Ek669 Most Cited Cases

(Formerly 199k25.15(5) Health and Environment)  
 Affirmative defenses, such as the statute of limitations, may be applied to a private cause of action to recover costs that is brought by an owner of private property damaged by a release of hazardous substances. AS 46.03.822(a).

[5] **Statutes** ⇨190

361k190 Most Cited Cases

The threshold question in ascertaining the correct interpretation of a statute is whether the language of the statute is clear or arguably ambiguous.

[6] **Statutes** ⇨190

361k190 Most Cited Cases

Even when the meaning of a statute's language seems plain on its face, ambiguity may arise if

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applying that meaning would yield anomalous consequences.

[7] Statutes ⇨188

361k188 Most Cited Cases

[7] Statutes ⇨205

361k205 Most Cited Cases

In ascertaining the plain meaning of a statute, the court must look to the particular language at issue, as well as to the language and design of the statute as a whole.

[8] Statutes ⇨223.1

361k223.1 Most Cited Cases

When a statute or regulation is part of a larger framework or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole.

[9] Statutes ⇨206

361k206 Most Cited Cases

In general, a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

[10] Limitation of Actions ⇨49(6)

241k49(6) Most Cited Cases

In actions to recover costs for cleanup of hazardous waste, a potentially responsible party's cause of action for contribution does not accrue until the direct cause of action concludes. AS 46.03.822(a), (j).

[11] Contribution ⇨9(1)

96k9(1) Most Cited Cases

In actions to recover costs for cleanup of hazardous waste, potentially responsible parties may assert contribution claims in actions prosecuted either in court or through administrative proceedings. AS 46.03.822(j).

[12] Environmental Law ⇨670

149Ek670 Most Cited Cases

(Formerly 199k25.15(5) Health and Environment)

Current landowner's action against former landowner and its tenants to recover hazardous

waste cleanup costs could not be characterized as one for continuing nuisance or trespass, so as to avoid the statute of limitations applicable to suit to recover costs by the owner of private property damaged by the release of hazardous substances, where former owner and tenants did not exacerbate the contamination that they allegedly caused over a decade earlier. AS 46.03.822(a).

\*345 Joseph R.D. Loescher and Carl J.D. Bauman, Hughes, Thorsness, Powell, Huddleston & Bauman LLC, Anchorage, for Plaintiff.

Ann W. Resch and Richard L. Waller, Brown, Waller & Gibbs, Anchorage, for Defendant Peninsula Sanitation Company, Inc.

Nelson G. Page, Burr, Pease & Kurtz, Anchorage, for Defendant Laidlaw Transit Alaska, Inc.

Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

OPINION

BRYNER, Justice.

I. INTRODUCTION

The Federal Deposit Insurance Corporation (FDIC), as receiver of a failed bank's assets, acquired land that had been contaminated by hazardous waste many years previously. After undertaking voluntary cleanup at the request of the Alaska Department of Environmental Conservation, the FDIC filed suit in federal court against the former landowner and the owner's tenants, seeking to recoup its cleanup costs. FDIC claimed a right to compensation under AS 46.03.822, which imposes strict liability on a joint and several basis for release of hazardous substances and, in addition, allows responsible parties to sue for contribution.

Since this court had not yet determined whether section .822 creates a private cause of action other than for contribution or is governed by a statute of limitations, the federal district court certified these questions to us. We conclude that the statute allows private parties to sue directly for damages,

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not just for contribution, and that suits under the statute—both direct and for contribution—are governed by a statute of limitations.

## II. FACTS AND PROCEEDINGS

For purposes of this decision, we accept the facts alleged in FDIC's complaint. In May 1988 Sun Savings and Loan Association, F.A., foreclosed on land that was owned by Burton Carver & Co. and that had been occupied by Carver and three tenants, Laidlaw Transit, K Beach Parts and Equipment, and Peninsula Sanitation Co. Carver and these tenants allegedly had contaminated the land by releasing various hazardous substances, including fuel oil.

In December 1989, a year and a half after Sun Savings foreclosed on the land, the Alaska Department of Environmental Conservation asked it to enter into a Compliance Order by Consent for the purpose of investigating and remediating contamination on the property. Not long after this, Sun Savings failed, and the Resolution Trust Corporation took over its assets. In July 1990 Resolution Trust wrote two of Carver's tenants—Peninsula Sanitation and Laidlaw—to inform them of the Department's action.

Nearly seven years later, in February 1997, FDIC, which by then had become the Resolution Trust Corporation's statutory successor, filed suit in federal district court against Laidlaw, K Beach Parts, Peninsula Sanitation, and Carver. FDIC alleged that these defendants were both strictly liable under AS 46.03.822(a) and liable in contribution under AS 46.03.822(j) for cleanup costs and other damages resulting from contamination of its land by their release of hazardous substances. FDIC alternatively alleged liability for the same damages under other theories, including continuing nuisance and trespass.

\*346 Peninsula moved for summary judgment, alleging that FDIC's claims are barred by AS 09.10.070(a), Alaska's statute of limitations for liability created by a statute. Finding that FDIC's complaint and Peninsula's summary judgment motion raised unresolved issues of Alaska law, the

federal district court certified four questions for our review:

1. Is a statute of limitations defense available for a direct cause of action under AS 46.03.822(a)?
2. Does private cause of action imposing joint and several liability exist under AS 46.03.822(a)?
3. When does a cause of action for contribution accrue under AS 46.03.822(j)?
4. Can continuing trespass and nuisance claims for environmental contamination be brought where the original act leading to the contamination occurred outside of the limitations period?

We accepted these questions under Alaska Appellate Rule 407 and answer them as follows.

## III. DISCUSSION

### A. Standard of Review

[1] Under Appellate Rule 407, a decision by this court upon certification from another court necessarily involves determinative questions of Alaska law as to which there is no controlling precedent. [FN1] Because we address questions of law and essentially stand in the shoes of the certifying court, we must exercise our independent judgment. [FN2]

FN1. Appellate Rule 407(a) provides:

The supreme court may answer questions of law certified to it by ... a United States district court ... when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

FN2. See *M.A. v. United States*, 951 P.2d 851, 853 (Alaska 1998).

B. Alaska Statute 46.03.822(a) Provides Private Plaintiffs with a Cause of Action for Strict Joint and

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*Several Liability.*

[2] FDIC alleges that the defendants are subject to joint and several strict liability under AS 46.03.822(a), which provides that "the owner and the operator of a ... facility, from which there is a release ... of a hazardous substance" are among those "strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village...." The passive language of this provision does not specify whether a private party may sue for damages. But the legislative history of this provision and our case law dealing with the creation of statutory causes of action establish that it provides a private cause of action for the owner of private property damaged by a release.

1. *The legislative history behind subsection .822(a) supports a private cause of action.*

The original version of AS 46.03.822, enacted in 1972, created a cause of action imposing strict liability on polluters who damaged private property:

To the extent not otherwise preempted by federal law, a person owning or having control over a hazardous substance which enters in or upon the waters, surface or subsurface lands of the state is strictly liable, without regard to fault, for the damages to persons or property, public or private, caused by the entry.... [FN3]

FN3. Ch. 122, § 1, SLA 1972 (emphasis added).

The act defined "damages" to include "injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit." [FN4] A separate provision, AS 46.03.870, specified that causes of action under AS 46.03 "inure solely to and are for the benefit of the state" "[e]xcept as provided under AS 46.03.822-46.03.828," implying that those sections provide for private causes of action. [FN5]

FN4. *Id.*

FN5. Ch. 122, § 2, SLA 1972. Title 46, Chapter 3 includes AS 46.03.010-900.

\*347 In 1989 the legislature amended section .822 to "strengthen the State's ability to obtain cleanup of hazardous substance spill sites." [FN6] The amendments explicitly allowed the state and municipalities to recover damages, including cleanup and remediation costs, under the strict liability language of subsection .822(a):

FN6. Position Paper, March 16, 1989, Dennis D. Kelso, Commissioner, Alaska Department of Environmental Conservation.

Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section[,] ... the following persons are strictly liable, jointly and severally, for damages to persons or property, whether public or private, including damage to the natural resources of the state or a municipality, and for the costs of response, containment, removal, or remedial action incurred by the state or a municipality, resulting from an unpermitted release of a hazardous substance....

....  
(2) the owner and the operator of a vessel or facility from which there is a release ... of a hazardous substance[,] [FN7]

FN7. Ch. 39, § 2, SLA 1989 (emphasis added).

Legislative history indicates that this amendment was modeled after the Federal Comprehensive Environmental Response Compensation and Liability Act (CERCLA), [FN8] which Congress enacted in 1980. [FN9]

FN8. See 42 U.S.C. §§ 9601-9675 (1994).

FN9. The Department of Environmental Conservation stated in its position paper: The bill [CSHB 68 (Resources)] was introduced at the request of the Governor. The Department strongly supports the bill

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and feels that it is necessary to provide appropriate tools to ensure that hazardous substance releases may be responded to properly. The first two sections of the law [including the re-enacted section .822] incorporate provisions similar to [those in] the federal "Superfund" law into state law. See Position Paper, March 16, 1989, Dennis D. Kelsø, Commissioner, Alaska Department of Environmental Conservation.

In addition, Senate Judiciary Chairwoman Jan Faik explained that the 1989 amendments to AS 46.03.822 were modeled after CERCLA. See Committee Minutes, Senate Judiciary Committee (May 2, 1989).

In 1991 the legislature passed a number of amendments to AS 46.03.822. First, it amended subsection .822(a) to add villages to the governmental entities that could recover cleanup and remediation costs. [FN10] In so doing, the legislature retained the "public or private" damages language quoted above. [FN11] Later in the same session, the legislature moved the damages language from subsection .822(a) to a new subsection, .822(k), but did not change its content. [FN12]

FN10. See Ch. 83, § 9, SLA 1991.

FN11. *Id.*

FN12. See Ch. 92, §§ 1, 3, SLA 1991 (including "damage to persons or to public or private property [and] damage to natural resources of the state or a municipality" in subsection .822(k) among the harms that trigger strict liability, as section .822 has always done). The amendments contained in §§ 1 and 3 took effect July 3, 1991. In the same Act, these sections were to be repealed effective July 1, 1992, with the language in the new subsection (k) reverting to subsection (a). See *id.* at §§ 10, 12. However, this repeal and re-enactment was itself repealed in 1992.

See Ch. 83, § 15, SLA 1992.

In each of the foregoing amendments, the legislature also retained AS 46.03.824, a provision defining damages to include injuries to persons or property, real or personal, and loss of income. [FN13] The legislature likewise retained the original version of AS 46.03.870, which, as mentioned above, specifically provides that causes of action under section .822 are not limited to the state. Moreover, every version of section .822 has subjected polluters \*348 of either private or public property to joint and several strict liability.

FN13. While the definition of damages does not expressly include cleanup costs outside the context of those incurred by the state, a municipality, or a village, other courts have held that damages include cleanup costs. See, e.g., *One Wheeler Road Assocs. v. Foxboro Co.*, 843 F.Supp. 792, 796-97 (D.Mass.1994) (applying Massachusetts law); *Borough of Rockaway v. Klockner & Klockner*, 811 F.Supp. 1039, 1051 (D.N.J.1993) (applying New Jersey law). The inclusion of cleanup costs in damages also furthers the legislative purpose of protecting the environment from pollution. See *Stock v. State*, 526 P.2d 3, 12 (Alaska 1974).

In sum, this history strongly suggests that the legislature originally contemplated a private cause of action against parties who release hazardous substances and that it never repealed that cause of action. It would be incongruous for the legislature to create strict liability for damage to private land without providing a way for private parties to get compensation for that damage.

2. *Alaska Statute 46.03.822(a) necessarily implies a private cause of action under the Hendsch Analysis.*

In *Alaska Marine Pilots v. Hendsch*, we identified six factors as relevant to determine whether a statute implies a private cause of action in tort: "the nature of the legislative provision, the adequacy of existing

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remedies, the extent to which a tort action will interfere with existing remedies, the importance of the purpose of the provision, how drastically the new tort will change the law, and the burden the [cause of action] will place on the court system." [FN14] Here, these factors support a private cause of action.

FN14. 950 P.2d 98, 104-05 (Alaska 1997) (citing Restatement (Second) of Torts § 874A cmt. h (1977)); see also *Walt v. State*, 751 P.2d 1345, 1351 n. 12 (Alaska 1988).

(1) *Nature of subsection .822(a)*: Subsection .822(a) is easily amenable to individual enforcement. The prohibited conduct and the potential defendants are clearly identified by subsection .822(a), which attaches strict liability for the release of hazardous substances, and by subsection .822(k), which identifies damage to "persons or to public or private property" as a kind of damage covered by subsection .822(a). [FN15] An injured property owner who, like FDIC, identifies parties responsible for contaminating the property need only show that the parties owned or operated the facility causing the contamination. [FN16]

FN15. See AS 46.03.822(k) (" [D]amages' has the meaning given in AS 46.03.824 and includes damage to persons or to public or private property, damage to the natural resources of the state or a municipality, and [certain damages caused by cleanup contractors]."). AS 46.03.824 reads: "Damages include but are not limited to injury to or loss of persons or property, real or personal, loss of income, loss of the means of producing income, or the loss of an economic benefit."

FN16. See AS 46.03.822(a).

(2) *Adequacy of existing remedies*: When the legislature created a strict liability regime for hazardous substance contamination, it expressed its judgment that negligence remedies were not

adequately controlling the hazardous substance contamination problem. Nevertheless, Peninsula and Laidlaw insist that the subsection .822(j) right of contribution is an adequate remedy. We disagree. Under subsection .822(j), a damaged party can seek contribution only "during or after" an action against the party under subsection .822(a). Since private parties who voluntarily undertake cleanup efforts cannot compel the state to commence an action against them, they would be forced to wait for government action and, if no action were brought, would lose funds spent cleaning up another's contamination. That is not an adequate remedy. A more convincing reading of subsections .822(a) and (j) gives private parties the means to recover private damages, while allowing defendants a way to spread the costs of that recovery among the responsible parties.

(3) *Interference with existing remedies, and (4) importance of purpose of the provision*: A private cause of action under subsection .822(a) would not interfere with existing remedies, such as contribution claims; and it would enhance the important purposes of Alaska's contamination responsibility regime. As discussed above, allowing private parties to initiate cleanup while they bring an action against others who may be responsible—without waiting for government action—promotes the goal of quick response to discovered contamination. At the same time, actions for contribution allow the parties to sort out ultimate responsibility for the contamination afterwards.

(5) *Scope of change in the law*: Allowing a private cause of action under subsection .822(a) is not a departure from the way the law already operates in Alaska. In *Chenega Corp. v. Exxon Corp.*, for example, the parties\*349 litigated a complex private strict liability claim under subsection .822(a) stemming from the EXXON VALDEZ disaster. [FN17] No party questioned that subsection .822(a) allowed the action, and Exxon ultimately conceded strict liability, contesting only causation and damages. [FN18]

FN17. 991 P.2d 769, 776 (Alaska 1999).

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FN18. See *id.* Several Alaska superior courts have adopted similar approaches. See *University of Alaska v. Texaco*, No. 4FA-93-2486 CI (Alaska Super., November 14, 1995, (memorandum decision)); *Parks Hiway Enters., LLC v. CEM Leasing, Inc.*, No. 4FA-95-2117 CI (Alaska Super., December 22, 1997) (memorandum and order granting defendant's motion for summary judgment).

(6) *Burden on the courts of creating a private action:* While allowing private parties to bring causes of action may increase the number of claims under subsection .822(a), it will be consistent with what the legislature intended. We do not see that as an undue burden on the courts.

Because subsection .822(a) meets all of the criteria for an implied cause of action under our *Hensch* analysis, and since the legislative history of the provision supports the conclusion that the legislature meant to permit private actions, we hold that subsection .822(a) creates a private cause of action for joint and several strict liability. In the following section, we briefly consider the scope of this private action.

3. *The private cause of action created in subsection .822(a) extends to potentially responsible parties.*

[3] In arguing that the only remedy available to FDIC is a subsection .822(j) action for contribution, the defendants place great weight on FDIC's status as a potentially responsible party. They contend that potentially responsible parties should not be allowed joint and several recovery, but should be limited to contribution from other potentially responsible parties.

Any entity that may be required to take financial responsibility for cleaning up a contaminated site is a potentially responsible party. Alaska Statute 46.03.822(a)(3) imposes strict liability on the owners of a facility that releases hazardous material. Insofar as FDIC stands in the shoes of the owner of the contaminated property at the time of the

release--allegedly Sun Savings--FDIC is a potentially responsible party and, as such, is theoretically subject to the same liability as those who caused the contamination. [FN19]

FN19. We note in passing that FDIC's exact status is not clear. FDIC is the ultimate receiver of property owned by Carver that was pledged as security to Sun Savings. The defendants allege that FDIC is potentially responsible, but FDIC does not address the question. Under AS 46.03.826(8) "owner" and "operator" are defined to exclude a person who "without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect that person's security interest in the vessel or facility." The federal district court's certified questions do not require us to interpret this provision or to determine whether FDIC is a potentially responsible party, and we decline to do so here. Nevertheless, we note that federal courts that have interpreted the CERCLA equivalent of this section are divided. Compare *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir.1990) (actual management unnecessary for secured creditor liability) with *In re Bergsøe Metal Corp.*, 910 F.2d 668, 672 (9th Cir.1990) ("[T]here must be some actual management of the facility before a secured creditor will [be liable under CERCLA]."). Moreover, AS 46.03.822(a) differs from its federal counterpart in the way it describes owner liability. Compare AS 46.03.822(a)(2) (imposing liability on "the owner ... of a ... facility, from which there is a release ... of a hazardous substance") with 42 U.S.C. § 9607(a)(1) (imposing liability on "the owner ... of a ... facility"). Alaska's law appears to focus on the owner at the time of the release, rather than on subsequent owners.

The defendants maintain that allowing one potentially responsible party to claim direct

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damages under subsection .822(a) from other potentially responsible parties would give the claimant an unfair advantage over the defending parties, because the claimant's joint and several recovery under subsection .822(a) might include compensation for damages caused by absentee or judgment-proof polluters; the claimant would then receive full compensation despite being a potentially responsible—and possibly culpable—party, whereas the defending parties might be left with a worthless claim for contribution under subsection .822(j). The defendants reason that, in these situations, cleanup costs should \*350 be borne by all potentially responsible parties equally.

This argument seems to assume that courts cannot distinguish among potentially responsible parties to avoid inequitable results. But federal case law shows that courts can. In *Rumpke of Indiana, Inc. v. Cummins Engine Co.*, the Seventh Circuit Court of Appeals found that when a potentially responsible party sues for direct damages under the federal counterparts to subsections . 822(a) and (j), the federal statutes allow the claim, but leave room for equitable distinctions upon conclusion of the litigation. [FN20] Thus, the court approved a direct action for joint and several liability by Rumpke—a potentially responsible party that denied actual responsibility for the contamination:

FN20. 107 F.3d 1235, 1240-42 (7th Cir.1997).

[W]e see nothing in the language of § 107(a) [the subsection .822(a) analog] that would make it unavailable to a party suing to recover for direct injury to its own land, under circumstances where it is not trying to apportion costs (i.e., where it is seeking to recover on a direct liability theory, rather than trying to divide up its own liability for someone else's injuries among other potentially responsible parties).[ FN21]]

FN21. *Id.* at 1240.

But the court went on to observe: "If the facts show, contrary to Rumpke's protestations, that it

was partially responsible for the mess ..., it can proceed only under § 113(f)(1) [the subsection .822(j) analog] in a suit for contribution." [FN22]

FN22. *Id.* at 1242 (citing *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761 (7th Cir.1994)). More recently, other federal courts have similarly allowed CERCLA's direct cost-recovery action to be recast as an action for contribution when brought by a potentially responsible party who is ultimately determined not to be "innocent."

See, e.g., *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir.1997). The *Pinal* court found that CERCLA's analog to subsection .822(a) placed cleanup responsibility on the plaintiff Pinal Group because it was a potentially responsible party. At the same time, Pinal Group was entitled to recover from other potentially responsible parties for their share of the cleanup costs under CERCLA's subsection .822(j) analog. The court found that "this duality is best implemented by permitting a [potentially responsible party] who has incurred cleanup costs to assert only a contribution claim against other [potentially responsible parties]." *Id.* at 1301.

We agree with *Rumpke* that the possibility of inequitable results need not bar a potentially responsible party who denies responsibility from pursuing a direct cause of action for joint and several strict liability against other potentially responsible parties. Insofar as a plaintiff is an "innocent" potentially responsible party, that is, one who ultimately would not be liable for contribution, that plaintiff should recover jointly and severally. On the other hand, if a plaintiff ends up being among those responsible for the damage, the court may recast the direct claim as a claim for contribution upon conclusion of the litigation.

C. *Alaska's Statute of Limitations Applies to Actions Under Subsection . 822(a).*

[4] The defendants contend that FDIC's action is

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barred by the statute of limitations. FDIC responds that subsection .822(a) precludes a statute of limitations defense. [FN23] In advancing this argument, FDIC points to the opening language of AS 46.03.822(a):

FN23. The defendants assert, without elaboration, that this case is governed by AS 09.10.070(a), which establishes a two-year limit for "an action ... upon a liability created by statute." But it seems that this case might alternatively be governed by AS 09.10.050, which specifies a six-year limit for "an action for waste or trespass upon real property." Yet the relevant portion of the federal court's certification order only asks us to address FDIC's claim that no statute of limitations defense is available for a direct cause of action under AS 46.03.822(a). The question of which statute applies has not been adequately briefed, and the facts recited in the federal court's certification order suggest that the point may be time-barred under any applicable limit. Given these circumstances, we decline to consider which statute of limitations provision would govern FDIC's direct cause of action.

*Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the exception set out in (i) of this section, the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages [and \*351 other costs associated with hazardous substance spills].* [FN24]]

FN24. AS 46.03.822(a) (emphasis added).

Asserting that this provision's "notwithstanding" phrase plainly excludes all "defenses" to a subsection .822(a) action except those listed in subsection .822(b), FDIC argues that the provision's plain meaning precludes a statute of limitations defense.

We reject FDIC's plain meaning argument, for, as we explain below, FDIC's literal reading of the "notwithstanding" phrase strains common sense, is contextually implausible, and is at odds with legislative history.

[5][6] "[T]he threshold question in ascertaining the correct interpretation of a statute is whether the language of the statute is clear or arguably ambiguous." [FN25] Here, subsection .822(a)'s "notwithstanding" phrase's meaning may indeed seem clear and unambiguous. But "'words are necessarily inexact and ambiguity is a relative concept.'" [FN26] Hence, even when a statute's language meaning seems plain on its face, ambiguity may arise if applying that meaning would yield anomalous consequences. [FN27]

FN25. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n. 4, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988).

FN26. *State v. Alex et al.*, 646 P.2d 203, 208-09 n. 4 (Alaska 1982) (quoting *United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.1973) and adopting a sliding scale approach to statutory interpretation).

FN27. Thus, courts adhering to the "plain meaning" rule of statutory interpretation commonly define the rule to apply only "where language of a statute is clear and construction according to its terms does not lead to absurd consequences." *North Slope Borough v. Sohio Petroleum Corp.*, 585 P.2d 534, 540 n. 7 (Alaska 1978).

FDIC's proposal to enforce subsection .822(a)'s literal meaning by categorically barring all "defenses" except those listed in subsection .822(b) would have the nonsensical effect of eliminating a host of generally available "defenses" serving vital purposes wholly unrelated to the elements or underlying purposes of a direct action arising under subsection .822(a). If enforced literally, for instance, the "notwithstanding" phrase would bar a defendant who had previously settled and paid a

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claim from defending on the basis of accord and satisfaction. A defendant who had already prevailed in an identical action by the same plaintiff could not raise the defense of res judicata. A defendant sued by a plaintiff who lacked an interest would be forbidden to claim lack of standing; one sued by a minor could not assert the plaintiff's lack of capacity; and one subjected to a claim without service of process could not raise lack of personal jurisdiction as a defense. The anomalies—all unavoidable consequences of adopting FDIC's proposed "plain meaning"—cast ambiguity on the seemingly clear language of subsection .822(a)'s "notwithstanding" provision. [FN28]

FN28. At least one federal court interpreting CERCLA has recently suggested that the "notwithstanding" language in the federal statute should not be interpreted to bar defendants from asserting res judicata, collateral estoppel, accord and satisfaction, or statutes of limitations, because such an interpretation would yield "absurd results that Congress could not have intended." See *Town of Munster, Indiana v. Shervin-Williams Co., Inc.*, 27 F.3d 1268, 1271-72 (7th Cir.1994); cf. *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 771-74 (9th Cir.1994) (affirming dismissal of section .822 claim on the ground of res judicata without expressly considering the "notwithstanding" language).

[7][8] Moreover, because "plain meaning" cannot exist in a vacuum, ambiguity is necessarily a creature of context. "As the Supreme Court has stated, 'in ascertaining the plain meaning of [a] statute, the court must look to the particular language at issue, as well as the language and design of the statute as a whole.'" [FN29] And "[w]hen a statute or regulation is part of a larger framework or regulatory scheme, even a seemingly unambiguous statute must be interpreted in light of the other portions of the regulatory whole." [FN30]

FN29. *Homer Elec. Ass'n v. Towsley*, 841 P.2d 1042, 1048 (Alaska 1992) (Compton,

J., dissenting) (quoting *K Mart Corp.*, 486 U.S. at 291, 108 S.Ct. 1811); see also *Nash v. State, Commercial Fisheries Entry Comm'n*, 679 P.2d 477, 478 (Alaska 1984).

FN30. *Millman v. State*, 841 P.2d 190, 194 (Alaska App.1992).

\*352 Considered in context with other relevant provisions, subsection .822(a)'s meaning is hardly plain. The "notwithstanding" phrase must initially be read together with other parts of section .822 to which subsection .822(a) specifically refers: subsection .822(b)'s list of "defenses" and the "exception" created in subsection .822(i). [FN31] The relevant language is as follows:

FN31. Subsection .822(a)'s "notwithstanding" phrase currently refers to two other provisions: "the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825." See AS 46.03.822(a). But neither of these references appeared in the originally enacted version of subsection .822(a). See Ch. 39, § 2, SLA 1989. Since both references were added after the original enactment of subsection .822(a), they are not relevant to establish the intent of the legislature that originally enacted the statute.

(b) In an action to recover damages or costs, a person otherwise liable under this section is relieved from liability under this section if the person proves

(1) that the release or threatened release of the hazardous substance to which the damages relate occurred solely as a result of

(A) an act of war;

(B) except as provided under AS 46.03.823(c) and 46.03.825(d), an intentional or negligent act or omission of a third party, other than a party or its agents in privity of contract with, or employed by, the person, and that the person

(i) exercised due care with respect to the hazardous substance; and

(ii) took reasonable precautions against the act or

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omission of the third party and against the consequences of the act or omission; or  
 (C) an act of God; and  
 (2) in relation to (1)(B) or (C) of this subsection, that the person [discovered the release and began containment and clean up within a reasonable period of time].

....

(i) In an action to recover damages and costs, a person otherwise jointly and severally liable under this section is relieved of joint liability and is liable severally for damages and costs attributable to that person if the person proves that

- (1) the harm caused by the release or threatened release is divisible; and
- (2) there is a reasonable basis for apportionment of costs and damages to that person. [FN32]]

FN32. AS 46.03.822(b) &amp; (i).

As can be seen, subsection .822(b) creates three defenses to subsection . 822(a)'s strict liability scheme: an act of God, an act of war, or an unavoidable act of a third party. Each of these listed "defenses" centers on causation; each is triggered by the intervention of an outside actor, to which the law attributes the hazardous release, away from the original defendant. Hence, this specific category of defenses ameliorates the otherwise harsh effects of strict liability. So too, subsection (i) creates a specific exception that, when triggered by particular circumstances justifying the apportionment of partial responsibility to an outside actor or third party, ameliorates the harsh effects of joint and several liability.

The narrow focus of these defenses has significance in its own right, because "[w]here ... specific words follow[ ] general ones, [the statutory interpretation doctrine of *eiusdem generis*] restricts application of the general term to things that are similar to those enumerated." [FN33] As applied to the statutory phrase at issue, then--"notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the exception set out in (i) of this section"--this interpretive canon strongly suggests

that the terms "defenses" and "exception" refer not to the entire universe of potential general defenses, but to provisions and rules outside the original legislation that specifically mitigate the effects of joint and several liability.

FN33. 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.17 (6th ed.2000); see *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 412-13 (Alaska 1982) (applying this doctrine).

A companion provision of Alaska's 1989 hazardous substances legislation lends further credence to this reading. The statute immediately following subsection .822--AS 46.03.823--expressly creates a partial exception to strict liability for "hazardous substance response action contractors" (cleanup contractors), making them liable for hazardous releases only on the basis of negligence. [FN34] This provision certainly qualifies as a "defense" to subsection .822(a)'s strict liability provision--at least in the broad sense of "defense" that FDIC urges us to adopt insofar as it relates to the statute of limitations. Yet because this defense is not mentioned in subsection .822(a), it necessarily conflicts with FDIC's proposed "plain meaning" of subsection . 822(a)'s "notwithstanding" phrase: according to FDIC, the phrase's categorical preclusion of all conceivable defenses except those set out in section .822-- subsections .822(b) and (i).

FN34. As originally enacted by chapter 39, § 3, SLA 1989, section . 823 provided, in relevant part: (a) A person who is a response action contractor with respect to a release or threatened release of a hazardous substance is not civilly liable for injuries, costs, damages, expenses, or other liability that results from the release or threatened release unless the release or threatened release is caused by an act or omission of the response action contractor that is negligent or grossly negligent or constitutes intentional misconduct. To show negligence by a response action contractor, a claimant must show that the acts or omissions of the contractor under

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the response action contract were not in accordance with generally accepted professional standards and practices at the time the response action services were performed.

(b) The liability limitation under (a) of this section does not apply to a response action contractor who would otherwise be strictly liable under this section.

[9] To apply FDIC's plain meaning of subsection .822(a), then, would nullify the section .823 defense, rendering the provision entirely superfluous. This, in turn would clash with the rule of construction holding that, as a general rule, a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." [FN35]

FN35. *Alascom, Inc. v. North Slope Borough Bd. of Equalization*, 659 P.2d 1175, 1178 n. 5 (Alaska 1983) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 46.06 (4th ed.1973)).

Legislation outside AS 46.03 reinforces the uncertainty generated by section .823. Just as subsection .822(a)'s "notwithstanding" phrase must be considered in context with the hazardous substances act as a whole, so too other relevant laws must be considered, for "a seemingly unambiguous statute [may be] restricted by another act or where it must be considered in pari materia with another act." [FN36] In this regard, the comprehensive regime of statutes of limitations listed in AS 09.10 is particularly relevant, [FN37] because, as Laidlaw correctly observes, "if, as FDIC suggests, § . 822(a) has no statute of limitations whatsoever, it appears to be the only cause of action in Alaska with this distinction." [FN38]

FN36. *Hafting v. Inlandboatmen's Union of Pacific*, 585 P.2d 870, 872 (Alaska 1978); see also *Anderson v. Anderson*, 736 P.2d 320, 321 (Alaska 1987) (seemingly unambiguous provision of Exemptions Act affected by Alaska

Limited Entry Act).

FN37. AS 09.10.010 provides: "A person may not commence a civil action except within the periods prescribed in this chapter after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute." AS 09.10.100 provides: "An action for a cause not otherwise provided for may be commenced within ten years after the cause of action has accrued."

FN38. See generally AS 09.10.010--AS 09.10.100.

The final factor to consider in determining subsection .822(a)'s meaning is its legislative history. In our view, this factor further indicates that the legislature did not intend to exclude the statute of limitations as an available "defense" to a private cost recovery action. In 1989 the legislature amended section .822, using the federal CERCLA statute as a pattern. [FN39] Congress originally passed CERCLA in 1980, including the defense-limiting "notwithstanding" language that appears in subsection . 822(a). [FN40] When first enacted, CERCLA incorporated a three-year \*354 statute for damages actions. [FN41] But two federal trial courts ruled that this statute of limitations did not apply to cost recovery actions under 42 U.S.C. § 9607--the CERCLA analog to subsection .822(a). [FN42]

FN39. See *supra* note 8 and accompanying text.

FN40. See Comprehensive Environmental Response, Compensation & Liability Act of 1980, Pub.L. No. 96-510, Title I, § 107, 94 Stat. 2767, 2781 (1980).

FN41. See 42 U.S.C. § 9612(d) (1994).

FN42. See *United States v. Dickerson*, 640 F.Supp. 448, 450-51 (D.Md.1986); *United States v. Mottole*, 605 F.Supp. 898, 901-10 (D.N.H.1985).

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In 1986, evidently responding to these rulings, Congress added statutes of limitations specifically covering CERCLA's counterparts to subsections .822(a) and (j). [FN43] Congress codified these new statutes as separate provisions within CERCLA, and did not amend CERCLA's "notwithstanding" language to mention them as "defenses" to a cost recovery action under CERCLA. [FN44] Obviously, then, Congress did not consider these statutes of limitations to be included among the kinds of "defenses" that were limited by CERCLA's "notwithstanding" provision—a provision directly corresponding to subsection .822(a).

FN43. See Pub.L. No. 99-499, § 113(b), 100 Stat. 1613, 1647 (1986).

FN44. See 42 U.S.C. § 9613(g) (1994). CERCLA's analog to AS 46.03.822(a) appears at 42 U.S.C. § 9607(a).

When the 1989 Alaska legislature revised section .822 by incorporating many features of CERCLA, [FN45] it omitted CERCLA's internal statutes of limitations. FDIC argues that this omission evinces the legislature's intent to withdraw any statute of limitations defense. But the defendants respond that the Alaska legislature's omission merely reflects its awareness that, unlike federal law, Alaska law already incorporated general statutes of limitations outside its hazardous substances act that would govern a direct action brought under subsection .822(a).

FN45. See *supra* note 8 and accompanying text.

The defendants' view is more plausible than FDIC's. As pointed out above, it is apparent that Congress considered CERCLA's internal statute of limitations to lie outside the sphere of "defenses" described by CERCLA's "notwithstanding" provision. If we accepted FDIC's proposed view of legislative intent, then, we would have to conclude that the Alaska legislature meant to give the "notwithstanding" language imported from CERCLA more significance in subsection .822(a) than Congress gave it in the federal context. Since

no legislative history supports this interpretation, there is no reason to suppose that the Alaska legislature intended subsection .822(a) to abrogate Alaska's general statutes of limitations.

In sum, we conclude that the limiting language of subsection .822(a) does not preclude affirmative defenses, like the defense of statute of limitations, that have no inherent relation to subsection .822(a)'s imposition of joint and several strict liability for release of hazardous substances.

*D. An Action for Contribution Under Subsection .822(j) May Be Filed When a Subsection .822(a) Action Is Brought but "Accrues" for Purposes of the Statute of Limitations When Judgment Is Entered or Settlement Is Reached.*

[10] One of the certified questions before us is when a cause of action for contribution "accrues" under subsection .822(j). In 1989, when the legislature amended subsection .822(a) to mirror CERCLA, it also enacted a new subsection, AS 46.03.822(j), that gave defendants an action for contribution:

*A person may seek contribution from any other person who is liable under (a) of this section during or after a civil action under (a) of this section. ... In resolving claims for contribution under this section, the court may allocate damages and costs among liable parties using equitable factors determined to be appropriate by the court. This subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section. [FN46]]*

FN46. Ch. 39, § 2, SLA 1989.

The statutory language is clear that any party named in a direct subsection .822(a) action may commence an action for contribution at any time "during or after" the direct §355 action. [FN47] We nevertheless conclude that even though subsection .822(j) allows a contribution action to be brought while a subsection .822(a) action is still in progress, the contribution action does not "accrue" for purposes of the statute of limitations until the

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subsection .822(a) action concludes.

FN47. Conversely, subsection .822(j)'s "during or after" language strongly suggests that a party has no right to seek contribution *before* an action has been commenced under subsection .822(a). Yet subsection .822(j) also provides that "this subsection does not diminish the right of a person to bring an action for contribution in the absence of a civil action under (a) of this section." In light of our decision that subsection .822(a) creates a private cause of action, these provisions are not contradictory. In the absence of a third-party claim under subsection .822(a), a potentially responsible party is free to bring a private action under subsection .822(a) against other potentially responsible parties and, in so doing, may seek or ultimately be limited to apportioned damages under subsection .822(j). *See, e.g., Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir.1997). While this kind of anticipatory action might plausibly be characterized as a claim for contribution under subsection .822(j), because it derives from subsection .822(a)'s creation of a private right of action, the anticipatory contribution action must accrue with the related subsection .822(a) action and be governed by its statute of limitations.

[11] Under CERCLA, an action for contribution accrues according to a contribution-specific statute of limitations, 42 U.S.C. § 9613(g)(3). Alaska has no analog to this provision on its books. Because the legislature unreservedly specified that contribution actions may be brought after a subsection .822(a) action concludes, and since an action under the subsection .822(a) could conceivably remain pending for many years after its inception, the statute of limitations on such actions cannot realistically begin to run upon commencement of the action under subsection .822(a). [FN48]

FN48. In this regard, we believe that subsection .822(j)'s language allowing potentially responsible parties to assert contribution claims "during" a subsection .822(a) action must be read to extend to actions prosecuted either in court or through administrative proceedings. If subsection .822(j) did not apply to parties who became subject to DEC administrative compliance actions, the benefit of a contribution action would accrue only to those who, through their recalcitrance, forced DEC to court. We do not believe that the legislature intended to force such cases into court. We note, however, that before the state's administrative process could qualify as an action, it would have to have the formal attributes of an administrative proceeding, including "a complaint-like pleading, which in turn set[s] in motion a formal process of dispute resolution." *Koss v. Koss*, 981 P.2d 106, 108 (Alaska 1999); *see also Agen v. State, CSED*, 945 P.2d 1215, 1219 (Alaska 1997); *cf. Hickel v. Halford*, 872 P.2d 171, 176 (Alaska 1994) (listing a formal charging document that triggers a formal mechanism for dispute resolution as indicia of an agency "proceeding").

Moreover, interpreting subsection .822(j) to authorize a contribution action accruing upon or after judgment comports with general contribution case law elsewhere, [FN49] as well as with our own case law governing contribution in other contexts. For example, in *Providence Washington Insurance Co. of Alaska v. McGee* we recognized "that a claim for contribution is substantively separate from the underlying tort and does not arise until the contribution claimant has paid more than his or her proportionate share of the total claim." [FN50]

FN49. *See* Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867, 912-13 (1974).

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FN50. 764 P.2d 712, 715 (Alaska 1988);  
see also *Alaska General Alarm, Inc. v. Grinnell*, 1 P.3d 98, 106-07 (Alaska 2000).

In the absence of statutory guidance other than the language of subsection . 822(j), and because subsection .822(j) specifically authorizes an action for contribution to be brought "during or after" a direct action under subsection . 822(a), we conclude that a contribution action under subsection .822(j) should not accrue for statute of limitations purposes until the direct cost recovery ends, either by judgment, settlement, or the conclusion of an administrative action. [FN51]

FN51. In our view, the rule we adopted in *Providence Washington Insurance Co. of Alaska v. McGee* should generally govern the date of accrual when a party who has paid damages assessed jointly and severally under subsection .822(a) files a contribution action to recoup the disproportionate payment. In at least one situation, however, reliance on the *Providence Washington* rule may not be warranted. When a party who has not been forced to pay an award or make cleanup efforts under subsection . 822(a) files a contribution action to apportion liability for the damages, the contribution action should be treated as accruing at the time of judgment on the subsection .822(a) action. Applying the *Providence Washington* rule to such cases would encourage subsection .822(a) judgment debtors to delay payment or cost recovery efforts, since any delay would be essentially cost-free and they could always trigger a new period for filing a contribution action by making a small payment on the judgment. In these situations and in other exceptional cases, subsection .822(j)'s express grant of discretion to consider "equitable factors determined to be appropriate by the court" will, we believe, empower trial courts to treat the contribution action as accruing upon entry of the subsection .822(a)

judgment.

\*356 E. *Nuisance and Trespass Actions Are Subject to Statutes of Limitations and the Discovery Rule.*

[12] Finally, we consider whether hazardous substance contamination can escape the statute of limitations by being characterized as a continuing nuisance or trespass. FDIC maintains that because the contamination of the Soldotna property "continued over time, and continue[s] up to the present time," no statute of limitations bars its claims for nuisance and trespass. To support this argument, it relies on our ruling in *Wood v. Alm*. [FN52]

FN52. 516 P.2d 137, 142 (Alaska 1973).

We are not persuaded that *Wood* is controlling. In *Wood*, we let stand the superior court's ruling that the defendant's failure to prevent the flooding of the Woods' property was a continuing nuisance that should be abated. [FN53] FDIC reads that case as describing a situation analogous to this case. But in *Wood*, the continuing nuisance was caused by a faulty dike for which the defendants were responsible. [FN54] While damage did occur soon after the dike began to leak, we recognized that compensation for that damage was time barred. [FN55] Nevertheless, the defendants were under a continuing obligation to prevent the inundation of the Woods' land, which they continuously failed to do; their leaky dike allowed water to seep onto the Woods' property up to the day the suit was filed. [FN56]

FN53. *See id.* at 141-42.

FN54. *See id.*

FN55. *See id.*

FN56. *See id.* (indicating that the superior court judge viewed the unrepaired conditions around the Woods' property).

In contrast, the defendants here are not

21 P.3d 344

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21 P.3d 344, 52 ERC 1488

(Cite as: 21 P.3d 344)

exacerbating the contamination that they allegedly caused during the late 1980s. And since they have lost their connection to the land, they cannot be characterized as maintaining an ongoing nuisance. Thus, we do not see how the contamination in this case differs from the harm ordinarily at issue in cases involving torts of a non-continuing nature, where discrete wrongful acts often have lasting consequences.

Insofar as there is a difference that relates to statutes of limitations, it is that injuries from seeping pollutants may be difficult to discover. That characteristic, however, does not militate in favor of describing the defendants' alleged actions as a continuing nuisance or trespass. Rather, the discovery rule adequately addresses this problem by delaying a cause of action's accrual until the plaintiff is aware, or reasonably should be aware, of its existence. [FN57]

FN57. See *Cameron v. State*, 822 P.2d 1362, 1365-68 (Alaska 1991) (laying out the discovery rule and its purpose).

Here, given the parties' briefing, the undisputed facts discussed in the federal court's certification request, and the available record, we conclude that FDIC's allegations do not lend themselves to being framed as a continuing trespass or nuisance. [FN58]

FN58. For the reasons that we advanced in discussing the availability of a statute of limitations defense to direct actions under subsection .822(a), see *supra* Part III.C, we need not consider what statute of limitations applies to FDIC's trespass claim.

#### IV. CONCLUSION

In sum, we answer the certified questions as follows:

1. A statute of limitations defense is available for a direct cause of action under AS 46.03.822(a).
2. Alaska Statute 46.03.822(a) creates a private cause of action imposing joint and several strict

liability.

\*357 3. A cause of action for contribution under AS 46.03.822(j) may be brought during the pendency of a direct action under subsection .822(a) but does not accrue for purposes of the statute of limitations until the direct action concludes.

4. Continuing trespass and nuisance claims for environmental contamination cannot be brought outside the limitations period under the undisputed circumstances presented here.

21 P.3d 344, 52 ERC 1488

END OF DOCUMENT

**HB**

**272**

**Judiciary  
Committee**

**Thursday  
March 23, 2006  
8:30 AM**

**Butrovich Room  
#205**

**1**

**HB 272**

**Card Rooms & Operations**

**(companion to SB 165  
previously heard in  
Committee)**

Prepared on March 22, 2006  
 Prepared by Dick Tremaine  
 Prepared for CSHB 272(FIN) version Y.A  
 Page 1 of 2

### DRAFT COMPARISON OF CSHB 272(FIN)AM TO NON-BANKED CARD ROOM ACTIVITY IN OTHER STATES\*

	<u>Montana</u>	<u>Washington</u>	<u>California</u>	<u>Alaska</u>
Total Population: Census 2000 <sup>1</sup>	902,195	5,894,121	33,871,648	626,932
Number of card rooms <sup>2</sup>	270	68	96	<i>maximum of 172</i>
Total non-banked tables <sup>3</sup>	335	195	1,376	<i>unknown</i>
Most non-banked tables per room <sup>4</sup>	6	9	243	<i>unknown</i>
Owner license application fee <sup>5</sup>	\$150	\$0	\$500	<i>\$25,000</i>
Annual fee per table <sup>6</sup>	up to \$500	up to \$1,060	up to \$3,700	<i>\$10,000</i>
Occupational license fee <sup>7</sup>	\$75 then \$25	\$175 then \$84	\$250	<i>to be determined</i>
Bond amount <sup>8</sup>	\$0	\$0	\$0	<i>\$500,000</i>
Maximum wager <sup>9</sup>	Pot limit \$300	Per person per hand \$100	none	<i>to be determined</i>
Maximum rake <sup>10</sup>	none	\$10 per player per hour	none	<i>to be determined</i>
Municipal population limit <sup>11</sup>	unknown	unknown	unknown	<i>1 card room per municipality or 30,000</i>
Other limits on card rooms <sup>12</sup>	500 hands per day	15 tables, 10 players per table	1996 levels	<i>to be determined</i>
Gross receipts <sup>13</sup>	\$5.1 million	\$31.6 million	\$563 million	<i>unknown</i>
State distribution <sup>14</sup>	\$89,796	unknown	\$3,868,350	<i>unknown</i>

\* Montana, Washington and California are the only states that have legalized commercial non-banked card rooms that are not in casinos or racetracks. Information presented does not include any municipal taxes, fees or restrictions.

Prepared on March 22, 2006

Prepared by Dick Tremaine

Prepared for CSHB 272(FIN) version Y.A

Page 2 of 2

**Notes:**

<sup>1</sup> U.S. Census 2000.

<sup>2</sup> Montana calls establishments that are operated by contractors card rooms (43) but all establishments that have non-banked card rooms as of March 31, 2005 are included here. Washington has banked, non-banked and combination card rooms but only the non-banked and combination card rooms as of June 30, 2004 are included here. California card rooms (which are non-banked only) are restricted in number and size by a moratorium holding local restrictions on maximum number and size to 1996 levels. Number provided by Division of Gambling Control April 2005. In Alaska, the Department of Commerce, Community, and Economic Development, Division of Community Advocacy lists 164 municipalities. Of these, a maximum of 10 card rooms would be possible in the only two municipalities with populations over 60,000: Anchorage - 8, Fairbanks North Star Borough - 2.

<sup>3</sup> In Montana the number of tables licensed is as of March 31, 2005. In Washington this is the number of non-banked tables only as on June 30, 2004. In California this is the total number of tables as of April 2005. In Alaska, the bill does not limit the total number of tables.

<sup>4</sup> In Montana the number of tables is not directly limited but card rooms are limited to 500 hands per day so the most tables at any establishment as of March 31, 2005 is 6. In Washington card rooms are limited to 15 tables total and the most non-banked tables at an establishment as of June 30, 2004 is 9. There are no state-imposed limits on number of tables in California and the largest card room as of April 2005 is the Commerce Casino in Los Angeles with 243 tables. In Alaska, the bill does not limit the number of tables per card room.

<sup>5</sup> In Montana the fee does not cover the cost of investigations and is required only for card room contractors. As of March 31, 2005 there were 35 card room contractors operating 43 of the 270 card establishments. In California the fee does not cover the cost of investigations. In Washington and Alaska the fee would be used to cover investigation costs and any additional investigation costs would be paid by the licensee. Washington charges a single license fee based on the number of tables and this fee is listed in this spreadsheet under "Annual fee per table."

<sup>6</sup> In Montana the first table is \$250 and any additional tables are \$500 per table. In Washington, annual fees are \$3,650 for the first five tables and \$1,060 for each additional table. In Washington this is the only license fee required by a card room owner and is used to cover investigation costs. In California, the per-table fee depends on both the number of tables and gross revenues of the establishment. The minimum per-table fee is \$250 for card rooms with 5 or less tables and under \$200,000 in gross revenue. The maximum per-table fee is \$3,700 for card rooms with over 70 tables. In Alaska the per table fee would be \$10,000.

<sup>7</sup> The card dealer license fee for Montana is \$75 for the initial license and \$25 for renewals. For Washington the occupational license fee is \$175 for the initial license and \$84 for renewals. For California the card room work permit fee is \$250 except for temporary employees it is \$25. In Alaska, the department would set biannual occupational license fees after receiving recommendations from the advisory board.

<sup>8</sup> There is no bond requirement in California, Montana or Washington. In Alaska there would be a cash bond of \$500,000 required of all licensed owners.

<sup>9</sup> Montana limits pots to \$300. Washington limits the number of players to 10, and limits the wager per round to \$25 and the total wager per hand to \$100 for non-banked card rooms. California does not limit wagers. In Alaska, the department would set wager limitations after receiving recommendations from the advisory board.

<sup>10</sup> Of the three states only Washington limits the rake, with a limit of \$10 per hour or \$1 per player per hand or the lesser of \$5 or 10% of total wagers per hand. In Alaska, the department would set any rake limitations after receiving recommendations from the advisory board.

<sup>11</sup> In Alaska, we assume that the bill refers to the Federal Census of 2000 and the definition of municipalities includes boroughs.

<sup>12</sup> Montana limits the number of hands allowed per day to 500. Washington has a 15 table limit in card rooms (includes banked and non-banked tables) and specifies that no more than 10 players may play at a table. California restricts the number and size of card rooms by a moratorium holding local restrictions on maximum number and size to 1996 levels. In Alaska, the location and maximum number of potential card rooms is limited in the bill, and other restrictions might be set by the department after receiving recommendations from the advisory board.

<sup>13</sup> Gross receipts for Montana are from 2003 as reported by the American Gaming Association. Gross receipts for Washington are annualized based on data for the quarter ended June 30, 2004. Gross receipts for California are from 2002 as reported by the American Gaming Association. Alaska gross receipts are unknown as they are dependent upon many of the factors listed on this spreadsheet that are to be determined.

<sup>14</sup> Montana's state distribution reflects the sum of card table permit fees (\$66,500), card dealer license fees (\$18,496) and card room contractor fees (\$4,800) for fiscal year 2004. California's state distribution reflects table fees (but not application fees) for 2003. For Washington we do not have estimates for total state distribution. Alaska total state distribution is unknown as it would be dependent upon many of the factors listed on this spreadsheet that are to be determined.

**Sources:**

California Division of Gambling Control; Montana Gambling Control Division; Washington State Gambling Commission; U.S. Census Bureau Census 2000; American Gaming Association "2004 State of the States"; Alaska Department of Commerce, Community, and Economic Development, Division of Community Advocacy

# ALASKA STATE LEGISLATURE

**Chair:**  
Legislative Council

**Member:**  
Community and Regional Affairs  
Judiciary  
Labor and Commerce - Vice Chair



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## REPRESENTATIVE PETE KOTT DISTRICT 17 - EAGLE RIVER

### Sponsor Statement for

### House Bill 272

### An Act relating to card rooms and card room operations

The growing popularity of poker is obvious to who have recently surf TV channels. Many networks, from ESPN to the Travel Channel, are regularly televising Texas Hold 'em tournaments and enjoying sky rocketing ratings and subsequent advertising revenues. Men and woman, old and young are joining the poker trend, which shows no signs of slowing. Due to this growth in interest, the intent of HB 272 is to allow social card games to be played in a tightly controlled public environment. Alaska can address the trend and bring this popular pastime into compliance with the safety and revenue laws of the state.

Under HB 272 card rooms would be limited to boroughs with a population of 30,000 or more and only one card room establishment per 30,000 people. These card rooms would be limited to players 21 years of age or older, and they would only offer non-banked card games such as poker, cribbage, rummy, etc.

In addition to the taxable revenue generated by the card rooms, food and drink purchases, and table charges, the establishments would also pay \$10,000 per table annually to the state and would be required to hold quarterly tournaments to benefit a non-profit educational institution or group. As part of the licensing procedure, the card room operators would also be responsible for covering the administrative cost of licensing and subsequent enforcement through a \$25,000 application fee.

In addition to the revenue and job creation, regulated card rooms would allow for players to enjoy their hobby in a safe regulated environment rather than playing in an unsavory, and often unsafe "back room." Currently many players, in addition to their friendly home game, play in underground games where the "house" takes in large profits with little assurance of "fair" play. Although not an everyday occurrence, players at these games have in the past been held up at gunpoint with little recourse because of the shady and illegal nature of the game.

By recognizing this trend and the fact that we already allow this type gaming in our homes, Alaska can address the issue head on and make card games a legitimate, safe, social activity that will increase revenue and job opportunities while minimizing the negative effects of underground gambling.

# FISCAL NOTE

**STATE OF ALASKA**  
**2006 LEGISLATIVE SESSION**

Fiscal Note Number: 3  
 Bill Version: CSHB 272(FIN) am  
 ( ) Publish Date: 3/22/2006

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Revenue 04  
 Title Card Rooms and Operations RDU Treasury and Tax  
 Component Tax Division  
 Sponsor Representative Kott  
 Requester (S) Component No. 2476

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	*	*	*	*	*	*
<b>CAPITAL EXPENDITURES</b>	*	*	*	*	*	*
<b>CHANGE IN REVENUES ( )</b>	*	*	*	*	*	*

**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	*	*	*	*	*	*

Estimate of any current year (FY2006) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

**POSITIONS**

Full-time	*	*	*	*	*	*
Part-time	*	*	*	*	*	*
Temporary	*	*	*	*	*	*

**ANALYSIS:** (Attach a separate page if necessary)

**Revenue Discussion**

This bill would legalize non-banked card rooms in Alaska with the caveat that the total number of owner's licenses issued in a municipality may not exceed one in municipalities with a population less than 30,000 and in larger municipalities the total population of the municipality divided by 30,000. A non-banked card room is one in which players compete against each other rather than against the house and the house has no stake in the outcome of a game. Poker, pan, rummy, bridge and cribbage are specified as the games that may be played in a non-banked card room.

The bill does not define the term "municipality" nor does it specify which census is to be used for establishing the population of larger municipalities. For our reference case, we used the definition of "municipality" in AS 29.71.800 (cities and boroughs) and the April 1, 2000 U.S. Cens (the decadal census). The Department of Commerce, Community, and Economic Development, Division

Prepared by: Larry Meyers & Dick Tremaine Phone 465-2320  
 Division Tax Division Date/Time 3/22/06 11:45 AM  
 Approved by: Jerry Burnett Date 3/22/2006  
 Agency Revenue

## FISCAL NOTE

STATE OF ALASKA  
2006 LEGISLATIVE SESSION

BILL NO. CSHB 272(FIN) am

### ANALYSIS CONTINUATION

of Community Advocacy lists 164 municipalities. Of these, The U.S. 2000 Census lists eight with populations over 30,000 but only two with more than 60,000 people. This would add eight more possible card rooms, a total of eight in Anchorage and two in the Fairbanks North Star Borough. In total, the bill would allow up to 172 card rooms throughout the state at this time. It is important to note that these estimates, including our reference case, would change based upon the formation or dissolution of municipalities and future census results.

There are five major reasons that we have not included a revenue or cost estimate on the first page of this fiscal note. First, while 172 card rooms are possible under the bill, many of the communities probably do not have a population or visitor base sufficient to support the required fees. However, this is not determinable based on any specific measure such as population or location. Second, the decision to open and operate a card room is a business decision. Third, under this bill the department is given authority to set many rules and regulations that will affect this business decision. These rules and regulations will be formulated after receiving recommendations from the five member governor-appointed advisory board created under this bill. Fourth, the fees imposed on card rooms in different states and localities vary widely and make comparisons to Alaska difficult. For example, the state of Montana charges a processing fee to cover the cost of determining whether to issue a license plus \$250 for the first table and \$500 for each additional table. Washington charges \$3,650 for up to 5 tables and \$1,060 per additional table up to a maximum of 15, plus any investigation costs exceeding the license fees. CSHB 272(FIN) imposes an owner's license fee of \$25,000 to apply for a five-year license plus an annual \$10,000 per table fee. Operators are also responsible for investigation costs that exceed the portion of the \$25,000 fee that is assessed for the investigation, posting of a \$500,000 cash bond and biannual occupational licensing fees to be set by the department. Fifth, The bill stipulates that "all revenue received from card room activities under this chapter" will be transferred to a State Gaming Fund created within the general fund. The fiscal implications of this new fund including deposits and use of fund proceeds is not elucidated.

Based on several assumptions, we estimate that one card room in Alaska could generate about \$201,000 in fees for the state in the first year. During years 2 through 5, we estimate a card room in Alaska could generate between \$150,000 and \$167,000 in annual fees for the state. These estimates assume that the average card room will have 15 tables (15 is the maximum allowed in Washington and in California the average is 14.3). The card room is assumed to pay its owner's license fee in the first year with no transfer of ownership over the 5-year license period. This estimate also assumes an occupational licensing system similar to Washington, where annual licenses are \$175 initially and \$84 for renewals (for Alaska's biannual licenses this would translate into \$175+\$84=\$259 initially and \$84+\$84=\$168 for renewals). We assume that Washington's average of 6.7 card room occupational licenses per table will hold in Alaska and that after the first year, all of the licenses will be renewals. We assume that, like in Washington, all gaming employees will be covered but non-gaming employees such as bartenders will not require licenses. A significant variable affecting revenues would be the actual number of tables card rooms would have. This is difficult to estimate, as in California non-banked card rooms range from a single table to 243 in the Commerce Casino in Los Angeles with the average being 14.3 tables per card room. One or more very large card rooms in Alaska could significantly boost revenues.

One provision of this bill instructs the department to set maximum wagers for card rooms; this restriction along with any maximum rake could have an effect on the revenue generated by potential card rooms. In Washington, non-banked card room wagers are capped at \$25 per player per round, and rakes are capped at \$10 per player per hour or \$1 per player per hand or 10% of the pot up to \$5. Annual gross revenue to card rooms per non-banked table in Washington is \$162,000. In California, there are no maximums placed on rakes or wagers, and the annual gross revenue per non-banked table is about \$400,000.

This bill stipulates that card rooms must hold at least one card tournament per quarter with "gross proceeds" donated to a nonprofit group. There are many variables that would help determine the total amount generated for charities, including the number of card rooms, the number of tables and rules and regulations adopted by the department. Also, while "gross receipts" is defined in the bill "gross proceeds" is not so it is unclear if prizes or any expenses would be included in this calculation. In Michigan the average Texas Hold-Em tournament generates \$2,920 in revenue and \$1,099 in profit for charities, with a \$500 per person per day prize limit. Any prize limits in Alaska would be determined by the department and may influence the profitability of tournaments. In a 2005 article in the Boston Globe, card tournament supplier Mike Sheehy estimated that "A well-run tournament will attract up to 200 players, each of whom pays a \$100 entrance fee [...] A tournament of that size can offer pots of \$5,000 for the first-place player and a few thousand for the second and third and still generate \$10,000 for the charity after expenses."

The costs of implementing this bill are not possible to estimate at this time. This is because we do not know the number, size, nor geographic locations of potential card rooms. We anticipate hiring at least several full time staff, including two teams of investigators which would ensure that teams could be available during all hours of card room operations. Also about \$60 in RSAs to Public Safety for fingerprint background checks would be required for each card room employee. If the card rooms have more than, say, ten or fifteen tables or spread beyond the major populations areas of the state, we would require additional staff and resources for investigation, regulation, and travel. Additionally, we do not include any additional costs that would be incurred by municipalities as a result of this bill.

# FISCAL NOTE

**STATE OF ALASKA**  
**2005 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: HB 272  
 (H) Publish Date: 4/22/05

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Revenue 04  
 Title Card Rooms & Operations RDU Treasury and Tax  
 Component Tax Division  
 Sponsor Representative Kott  
 Requester (H) L&C Component No. 2476

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>

<b>CAPITAL EXPENDITURES</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>
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<b>CHANGE IN REVENUES ( )</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>	<b>*</b>
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2005) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 (see attached)

Prepared by: Larry Meyers & Brett Fried Phone 465-2320  
 Division Tax Division Date/Time 4/1/2005  
 Approved by: Jerry Burnett, Special Assistant to the Commissioner Date \_\_\_\_\_  
 Agency Department of Revenue

## FISCAL NOTE #1

STATE OF ALASKA  
2005 LEGISLATIVE SESSION

BILL NO. HB 272

### ANALYSIS CONTINUATION

#### Revenue Discussion

This bill would legalize non-banked card rooms in Alaska, with the caveat that "the total number of owner's licenses issued in a municipality may not exceed the total population of the municipality divided by 30,000". A non-banked card room is one in which players compete against each other rather than against the house and the house has no stake in the outcome of a game. Texas Hold-Em poker is an example of a game that might be played in a non-banked card room. It is not clear if "the most recent federal census information" refers to the Decennial Census or the most recent estimate by the U.S. Bureau of Census for purposes of determining the number of card rooms allowed. We used the April 1, 2000 U.S. Census to determine that a maximum of 13 card rooms would be possible under this bill: 8 in Anchorage, 2 in the Fairbanks North Star Borough, 1 in Juneau, 1 in the Kenai Peninsula Borough and 1 in the Matanuska-Susitna Borough. If we were instead to use the July 1, 2004 annual estimates of population from the Census Bureau, then 15 card rooms would be possible: 9 in Anchorage, 2 in the Fairbanks North Star Borough, 1 in Juneau, 1 in the Kenai Peninsula Borough and 2 in the Matanuska-Susitna Borough. We assume the definition of "municipality" in AS 29.71.800, which includes first-class and home-rule cities and boroughs.

There are three reasons why we did not include a revenue or cost estimate on the front page of this fiscal note. First, the decision to open and operate a card room is a business decision that will be made by potential licensees. Second, under this bill the department is given authority to set many rules and regulations that will affect this business decision. Third, the fees imposed on card rooms in different states and localities vary widely and make comparisons to Alaska difficult. For example, the state of Montana charges a processing fee to cover the cost of determining whether to issue a license plus \$250 for the first table and \$500 for each additional table. Washington charges \$3,650 for up to 5 tables and \$1,060 per additional table up to a maximum of 15, plus any investigation costs exceeding the license fees. SB 165 imposes an owner's license fee of \$25,000 to apply for a five-year license plus an annual \$10,000 per table fee. Operators are also responsible for investigation costs that exceed the portion of the \$25,000 fee that is assessed for the investigation, and the department is authorized to set occupational licensing fees.

Based on several assumptions, we estimate that the maximum of 13 card rooms in Alaska would generate about \$2.5 million in fees for the state in the first year. During years 2-5, we estimate the maximum of 13 card rooms in Alaska would generate \$2.1 million in annual fees for the state. These estimates assume that there will be the maximum of 13 card rooms with an average of 15 tables each (15 is the maximum allowed in Washington and in California the average is 14.3). All card rooms are assumed to pay their owner's license fees in the first year and would not transfer ownership over the 5-year license period. These estimates also assume an occupational licensing system similar to Washington, where annual licenses are \$175 initially and \$84 for renewals. We assume that Washington's average of 6.7 gaming employees per table will hold in Alaska and that after the first year, two-thirds of the licenses will be renewals. We assume that, like in Washington, all gaming employees will be covered but non-gaming employees such as bartenders will not require licenses. Of course, a significant variable affecting revenues is the actual number of tables any individual card room would have. This is difficult to estimate, as in California non-banked card rooms range from a single table to 243 in the Commerce Casino in Los Angeles with the average being 14.3 tables per card room. One or more very large card rooms in Alaska could significantly boost revenues. California and Washington are useful comparisons because both states have data available specifically for non-banked card rooms.

This bill stipulates that card rooms must hold at least one card tournament per quarter with proceeds donated to a nonprofit group. There are many variables that would help determine tournament proceeds, including the number of card rooms, the number of tables, rules and regulations adopted by the department, and other factors. In Michigan the average Texas Hold-Em tournament generates \$1,099 in profit for charities, with a \$500 per person per day prize limit. Any prize limits in Alaska would be determined by the department and may influence the profitability of tournaments. In an article in the Boston Globe, card tournament supplier Mike Sheehy estimated that "A well-run tournament will attract up to 200 players, each of whom pays a \$100 entrance fee [...] A tournament of that size can offer pots of \$5,000 for the first-place player and a few thousand for the second and third and still generate \$10,000 for the charity after expenses."

#### Cost Discussion

The costs of implementing this bill are difficult to estimate because we do not know the number nor size of potential card rooms. Given the assumptions in our revenue discussion, we would anticipate \$448,600 in total costs with \$371,600 in personnel costs and related expenditures and \$77,000 in RSAs to Public Safety for fingerprint background checks. The personnel costs are for an Investigator IV, four Investigator III's and an Admin Clerk III. Based on the experience of other states and our own experience, this staff should be sufficient to investigate, license and regulate up to 13 card rooms with an average of 15 tables each. Also having two teams of investigators would ensure that teams could be available during all hours of card room operations (assumed to be 12:00 noon to 2:00 am). If the card rooms are larger on average than the assumed 15 tables we would require additional staff and resources for investigation and regulation. We did not include any additional costs that would be incurred by municipalities as a result of this Bill.

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## MEMORANDUM

April 21, 2005

**SUBJECT:** Card Rooms and Indian Gaming (HB 272)  
**TO:** Representative Pete Kott  
**FROM:** Kathryn L. Kurtz *KK*  
Legislative Counsel

You asked whether this bill would affect Indian gaming in Alaska. I do not think this bill will open the door to class three gaming.

The federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 et seq., gives Indian tribes the authority to conduct gaming and gambling on Indian lands. The Indian Gaming Regulatory Act divides gaming into three classes:

- (1) Class I gaming includes social gaming for minimal prizes and traditional Indian gaming conducted at ceremonies or celebrations;
- (2) Class II gaming includes bingo, lotto, pull-tabs, punch boards, tip jars and non banking card games, as well as banking card games operated on or before May 1, 1988;<sup>1</sup> and
- (3) Class III gaming includes casino-type gambling, pari-mutual horse and dog racing, lotteries, and all other forms of gaming that are not class I or II gaming.

Class I gaming on Indian lands is within the exclusive jurisdiction of the tribes and is excluded from the provisions of the IGRA. Class II gaming on Indian lands is within the jurisdiction of the tribes but is subject to the provisions of the IGRA, including oversight by the National Indian Gaming Commission. For example, an Indian tribe seeking to conduct bingo games could choose to do so under the authority of state law or could do

---

<sup>1</sup> Class II gaming does not include:

- (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
- (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(b).

Representative Pete Kott

April 21, 2005

Page 2

so separately under a permit from the National Indian Gaming Commission. Class III gaming activities are lawful on Indian lands only if authorized by a tribal ordinance or resolution, the activities are conducted on lands located in a state that permits such gaming for any purpose by any person, organization, or entity, and the activities are conducted in conformance with a tribal-state compact entered into by the tribe and state.

The Act provides a framework for negotiation of a tribal-state compact -- the tribe requests the state to enter into negotiations; upon receiving such a request, the state "shall" negotiate with the tribe in "good faith" to enter into such a compact.

There has been a good deal of litigation involving the various provisions of the IGRA since its passage. Some of that has involved the definition of "Indian lands." Although Alaska has only one remaining reservation, it is not safe to assume that there are no other "Indian lands" in Alaska. There certainly are parcels that are held in trust by the United States that might qualify for purposes of IGRA.

This underscores the significance of the difference between class II and class III gaming. If the legislature permitted class III gaming in state law, it would pave the way for tribes to conduct class III gaming on Indian lands under federal law. However, HB 272 permits only non-banking card games, specifically poker, pan, rummy, bridge, and cribbage games. Poker falls under IGRA's definition of class II games. 25 C.F.R. 502.3; National Indian Gaming Commission Opinion dated June 17, 1999, Re: Game Classification Opinion - "Poker Club."<sup>2</sup> House banked card games, such as blackjack and baccarat, as well as player banked games, such as chemin de fer, are class III games, 25 C.F.R. 502.4; National Indian Gaming Commission Bulletin No. 95-1, April 10, 1995, but those types of games are not permitted in card rooms under HB 272.

KLK:med  
05-284.med

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<sup>2</sup> According to this National Indian Gaming Commission opinion, "Banking games, as commonly understood and defined in the NIGC regulations, are games in which the banker (usually the house) takes on, that is, competes against, all players, collecting from losers and paying winners. See 25 C.F.R. 502.11(c). Conversely, non-banking card games are games where players play against each other. Poker is the typical example of a non-banking card game." The opinion went on to conclude that the proposed poker club would constitute class II, rather than class III gaming: "[A]s proposed, the players in the Nation's Club would play against each other in a non-banking format, not against the house or other banker. Turning Stone and its dealers would not have an interest, financial or otherwise, in the outcome of any poker game. Thus, the poker games to be played at the Club qualify as non-banking card games."

Distributed by Rep. Pete Kott

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April 25, 2005

Perry Green  
130 W. 4<sup>th</sup> Avenue  
Anchorage, Alaska 99501

Re: Effect of HB 272/SB 165 (Card Rooms) on Indian Gaming in Alaska

Dear Mr. Green:

You have asked what effect, if any, the enactment of HB 272 or SB 165 would have on Indian gaming in Alaska. More specifically, you have asked me to address two questions:

(1) Would the enactment of HB 272 or SB 165 "open the door" to allow Indian tribes in Alaska to operate casino type gaming operations – referred to in the federal Indian Gaming Regulatory Act ("IGRA") as "Class III" games?

The answer is no. As discussed below, all of the card games authorized in HB 272 and SB 165 are Class II games for purposes of IGRA. IGRA authorizes Indian tribes to operate Class III games only if state law does not prohibit them. Alaska law currently prohibits all forms of Class III gaming, and nothing in either bill would authorize Class III games. So long as Alaska law continues to prohibit Class III games, IGRA would not authorize Indian tribes to operate them within Alaska

(2) Would the enactment of HB 272 or SB 165 "open the door" to additional Class II Indian gaming in Alaska, beyond what is already authorized under existing law?

The answer is no. As discussed below, Alaska currently allows certain organizations and entities to conduct various types of Class II gaming under AS 05.15, including bingo, pull tabs, raffles, lotteries and various lottery type "classics," such as ice classics, rain classics, and salmon classics, among others. In addition, Alaska's criminal code exempts players engaged in social gambling, including players in social card games, from the criminal prohibitions against gambling in the state. Because Alaska currently allows Class II gaming, including card games, IGRA would allow Indian tribes to operate the types of

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Class II card games allowed in HB 272 and SB 165 on Indian lands in Alaska – even if neither of those bills were enacted.

I. Brief overview of the Indian Gaming Regulatory Act.

The federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 et seq., provides authority for Indian tribes to conduct certain gaming operations on Indian lands.<sup>1</sup> There are three classes of games under the Act.

Class I games include social gaming for minimal prizes and traditional Indian gaming conducted at ceremonies or celebrations. Tribes may conduct Class I games on Indian lands without oversight by the Indian Gaming.

Class II games include bingo, lotto, pull-tabs, punch boards, tip jars and non-banking card games. Non-banking card games are games in which only the players may make wagers on the outcome, in contrast to "banked" card games such as blackjack, baccarat and chemin de fer, where the player effectively plays against the house or another banker and the house or banker collects money from losers and pays winners. Indian tribes may conduct Class II games on Indian lands if the tribe adopts an ordinance authorizing the activity and receives a permit from the Indian Gaming Commission. IGRA imposes various regulatory requirements on Class II gaming and restricts the uses of revenues from Class II gaming operations.

Class III games include casino type gambling, electronic or electromechanical facsimiles of any games of chance, slot machines, pari-mutuel horse and dog racing, and all other forms of gaming that are not Class I or Class II. For states located within the federal Ninth Circuit (including Alaska), Indian tribes may conduct a Class III game only if the state permits the particular type of game that the tribe seeks to operate. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250 (9<sup>th</sup> Cir. 1995). Class III games, if they are allowed by the state, may be conducted only in conformity with a negotiated tribal-state compact entered into by the tribe and the state.

II. Enactment of HB 272 or SB 165 would not "open the door" to Class III Indian Gaming in Alaska.

HB 272 and SB 165 are identical bills that would authorize, under various limitations, the operation of card rooms in Alaska for the purpose of playing one or more

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<sup>1</sup> IGRA restricts Indian gaming to activities conducted on "Indian lands." This is a significant restriction, and is discussed briefly in Part IV of this opinion, beginning on page 4.

specified "non-banking" card games<sup>2</sup>. The specified games are poker, pan, rummy, bridge and cribbage. Since the only games allowed under the bills are non-banking games, they would be considered as Class II games and not Class III games.

IGRA allows Class III Indian gaming activity only if the activity is "located in a State that permits such gaming for any purpose by any person, organization, or entity." Alaska currently does not permit any type of Class III gaming activity, and nothing in either HB 272 or SB 165 would constitute such permission. Kathryn L. Kurtz, Legislative Counsel, recently provided an opinion to Representative Pete Kott in which she concluded that HB 272 would authorize only Class II games and would therefore not provide a basis for any Class III Indian gaming in Alaska. (Memorandum from Kathryn L. Kurtz to Representative Pete Kott, April 21, 2005.) I agree with her analysis, and rather than repeat it here, I have attached a copy of her opinion to this letter.

### III. Authority of Indian Tribes to Conduct Class II Card Games under Existing Alaska Law.

IGRA, in 25 U.S.C. 2710(b)(A), allows an Indian tribe to engage in Class II gaming on Indian lands within the tribe's jurisdiction if

such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law).

AS 05.15 currently allows charitable organizations and municipalities to conduct certain games that would be included within IGRA's definition of Class II games – specifically, bingo, pull tabs, raffles, lotteries and various lottery type "classics" such as the Nenana Ice Classic. Additionally, Alaska's criminal code exempts from prosecution for gambling offenses "a player in a social game." AS 11.66.200. "Social game" is defined in AS 11.66.280(9) as "gambling in a home where no house player, house bank, or house odds exist and where there is no house income from the operation of the game."

There are two alternative bases for concluding that IGRA would permit Indian tribes to operate the types of card games authorized under HB 272 and SB 165, even if neither bill were enacted. The first is that under the authorizing language quoted above, Alaska allows "such gaming" – that is, Class II gaming – of several types. It does not matter that Class II gaming activity is limited to charitable organizations and municipalities. Alaska need only authorize these games for "any purpose by any person,

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<sup>2</sup> Both bills, at page 2, line 1, make it clear that the specified card games are "non-banking." The Senate Labor & Commerce Committee Substitute for SB 165 contains additional language to further emphasize that only "non-banking" games are allowed. The committee substitute, at page 2, lines 18 and 19, provides that wagers may be made only by a player with respect to his or her own game and that players may not make a wager on behalf of another individual.

organization or entity." As noted above, the Ninth Circuit Court of Appeals has ruled that for a Class III game, IGRA authorizes it only if state law permits the same type of game that the tribe seeks to operate.) The Court has indicated however, that for Class II games, a less stringent standard will be applied, and a tribe may operate a Class II game if the state permits any person, organization, or entity to operate any Class II game. *Sec. Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d at 1258 n. 4. Under this analysis, IGRA would authorize Indian tribes to operate Class II card games solely by virtue of current law authorizing charitable organizations and municipalities to operate certain Class II games.

Alternatively, it may be argued that the *Rumsey* analysis should not be applied so broadly where Class II card games are at issue. That is because IGRA makes a distinction in its definition of Class II games between bingo, pull tabs and other bingo-like games on the one hand, and card games on the other. Specifically, IGRA defines Class II card games as games that "are explicitly authorized by the laws of the State" OR that "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." 25 U.S.C. 2703(7)(A)(ii)(I) and (II). Current Alaska law meets that definition.

While current Alaska law does not "explicitly" authorize non-banking card games, it clearly does not "explicitly" prohibit them, because of the exemption in AS 11.66.200(b) from prosecution for players in social games. Moreover, since non-banking gambling is allowed in Alaska by players in homes, existing law allows for gambling on card games "at any location in the State."

Thus, Indian tribes are authorized under IGRA to operate non-banking card games under Alaska law as it exists today. Enactment of either HB 272 or SB 165 would not be required as a prerequisite to that authorization.

#### IV. Territorial Restrictions on Indian Gaming in Alaska.

Even though IGRA would authorize Indian tribes to conduct Class II card games in Alaska under existing state laws, there are additional restrictions in IGRA that may serve to minimize the proliferation of such gaming in Alaska. Indian tribes may conduct Class II and Class III gaming operations only on "Indian lands." Indian lands are defined in IGRA, 25 U.S.C. 2703(4), as:

(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.

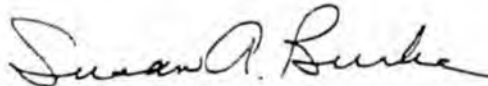
In Alaska, the only lands within an Indian reservation are those within the Metlakatla reservation. The Alaska Native Claims Settlement Act revoked all other reserves set aside for Native use and lands conveyed to regional and village Native corporations are held in fee simple by each corporation. Native corporation lands, then, do not fall within the definition of "Indian lands" because they are not within an Indian reservation, they are not held in trust by the United States, and they are not subject to any restrictions on alienation or sale.

Another category of lands that arguably might constitute "Indian lands" are various Alaska village town sites. While these lands were at one time held in trust, they have since been re-conveyed to the villages in fee simple and are now free of any prior restrictions on the sale of these lands. As a result, village town sites would not qualify as "Indian lands" for purposes of IGRA.

The last category of lands that may constitute "Indian lands" under IGRA are individual Native allotments. There are a number of parcels of land in this category scattered all over the state, and most, if not all, are held by individual Natives and are subject to federal restrictions against alienation. Thus, Native allotments would likely meet two of the three requirements needed to qualify as "Indian lands." What is less clear is whether Native allotments would meet the third requirement that the Tribe must "exercise governmental power" over the lands. This is a complex issue, however, and the result would depend on the facts surrounding the particular parcel in question and the extent to which a recognized tribe actually exercises any governmental powers within the boundaries of that particular parcel.

Please let me know if you have additional questions.

Very truly yours,



Susan A. Burke

SAB:ps

Enclosure

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## MEMORANDUM

April 21, 2005

**SUBJECT:** Card Rooms and Indian Gaming (HB 272)

**TO:** Representative Pete Kott

**FROM:** Kathryn L. Kurtz *KK*  
Legislative Counsel

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- (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
- (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(b).

Representative Pete Kott

April 21, 2005

Page 2

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This underscores the significance of the difference between class II and class III gaming. If the legislature permitted class III gaming in state law, it would pave the way for tribes to conduct class III gaming on Indian lands under federal law. However, HB 272 permits only non-banking card games, specifically poker, pan, rummy, bridge, and cribbage games. Poker falls under IGRA's definition of class II games. 25 C.F.R. 502.3; National Indian Gaming Commission Opinion dated June 17, 1999, Re: Game Classification Opinion - "Poker Club."<sup>2</sup> House banked card games, such as blackjack and baccarat, as well as player banked games, such as chemin de fer, are class III games, 25 C.F.R. 502.4; National Indian Gaming Commission Bulletin No. 95-1, April 10, 1995, but those types of games are not permitted in card rooms under HB 272.

KLK:med  
05-284.med

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# Alaska Native Brotherhood Camp 2

May 3, 2005

The Honorable Pete Kott  
Alaska State House of Representatives  
State Capitol, Room 403  
Juneau, Alaska 99801

RE: Finance Committee Substitute for House Bill 272 "An Act relating to card rooms and card operations."

Dear Representative Kott,

The Alaska Native Brotherhood Camp #2 and affiliated charitable gaming organizations have examined HB 272 "An Act relating to card rooms and card operations." After considering this legislation thoroughly and considering possible impacts on charitable gaming, we have concluded that there is no impact by the enactment of this law on charitable gaming permittees. Our organization has been involved with charitable gaming since before statehood. We would like it known that we are not opposed to the enactment of this law.

In the course of our review and in discussions with legislators, the question of the potential of Indian Gaming under the Federal law entitled the Indian Gaming Regulatory Act (IGRA) has arisen.

From our point of view as a state permitted charitable gaming qualified entity, we see no ability on our part to expand our bingo, pulltab and raffle program into the card room activities as a result of this law. Our organization and other organizations in the community such as the Filipino Community, the Moose Club, the Elks club, Eagles and other similar organizations are chartered as non-profit fraternal organizations under state law and are not eligible under IGRA.

With regard to Indian Tribes and Alaska Native tribes capability to have card rooms, these entities can engage in Bingo and related games played

as well as non-banking card games, if those games are otherwise lawful within states where tribes conduct those activities. Under HB 272, the following games are authorized: poker, pan, rummy, bridge and cribbage. These are considered non-house bank games. Therefore, these games do not fall into the Class III commercial casino style gaming operation and therefore, these games fall into the Class II non-commercial non-casino style gaming category. In this case, games that are determined Class II, Indian Tribes and Alaska Native tribes are free to offer it without a Tribal-State compact.

However, it should be noted that Indian Tribes and qualified Alaska Native tribes have a number of hurdles that they would have to overcome in order to proceed with card rooms in Alaska. First of all, a Tribal government in Alaska would have to have a proper tribal ordinance enacted by its members in order to proceed. Secondly, such tribal ordinance would have to be submitted to the National Indian Gaming Commission for its approval. Thirdly, such a card room would have to be located on Indian Trust Property i.e. an Alaska Native town site property or Indian allotment.

Based upon our existing knowledge, it would be very unlikely that we would see a proliferation of such card rooms in Alaska due to the limited number of parcels of property available at strategic locations near urban centers. Any such properties that would be available in rural Alaska are likely to be limited in accessibility as well. Therefore, the process and the need for strategically located properties most likely would inhibit Alaska Native tribes from embarking on the creation and operation of card rooms.

It should be noted here that I was a commissioner appointed by President Clinton on the National Gambling Impact Study Commission that provided a report to the President of the United States and to the Congress and the public on the current condition of all forms of gambling in America. In the course of the preparation of that report over a two and a half year period, the commissions undertook hearings and made field visits to all types of gambling establishments across America. Being the only Native American on that commission I was a part of a sub-committee that reviewed the status of Indian Gaming by taking testimony from 150 Tribal leaders, visiting many, many Indian casinos and meeting with gaming officials such as the National Indian Gaming Commission. I believe that the comments and observations we have provided here on HB 272 comports with the findings of that commission, IGRA and information available on opportunities available to Alaska Native tribes.

Again, we would like to go on record as expressing no opposition to the enactment of HB 272.

Sincerely,  
ALASKA NATIVE  
BROTHERHOOD CAMP 2

A handwritten signature in cursive script that reads "Bob Loescher".

Robert W. Loescher, Chairman  
Legislative Affairs Committee

Cc: Andrew Ebona, President ANB Camp 2

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## Local bars draw poker crowds

By DOUG O'HARRA  
Anchorage Daily News

Published: May 5th, 2005  
Last Modified: May 5th, 2005 at 05:49 AM

Chips chattered like castanets. The faint chinking sound penetrated rock music and the yammer of about 100 patrons inside the log-walled Peanut Farm tavern. The dealer laid another hand across the table.

It's poker and it's legal. Right here. And it's gaining fast in popularity all over town.

A bill now working through the Alaska Legislature would legalize licensed card rooms offering poker and some other card games for money. But hundreds of Anchorage residents already bet and bluff for fun in local bars with no money involved.

As players peeked at cards and fingered their stacks Tuesday night, poker impresario Stu Rosenthal scanned 10 impassive faces at a couple of square tables pushed together near a window overlooking Campbell Creek. "Fifty to go," he said, asking for the minimum bet.

With goatee and glasses, Rosenthal, 52, looks more like his day job: a ceramic artist of glazed vases. But he also runs Texas Hold 'Em poker tournaments at the bar and keeps things rolling for up to 50 competitors.

Aces showed in the middle. Knuckles rapped. No new bets.

The action settled on retired math teacher Steve Guthrie. Chewing gum fast, Guthrie seemed more interested in a baseball game on TV. He bet chips -- worth thousands if they'd been playing for

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Photo by Bob Hallinen / Ancho  
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A bill now working through the Alaska Legislature would legalize licensed card rooms offering poker card games for money. But hundreds of Anchorage residents already bet and bluff for fun in local bars with no money involved.

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money -- like he didn't care much what happened.

"He's so hot, he doesn't even have to look at this cards," Rosenthal said.

Other players studied their hands. The reigning poker champ, who won a trip to Hawaii a couple months ago in the last 10-week tournament, folded. The guy in a leather vest and one of those tough-guy ponytails threw in his hand. So did the high school principal, the title insurance salesman, the asphalt quality control man, the college student.

"They're scared of you, man!" Rosenthal said

Guthrie smiled, raked the pot, and kept chewing.

Rosenthal used to run card rooms in California before he moved to Anchorage a few years ago. He thinks people shouldn't fear the closely regulated card rooms proposed by the bill -- assuming they mirror the friendly atmosphere of the no-money games now operating.

"I just want to convey how mainstream it is," he said. "It's not the sort of ominous, dingy, smoke-filled room where there are currents or undertones. ... These people would play for, like, a carrot -- first prize, a carrot."

The Peanut Farm began hosting the weekly games with sponsorship from Budweiser as a way to draw more business on Tuesdays, often a dead night, said bar manager Gary McCutcheon. Add in a dinner crowd bound for the Alaska Aces game across town, sunshine on the bar's outside deck - - and nine servers, six cooks and two bartenders were scrambling hard.

"On a night like this, we'll blast through 10 kegs of beer and 100 burgers," he said.

Rosenthal's dealers included a radio deejay, an Alaska Housing manager and Anchorage's official "Bud Girl" from the local beer distributor. Among the players was Gabe Sam, a land manager originally from the Interior village of Huslia. Legendary musher George Attla is his uncle, he said.

"So I'm the other Huslia Hustler -- of poker, that is," he said. "Tonight I'm going to win it all."

Sitting at Rosenthal's table, Jim Bailey, principal of West High School, laid a Maduro Romeo & Juliet cigar, still wrapped in cellophane, against

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his stacked chips. For luck, he explained later.

That's what the game's all about, he said. "And patience."

Tuesday's game began during the height of dinner hour amid deafening clamor by Aces fans. The stakes? A snazzy digital camera-binocular combo, plus seven seats in the championship tournament later in the month, with its grand prize of two tickets to Hawaii.

Players began with chips worth 2,000 pretend dollars and were eliminated when those were gone. There were five tables to start. Periodically, Rosenthal raised the minimum bets and reshuffled the players, gradually eliminating one table after another.

After four hours, nine players remained and the game moved to a round table in a quieter non-smoking room. While sports fans at the bar hooted and howled, the dealer dealt the cards. Bets began at 2,000, then jumped to 4,000.

Gabe Sam lost to two pairs: kings and sevens. "Good game, Gabe," they called as he left.

Diane Burd, an Anchorage housewife, went all in and lost against her husband, Jim, an engineer with Conoco Phillips.

And then there were two: Jim Burd and Dan Lindblom, a 25-year-old asphalt inspector studying aviation at college. In a series of fast hands, the men traded enormous pots: 28,000, then 53,000. A dozen people stood around the table, applauding each new turn of the cards.

Finally the two men stared at the "flop," the cards in the middle everyone can use to make a good hand: a king, nine and seven.

"All in," said Lindblom, betting all his chips.

"What the hell, I'm with you," said Burd.

The dealer flipped over a five, then a three. Lindblom -- who had never played Texas Hold 'Em in public before -- threw down a pair of fives, giving him three of a kind and the game.

He shook hands with Burd and took the camera from Rosenthal.

Lindblom said he'll be back. "Hawaii here I come."

Daily News reporter Doug O'Harra can be reached at do'harra@adn.com.

March 3, 2006

# life

Fill up your evening at fun events



BILL ROTH / Anchorage Daily News

Poker players hone their skills in a Texas Hold 'em tournament at The Peanut Farm. Poker lovers will play for higher stakes — including a trip to Las Vegas, a gold and diamond bracelet and lunch with poker star Perry Green — during the Texas Hold 'em Alaska State Championship on Saturday at the Egan Center.

# Show of hands

*Fur Rondy tournament deals out poker for all levels of fans*

By Casey Brogan  
Anchorage Daily News

**G**etting into a friendly game of poker hasn't been this easy since the Gold Rush days. Most trends take a while to find their way north, but the epidemic of poker fever that has swept the nation didn't take long to infect Alaska, and it has players sweating bullets at bars all across Anchorage.

One of those players is likely to walk out of the Egan Center Saturday night with a boatload of prizes as Alaska's first state poker champion. But if you play your cards right, it could just as easily be you.

The inaugural Texas Hold 'em Alaska State Championship begins at 5 p.m. Saturday as part of Fur Rendezvous, and while there have been qualifying tournaments around town for months, a drawing will turn 12 lucky spectators into participants. Tickets to get in the door and into the drawing cost \$5.

"With all the popularity of Texas Hold 'em around town, we thought it would be perfect for Fur Rondy," event manager Susan Duck said Monday.

Anchorage bars have certainly found the Texas Hold 'em craze to be a good draw for poker-playing patrons.

Since Latitude 61 started hosting tournaments two years ago — and filling its parking lot — bars all across town have gotten in on the action, and seven of them, plus one in Fairbanks and one in Mat-Su, will have a dozen of their best players in the Fur Rondy tournament.

As a three-time winner of the World Series of Poker, Perry Green is Alaska's unof-

## Texas Hold 'em Alaska State Championship

**When:** 5 p.m. Saturday

**Where:** Egan Center

**How much:** \$5 for spectators

**Web:** [www.furrondy.net](http://www.furrondy.net),  
[www.perrygreengreenpoker.com](http://www.perrygreengreenpoker.com)

ficial dean of the decks and an unabashed enthusiast of the game. He says poker's appeal is its combination of skill and luck.

"The best player always wins in chess. ... In poker, you can be a good player and beat a great player or you can be a mediocre player and sometimes get lucky enough to beat a great player."

Before heading to Las Vegas this summer for the 2006 World Series of Poker, Green plans to have lunch with Alaska's first state champion. But he doesn't want to venture a favorite.

"We have a lot of great players in Alaska," he said. "My favorite will be the one who wins it."

Becoming a good player requires practice, but with about two dozen Anchorage bars hosting tournaments on a regular basis, it isn't hard to find someplace to hone your skills. You might prefer to practice online from the comforts of home, but you certainly aren't going to get any better at reading someone's poker face online. Plus it's not as much fun.

"It's like a social event," said Latitude 61 manager Jeff Matosky. "Everybody knows each other."

A player in a recent Fur Rondy qualifying tournament, Ryan Doerner, 24, likes playing at the bars because it allows

## Origins of Texas Hold 'em

The history of Texas Hold 'em is a bit murky, but it is believed to have originated in Robstown, you guessed it, Texas, sometime in the early 1900s. It became popular with ranch hands because play moves quickly and it allows a maximum number of players to participate using a single deck.

him to help his game without hurting his pocketbook.

"The best thing about coming to these games is that they're free. ... You're going to leave happy because you're not going to lose any money," Doerner said.

Many of the 140 players in the tournament will know each other and their tendencies, but it might be an unknown who comes out of the audience and ends up having lunch with Green.

If the prestige of becoming Fur Rondy's first state champion isn't enough to make you want to get into hand-to-hand combat with Alaska's best Texas Hold 'em players, maybe the tournament's prizes will. The winner will get the lion's share of loot that includes two tickets to Las Vegas, a gold and diamond bracelet, a men's or women's fur hat and a limited-edition Smith and Wesson .38-caliber pistol.

The doors open at 5 p.m., and the drawing to see which faces in the crowd become players at the tables will be at 5:30 p.m. Spectators get one raffle ticket with the purchase of their venue-entry ticket, but

## Table talk

Some local watering holes where patrons can play poker

### Latitude 61

4848 Old Seward Highway, 562-5701

8 p.m. daily

### Peanut Farm

5227 Old Seward Highway, 563-3283

6 p.m. Tuesdays

### The O

4801 Old Seward Highway, 561-9157

7:30 p.m. Mondays

### Chilkoot Charlie's

2435 Spenard Road, 272-1010

Sign-up 6:30 p.m. Tuesdays

### North Slope Saloon

11501 Old Glenn Highway, 694-9120

3 p.m. Sundays and 7 p.m. Wednesdays

### Crazy Horse

16th and Gambell, 279-1231

6:30 and 9:30 p.m. Mondays-Wednesdays

### Eddie's Sports Bar

6300 Old Seward Highway, 563-3970

7 p.m. Wednesdays and Thursdays

### Last Frontier

369 Muldoon Road, 338-9922

7 p.m. Sundays-Wednesdays (6 p.m. sign-up)

an unlimited number of raffle tickets can be bought for \$5 each.

► Daily News sports copy desk  
Casey Brogan can be reached  
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**Green: Legal gambling in the cards**

**LOBBYING: State needs to tap into national craze; first step is commission.**

By PAULA DOBBYN  
Anchorage Daily News

*(Published: August 30, 2005)*

The man dubbed "Alaska's Poker Guru" pitched the Anchorage business community Monday on his efforts to legalize card rooms in the state.

Semiretired furrier Perry Green told an Anchorage Chamber of Commerce lunch audience that poker is a booming industry that Alaska should tap to diversify its oil-dependent economy.

"It's not shady," Green said. "It's a mainstream activity."

Green is a well-known gambler who has competed in such major tournaments as the World Series of Poker. In the past year, he has spent tens of thousands of dollars on lobbyists to try to persuade the Alaska Legislature to sanction legalized gambling, according to state financial disclosures. The efforts have failed so far, but Green said Monday that he's closer than ever to having enough support to get a bill passed.

"This Legislature has matured enough to see poker as a viable business," Green said.

Last year, he pushed for legislation to establish a state gaming commission that would have had the authority to license an international casino at a failed fish plant in South Anchorage. The casino bill narrowly passed the House but died in the Senate.

Green retooled his strategy this year. He got Rep. Pete Kott, R-Eagle River, and Sen. John Cowdery, R-Anchorage, to sponsor bills that would legalize card rooms in Alaska where people could play poker, cribbage and other games for money. The bill passed the House but bogged down in the Senate Judiciary Committee.

Meanwhile, sponsors of legalized video poker are collecting signatures to get an initiative on the 2006 fall ballot that would create a gaming commission. The panel would be able to authorize video poker, slot machines and other games without legislative approval.

On Monday, Green promoted what he considers the virtues of gambling, describing it as a billion-dollar industry that would bring the state millions in tax revenue and provide employment.

"This industry provides decent jobs," he said.

Not-for-profit card games and tournaments are a growing form of entertainment in bars, Green said.

"People are demanding it."

People play cards in their homes, and scores of illegal, underground games are held routinely, Green noted. All the legislation would do is bring into the open what's already happening and make it legal, in his view.

Cowdery, who attended the luncheon, agreed. Illicit activity often accompanies the illegal games, he said. The bill to legalize card games and impose restrictions on them would be good for the state, the senator said.

"It will take it out of the underground. This will clean up the whole thing," Cowdery said.

Sen. Hollis French, D-Anchorage, also attended Green's talk. A member of the Senate Judiciary Committee, French said he has reservations about legalized gambling and voted against the casino bill. The casino would have been in his district, and he opposed giving an exclusive gambling license to a single operator.

French said he opposes electronic gaming because the machines are addictive and mind-numbing, among other drawbacks. While he's open to the idea of card rooms, he said, he hasn't made up his mind whether he'll support Cowdery's bill.

A staunch opponent of legal, for-profit gambling is Rep. Harry Crawford, a Democrat who represents part of East Anchorage. Crawford said he watched his hometown of Shreveport, La., suffer after riverboat gambling was legalized. He doesn't want it to happen in Alaska.

"Studies show that for every dollar that we take in from gambling, we have to pay out three dollars in (social) services," Crawford said. The people hurt the most by gambling are those who can least afford it, he said, adding, "It doesn't add much to the state economy, and it takes so much with it."

Crawford said he can't imagine the Senate Judiciary Committee voting to legalize card rooms, which he described as a thinly disguised attempt to usher in casinos, electronic gaming and other forms of gambling.

While he's focused now on card rooms, Green hasn't given up on the idea of casinos in Alaska. He's also in favor of Internet gaming. Green mentioned in his talk that he recently won \$18,000 playing online poker.

Asked whether poker is about luck or skill, Green said his answer depends on whether he's winning or losing. So would he bet that the Legislature will approve card rooms next session?

Green wouldn't wager but described himself as "hopeful."

Daily News reporter Paula Dobbyn can be reached at [pdobbyn@adn.com](mailto:pdobbyn@adn.com).

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## Florida Raises Poker Stakes (A Little)

It is difficult to get a state to legalize a new form of gambling. But it is nearly impossible to get the stakes raised once the cards have been dealt.

Florida is the latest example of this political rule.

Racetracks in Florida, like racetracks everywhere, have been searching for years for a way to bring in more gambling dollars. Consistently denied the right to operate slot machines and video lottery terminals, the tracks turned to card games.

Banking Blackjack would have been best, but did not look like it could get through the State Legislature. But poker was a different (political) game.

In 1989, the Legislature decided that the government should not be wasting its time going after small-stakes games. In fact, the law literally called the games "Penny-ante" defined as "a game or series of games of poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah-jongg in which the winnings of any player in a single round, hand, or game do not exceed \$10 in value."

Over the years, penny-ante games were allowed to be played not only in people's homes, but also in mobile home parks and publicly-owned community centers.

So, in 1996, the Legislature passed a law that beginning January 1, 1997, licensed pari-mutuel facilities could open commercial cardrooms.

Great idea, with just one hitch: cardrooms were stuck with the same penny-ante limits: "The winnings of any player in a single round, hand, or game may not exceed \$10 in value. The fee charged by the cardroom for participation in the game shall not be included in the calculation of the limitation on the pot size provided in this paragraph."

Notice the club can charge a fee, which was a good thing, considering it had to supply not only the facilities but also a non-playing dealer.

The plan was to lobby first for penny-ante poker and then get the Legislature to raise the limits. It did not happen.

Imagine what those game were like. The total pot could not be more than \$10. I talked with players and operators who said if you had five players at a table, everyone would chip in \$2.00 and that was it, no raising, no more bets of any kind.

To get around the low limit, operators tried to expand the definition of "poker." I testified as an expert witness on behalf of the State that a game where each player got two cards and tried to get closer to 21 than his opponent was not poker.

We won, but even the State attorney thought the \$10 limit on pots for poker games was silly.

Every attempt to get the Legislature to raise the stakes failed; until this year, when a bill finally made it through both houses. In August, 2003, Gov. Jeb Bush (R.) decided to not veto the bill. He said limits placed last year on when cardrooms could operate made the bill acceptable. But Gov. Bush's main reason for letting the bill become law was, according to TheLedger.com, "It is changing, kind of, the rules of a poker game, taking away one thing and adding another and that really doesn't expand gambling."

Was he correct?

The bill, HB 1059, eliminates the \$10 pot limit. But it replaces it with these new limits: "The cardroom operator may limit the amount wagered in any game or series of games, but the maximum bet may not exceed \$2 in value. There may not be more than three raises in any round of betting."

It will certainly change what was nothing more than a lottery into something resembling true, low stakes poker. But will it greatly expand the games.

My guess is yes.

Although there is a limit on bets and the number of raises per round, there is no limit on the number of rounds. Games like 7-Card Stud can get pretty expensive, but there is now every incentive to be inventive. I bet the first thing we see is the rules of Texas Hold'em being changed, so that there is a round of betting after the first down card and after each individual up card.

The lesson is: if you are fighting to legalize a new form of gambling, start with the stakes you want from the beginning. Your chances of getting the Legislature or voters to raise the limits once the law has been passed is about the same as your winning the World Series of Poker.

HB 1059

END

Professor I Nelson Rose is recognized as one of the world's leading authorities on gambling law. His website is [www.GamblingAndTheLaw.com](http://www.GamblingAndTheLaw.com)

# Why All These Stupid Laws?

A LOOK AT WHAT'S BEEN HAPPENING ON THE LEGAL FRONT SINCE THE GULF COAST DEVASTATION

Several years ago when I visited the casinos in Biloxi and Gulfport, Mississippi I asked what I'm sure every tourist that visits the area asks: what's going to happen to these casino barges when the first self-respecting hurricane blows through? Katrina answer that question, and the answer is exactly what anyone smart enough not to split tens or double down with 12 would have expected. In fact, I suspect a hurricane with less fury than Katrina would have had much the same results, at least as far as the casinos were concerned.

This leads to the question, why would anybody put these casinos in arguably the most venerable place in America? The short answer is that's where the Mississippi legislature said they had to be. But this begs the question: Why would the politicians require such a thing? Many people who oppose motorcycle helmet laws, mandatory seat belt laws and other laws designed to protect us from ourselves argue that "you can't legislate against stupidity." They may have a point, but requiring gambling barges to be unprotected in the Gulf of Mexico is "legislating stupidity." How can you defend that?

Perhaps the Mississippi legislature feels that if casinos are going to make money from people gambling they should take some risk themselves. However, if there is anything casino owners know how to do, it's lay off risk. I suspect the financial burden of the destroyed gambling barges will be borne by insurance companies (read that as you and me) and taxpayers (that's you and me again).

Mississippi politicians are not alone in putting illogical and arbitrary restrictions on legalized gambling. In New York State you cannot have slot machines, but "Video Gaming Devices" are fine. What's the difference, you ask? Well, slot machines have slots and Video Gaming Devices have slits. But today's slot machines also have slits so you can slip those hundred dollar bills in, but the Video Gam-



IT'S BEEN SAID THAT  
USING GAMBLING  
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THE COST OF  
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TO LOVE THAT.

have a slit for a casino debit card. You purchase the card from the casino, and if you run out of money there will be a casino employee there to sell you more debit before you can say, "It's about time I get home anyway."

In Illinois, casinos cannot operate 24 hours a day. Twenty-two is fine, but not 24; and in Canada, casinos can stay open all night and be on dry land, but they can't play craps. Every other game anyone can come up with is there - but no craps in Canada.

In Missouri you can only purchase \$500 worth of chips every two hours. On the surface this seems like a way to keep people from getting carried away in the moment and losing more than they can afford. But that's just the surface, the reality is that it accomplishes very little. First, the rule doesn't prohibit a player from purchasing more than \$500 in two hours, but rather the casino divides the day into two hours intervals, say 12 o'clock to 2 o'clock, 2 o'clock to 4 o'clock and so forth. You can't purchase more than \$500 worth of chips in any interval. So you can buy \$500 worth of chips at a minute before 2, and another \$500 a few minutes later after 2. But that's it until 4 o'clock, right? Wrong. Most Kansas City casinos are two

riverboats docked on different sides of a pier. Legally these are different casinos. So after you buy your \$1,000 worth of chips on one boat, walk across the pier and do it all again. Just in case your timing is off, the other boat measures two-hour intervals on the odd hours. If this isn't enough, you can drive five minutes to another casino and start with a clean slate.

Why all these strange rules?

Gambling offers politicians two things they can't resist. First, free money. Casinos create jobs, pay taxes, bring money into town and ask very little in government services. It's been said that using gambling taxes to finance the cost of government is a "tax on the stupid." Any politician has to love that. Money without angry e-mails from the Taxpayers' Union.

The only objections occasionally come from social or religious reformers. And this gives politicians the other thing they can't resist—an opportunity to be self-righteously against evil, things like gambling and other weaknesses of the flesh.

Of course, to get the free money politicians have to legalize gambling, and to oppose evil they have to be against it. For most of us this would be a problem, and that's why we are not politicians. These restrictive laws allow politicians to play both sides. They can get the free money by legalizing gambling, while boasting to their constituents about how they stood up to the gambling interest.

I can hear the Mississippi State Senator reviling gambling as the scourge of the land (no mention of the

OF COURSE, TO GET  
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water), or the Illinois legislator promising his Bible Belt constituents that no one in Illinois will ruin their family's lives by gambling all day and all night—22 hours a day should do it. The Missouri congressperson can reassure her constituents that no one will lose a week's salary in a few hours in a Missouri casino (at least not without walking across the pier).

I'm sure that when the full story of the devastation, both human and financial, in the wake of Hurricane Katrina is told, the unnecessary loss of the Gulf Coast casino will be one of the less consequential sacrifices due to political demagoguery, it just happens to one I can personally relate to. ♣

*Stephen Custer is an expert in statistics and probability theory and has taught at several universities. He currently lives in Las Vegas where he applies these skills at the blackjack and poker tables. He is the author of a new book, 21 a journey: Memoirs of a Professional Gambler, a chronicle of his yearlong journey across America playing blackjack. For more information, or to contact the author, visit [www.21ajourney.com](http://www.21ajourney.com).*

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# An Unconstitutional Anti-Gambling Statute

## A violation of Fourth Amendment protection against unreasonable search and seizure?

**I**n a couple of previous columns, I discussed some legal points connected with a recent poker bust in South Carolina, in which some people holding a poker tournament in their apartment-complex recreation room were arrested. I pointed out that the South Carolina statute they were charged under has no counterpart in any other state, and is constitutionally suspect. If a statute prohibits a substantial amount of constitutionally protected behavior, the whole statute is invalid and cannot be used to prosecute anyone, even someone who engages in behavior that is not constitutionally protected.

Here is part of the statute in question:

**"SECTION 16-19-40. UNLAWFUL GAMES AND BETTING.** If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts ..." (the rest of the statute discusses penalties).

You can see that the statute attempts to ban many nongambling games, as well as gambling games. This is shown by the name of the section ("unlawful games and betting" rather than "unlawful gambling"), the fact that the words "used as a place of gaming" appear in the middle of the statute (modifying only "store" and "house") rather than at the beginning, and most importantly, by the part that specifies which nongambling games are legal (implying that there are other nongambling games that are illegal).

This statute makes one wonder if the government can go

this far in the pursuit of morality. It appears in this statute that we are somehow being denied a fundamental right. In any law case that might be appealed and go to a higher court, such as a state Supreme Court or the U.S. Supreme Court, it is necessary that an argument be used in front of such a body that was brought up in the initial trial. So, we must find out which right is being violated, and where in our Constitution the particular fundamental right is stated or implied.

All of the cases used in this column are U.S. Supreme Court cases. According to the U.S. Supreme Court, a fundamental right is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed" (*Palko v. Connecticut*, 1937). In *Moore v. East Cleveland* (1977), the court used the term "deeply rooted in this nation's history and tradition." Is playing games with cards or dice important enough to fit such a lofty description?

It would be nice if there were something in the First Amendment to pin our hopes on, as that law is considered to be the essence of a free society: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Unfortunately, the right to assemble is directly connected to the part about petitioning the government, and probably does not include assembling to play card games. The South Carolina statute does look like it might infringe on our freedom of religion, as there are some social fundamentalist religions that frown on cards and dice, and they may have foisted their view into the law. However, it seems better to look elsewhere in the Constitution for a clearer and more suitable place to claim that one of our basic rights is being stomped on by the statute in question.

I believe the right place to look for a Constitutional infringement on our rights is the Fourth Amendment, which reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Of course, the police had a warrant to bust the poker game. Does this mean the players were not protected by the Fourth Amendment?

Fortunately, the Fourth Amendment is interpreted to mean more than just a warrant needs to be issued in order for an invasion by the police to be reasonable. Here are some quotes from the U.S. Supreme Court in an unrelated case, *Lochner v. New York*, 1905. "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state." "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty ...?" In the 1923 case *Meyer v. Nebraska*, Justice McReynolds explained the word "liberty" by writing, "Without doubt, it denotes not merely freedom from bodily restraint, but also ... to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

I think the answer to that question of whether this particular South Carolina statute is an unreasonable interference with personal liberty must be that although it is reasonable to

raid a place where there is illegal gambling, it is not reasonable to raid a place because people are playing a nongambling game with cards or dice. Otherwise, you could not play even bridge or Monopoly with your family and friends. Imagine the police breaking down a door and raiding such a game.

Ever since the 14th Amendment was passed after the Civil War, our federally guaranteed constitutional rights also must be acknowledged and observed by all state and local laws. In the 1949 case *Wolf v. Colorado*, the Court said, "The security of one's privacy against arbitrary intrusion by the police — which is at the core of the Fourth Amendment — is basic to a free society. It is therefore implicit in the concept of liberty and as such is enforceable against the states through the Due Process Clause" (of the 14th Amendment). In *Ker v. California* (1963), the Court said that federal constitutional standards of reasonableness of searches "is the same under the Fourth and 14th Amendments," meaning the states are bound by federal standards in this area. In the famous 1963 case *Gideon v. Wainwright*, there is a part that reads, "Any state conduct which is grossly unfair denies due process of law."

A statute forbidding the playing of nongambling card games is an overreach of the state's power to enforce morality. It might be argued that the part of the South Carolina law that is constitutionally suspect is not enforced by the police. However, nonenforcement is irrelevant, as per *Epperson v. Arkansas*, the evolution case discussed in my previous column.

The South Carolina statute also should be voided for vagueness. In *Papachristou v. Jacksonville* (1972), the Court, in striking down a city vagrancy law, said, "A law is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." The Court additionally said the Jacksonville law "makes criminal activities which by modern standards are normally innocent" and "puts unfettered discretion in the hands of the Jacksonville police." These are exactly the things the South Carolina law forbidding games with dice or cards does! All you need to do is change the word "Jacksonville" to "South Carolina."

I believe that South Carolina has a law violating our Fourth Amendment protection against unreasonable search and seizure. It is the only state in the nation that tries to forbid nongambling games that use dice or cards. The statute in question cannot legally be used to enforce gambling violations. It is facially invalid, meaning no one can be prosecuted under it. The net result is that the state of South Carolina will have the opportunity to bring its gambling laws into the 21st century. ♠

Bob Ciaffone has authored four poker books, *Middle Limit Holdem Poker* (available at [CardPlayer.com](http://CardPlayer.com)), *Pot-limit and No-limit Poker*, *Improve Your Poker*, and *Omaha Holdem Poker*. Ciaffone is available for poker lessons; e-mail [thecoach@chartermi.net](mailto:thecoach@chartermi.net). His website is [www.pokercouch.us](http://www.pokercouch.us), where you can get his rulebook, *Robert's Rules of Poker*, for free.

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# South Carolina Gambling Laws

## Archaic laws likely to be tested in South Carolina

**I**n my last column, I described how a group of men from South Carolina, mostly businessmen, were playing in a friendly poker tournament in their apartment-complex recreation room and were busted by the police. Their lawyer, Jeff Phillips (himself a poker player), told me they were charged under Section 16-19-40 of the SC Penal Code. The statute they were charged under is unique in state law. This is an anti-gambling statute that is combined with a portion that forbids nearly all games played with dice or cards, whether or not any wagering is involved. No other state in the nation attempts to regulate the mere playing of games, as opposed to gambling. Here is the statute, which was passed by the South Carolina Legislature on Dec. 18, 1802, in much the same form as it exists today. I received this information about the statute date over the phone from the Coleman-Koresh Law Library reference desk in Columbia, the capital city of South Carolina. Note part (a).

**"SECTION 16-19-40. UNLAWFUL GAMES AND BETTING.** If any person shall play at any tavern, inn, store for the retailing of spirituous liquors or in any house used as a place of gaming, barn, kitchen, stable or other outhouse, street, highway, open wood, race field or open place at (a) any game with cards or dice, (b) any gaming table, commonly called A, B, C, or E, O, or any gaming table known or distinguished by any other letters or by any figures, (c) any roley-poley table, (d) rouge et noir, (e) any faro bank, (f) any other table or bank of the same or the like kind under any denomination whatsoever or (g) any machine or device licensed pursuant to Section 12-21-2720 and used for gambling purposes, except the games of billiards, bowls, backgammon, chess, draughts, or whist when there is no betting on any such game of billiards, bowls, backgammon, chess, draughts, or whist or shall bet on the sides or hands of such as do game, upon being convicted thereof, before any magistrate, shall be imprisoned for a period of not over thirty days or fined not over one hundred dollars, and every person so keeping such tavern, inn, retail store, public place, or house used as a place for gaming

or such other house shall, upon being convicted thereof, upon indictment, be imprisoned for a period not exceeding twelve months and forfeit a sum not exceeding two thousand dollars, for each and every offense."

Here is another South Carolina statute (not used in this case) that is even more outrageous, forbidding all games on the Sabbath. This one was passed in 1799, and at that time pertained only to Sullivan Island in South Carolina, until later extended to be statewide.

**"SECTION 16-19-70. KEEPING GAMING TABLES OPEN OR PLAYING GAMES ON THE SABBATH.** Whoever shall keep or suffer to be kept any gaming table or permit any game or games to be played in his house on the Sabbath day, on conviction thereof before any court having jurisdiction, shall be fined in the sum of fifty dollars, to be sued for on behalf of, and to be recovered for the use of, the State."

As you see, the first statute declares playing any games using cards or dice unlawful (whist and backgammon are exempted). The second statute states that you cannot permit any game or games to be played in your house on the Sabbath. These laws are so offensive that they make you wonder how they could exist in the United States of America. I would like to take you through the legal reasoning process that shows they are not constitutional, and that the poker players cannot be convicted of a crime under the statute that they violated.

The due process clause of the 14th Amendment to the Constitution not only guarantees us procedural due process, but substantive due process. This means that the lawmaking ability of a state is not unlimited. The ability of a state to make laws is restricted in order to guarantee fundamental fairness, justice, and liberty. States are not permitted to enact laws without having a legitimate governmental interest in regulating or prohibiting an activity. In the 2003 Patrick case, the U.S. Supreme Court said, "If the substance, meaning, or effect of a law or action of a government infringes upon a fundamental right to liberty, then the state must show that its infringements are necessary to achieve some compelling governmental interest." One of our fundamental rights is

## Quick reference to South Carolina's unlawful games and betting laws

Who:	Any person
What:	Any game with cards or dice
When:	Any time or place
Where:	Any place

guaranteed by the Fourth Amendment to the Constitution, which states in part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." The due process clause has also been utilized to recognize unenumerated rights like the right to privacy.

A state is allowed to pass laws against gambling in order to further the legitimate state interest of protecting morals. A law against playing any game that uses cards or dice is an overly long stretch by the state in protecting morals, and is highly unlikely to pass a constitutionality test. Laws like the statutes above look like they reflect a superstrict view of morality held by a few small religious groups such as the Puritans two or three centuries ago, and are still being inflicted by the state of South Carolina upon our world of the 21st century. This may bring the First Amendment protection against the establishment of a state religion into the picture.

Here are some legal points that work in favor of the poker players.

1. If a statute has a substantial part of it that is unconstitutional, the whole statute is invalid. Even if the part of it that pertains to your particular activity passes muster, you cannot be convicted under it.

2. You have standing with the court to challenge the statute even if your rights were not violated, as long as there

is a substantial chance that someone else's might be. The 1973 U.S. Supreme Court case of *Broadrick v. Oklahoma* departs from traditional rules of standing by allowing litigants to challenge a statute, "not because their own rights of free expression are violated... but because of the possibility that third parties engaging in activities protected by the First Amendment might be chilled from such activity."

3. An unconstitutional statute does not have to actually be used to prosecute anyone for it to be invalidated. In the case of *Epperson v. Arkansas*, in which a teacher, Susan Epperson, challenged a state statute making it unlawful to teach any theory of evolution or adopt or use a textbook that teaches evolution, the Supreme Court specifically noted, "There is no record of any prosecutions under the statute. It is possible that the statute is presently more of a curiosity than a vital fact of life." Then it said, "Nevertheless, it is our duty to decide the issues presented." We must conclude that even if no one in South Carolina has ever been arrested for violating the unconstitutional part of these statutes (which in a statute this old would be impossible to prove), it is still valid to take issue with the statute as a whole.

As you see, I believe the Greenville poker players have an excellent chance to win their case. Even if they lose on the first round, an appeal should be considered. In that event, court costs would be much higher, and it would be reasonable to support their efforts with a special fund from the poker community. However, I am guessing it will not come to that. What often happens in these raids is that the charges are dropped and the case never goes to court. In such a case, one wonders why the police run the risk of a raid in the first place, since there is the risk that a police officer or a player could be injured. In my home state of Michigan about 30 years ago, three people were shot, one fatally, in one of these raids because the players thought the game was being hijacked.

A police tactic more common than one would think is, "We will drop the charges if you do not try to recover what was seized in the raid." (In these cases in which charges are never pressed, you have to wonder if the raids are mainly police fundraisers, and whether the methods for tracking what was seized always accurately account for the full amount.) Poker players often go for that deal, but I sure hope no one in South Carolina does. ♠

*Bob Ciaffone has authored four poker books, Middle Limit Hold'em Poker (available at CardPlayer.com), Pot-limit and No-limit Poker, Improve Your Poker, and Omaha Hold'em Poker. Ciaffone is available for poker lessons: e-mail [thecoach@chartermi.net](mailto:thecoach@chartermi.net). His website is [www.pokercoach.us](http://www.pokercoach.us), where you can get his rulebook, Robert's Rules of Poker, for free*

## Attorney General Opinion

FORMAL OPINION	No. 93-5
of	AG Alpha No. LE HR AGATR
GALE A. NORTON Attorney General	April 21, 1993

This is a response to a request from Representative Lewis Entz concerning the General Assembly's authority to legislatively permit certain forms of gambling.

### QUESTION PRESENTED AND CONCLUSION

Does the Colorado Constitution prohibit the General Assembly from enacting legislation to legalize gambling?

The Colorado Constitution prohibits the General Assembly from enacting legislation to authorize lotteries, but it does not prohibit the General Assembly from enacting legislation to authorize forms of gambling which are not lotteries. The prohibition against lotteries applies to slot machines and blackjack. It does not apply to poker; therefore, this game could be legalized.

### ANALYSIS

#### Applicable provisions.

Article XVIII, section 2 was part of the original Colorado Constitution, adopted in 1876. At that time, it read as follows:

Section 2. Lotteries prohibited. -- The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state.

The lottery provision of the Constitution has since been amended to allow the General Assembly to authorize certain forms of lotteries. In **Bills v. People**, 113 Colo. 326, 157 P.2d 139 (1945) the court indicated that the terms lottery and gift enterprise were "synonymic" and used interchangeably in the Constitution and statutes. The phrase "gift enterprise" was deleted in 1959. 1959 Colo. Sess. Laws p. 867.<sup>FN1</sup>

The Article XVIII prohibition against legislatively authorized lotteries was the basis of an unsuccessful challenge to parimutuel wagering on dog and horse races. This type of wagering was legalized when, in 1948, the voters approved "An Act Authorizing, Regulating and Providing for Licensing the Racing of Horses and Other Animals with Parimutuel Wagering" that the General Assembly had submitted as a referendum. The Supreme Court rejected the constitutional challenge in **Ginsberg v. Centennial Turf Club**, 126 Colo. 471, 251 P.2d 926 (1952). Later, however, in 1978, the conduct of Sweepstakes races at the same facilities was found to be prohibited by Article XVIII, Section 2. **In re Interrogatories of the Governor Regarding the Sweepstakes Races Act**, 196 Colo. 353, 585 P.2d 595 (1978).

Section 2 of Article XVIII, as amended in 1980, now provides that

[t]he general assembly shall have no power to authorize lotteries for any purpose, except that the conducting of such games of chance as provided [therein] shall be lawful on and after January 1, 1959, and the conducting of state supervised lotteries ... shall be lawful on and after January 1, 1981.

It also provides that the authority to conduct particular lottery games be limited to certain non-profit licensees and the games be

[r]estricted to the selling of rights ... in the specific kind of game of chance commonly known as bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random and in the specific game of chance commonly known as raffles, conducted by the drawing of prizes or by the allotment of prizes by chance.

**Id.**

Article XVIII was again amended in November of 1990, when the voters granted the three mountain communities of Central City, Blackhawk and Cripple Creek the authority to permit "limited gaming." Section 9 of Article XVIII, provides **inter alia**:

(1) Any provision of section 2 of this Article XVIII or any other provision of this constitution to the contrary notwithstanding, limited gaming in the City of Central, the City of Blackhawk and the City of Cripple Creek shall be lawful as of Oct. 1, 1991.

(4) (b) "Limited gaming" means the use of slot machines and the card games of blackjack and poker, each game having a maximum single bet of five dollars.

**Meaning of "lottery".**

For purposes of your request, the critical term in Section 2 is "lottery." Because state-authorized lotteries were a very common means for states to raise money in the nineteenth century, and because abuses apparently became common also, most states banned lotteries in the last decades of that century. By 1885, twenty nine states had banned lotteries. **Greater Loretta Improvement Assoc. v. State**, 234 So. 2d 658 (Fla. 1970); **State v. Brotherhood of Friends**, 274 P.2d 787, 794-95 (Wash. 1952).

Consequently, what constitutes a lottery has historically been the subject of much litigation. And, because in that litigation courts have approached the question from different directions, the determinations as to what does and does not qualify as "lottery" vary significantly. Generally, however, there is agreement that while all lottery is gambling all gambling is not lottery, **Ginsberg v. Centennial Turf Club**, *supra*, and that principle is most germane to this inquiry.

In Colorado, the Supreme Court has provided the following description of "lottery":<sup>FN2</sup>

[A] lottery is present when consideration is paid for the opportunity to win a prize awarded by chance.

**In re Interrogatories of Governor Regarding Sweepstakes Races Act**, 196 Colo. at 357, 585 P.2d at 598. According to this formulation, a particular gambling scheme is a "lottery" whenever three essential elements are present: consideration, prize, and chance. The type of scheme involved is immaterial.

**The "chance dominant" test.**

Not surprisingly, most litigation concerning lotteries has involved the third element: chance.<sup>FN3</sup> In determining whether this element is present within the meaning of constitutional and statutory provisions relating to lotteries, courts have adopted two distinct approaches.

Certain jurisdictions have embraced the "pure chance" doctrine. Under this approach, for a scheme to be a lottery, it must be one solely based on chance. The exercise of any skill by a participant in the scheme removes the scheme from within the definition of a lottery. See **Braddock v. Family Finance Corp.**, 95 Idaho 256, 506 P.2d 824 (1973).

The majority of courts, however, have adopted the "dominant factor" doctrine under which a scheme is a lottery when chance dominates the distribution of prizes, even though the distribution maybe affected to some extent by the exercise of skill or judgment. **E.g., Roberts v. Communications Inv. Club**, 431 A.2d 1206, 1211 (RI 1981). Colorado has adopted this

approach: "Article XVIII, Section 2 is violated if chance is the controlling factor in the award." **In re Interrogatories of Governor, supra**, 196 Colo. at 356, 585 P.2d at 598.

In an analysis of the "dominant factor" doctrine the supreme court of Alaska, in **Morrow v. State**, 511 P.2d 127 (Alaska 1973), set forth a four-part test to determine whether skill dominates over chance: 1) whether without skill it would be impossible to win the game; 2) whether the general public, not experts, have the capacity to solve the problems presented; 3) skill must control the final result, not just one part of the larger scheme -- where skill does not destroy the dominant effect of chance, the scheme is a lottery and 4) the participants must be informed of the criteria used in selecting winners.

Consequently, the determination of which gambling game is exempt from the lottery prohibition must be made by applying the "dominant factor" test to the specifics of each game to see whether chance or skill dominates.

#### **Specific games analyzed.**

For purposes of this opinion, the games which constitute "limited gaming" within the meaning of the Colorado Constitution, Article XVIII, section 9(4)(b) have been analyzed. These games are slot machines, blackjack, and poker. Colorado courts have never been asked to determine whether any of these games constitutes a lottery. However, under the "chance dominant" test, it appears that slot machines are lotteries because chance clearly dominates; blackjack is probably a lottery because chance plays a large part but some skill is necessary; and poker is probably not a lottery because skill plays a larger, perhaps dominant role.

#### **Slot machines.**

Games played through slot machines have generally been perceived to be games where chance dominates and therefore have been categorized as lotteries. E.g., **State ex rel. Evans v. Brotherhood of Friends**, 41 Wash. 2d 133, 297 P.2d 787 (1952).<sup>FNA</sup>

#### **Blackjack.**

The game of blackjack (or twenty-one)<sup>FNS</sup> presents a situation where both skill and chance are present. In a formal Attorney General's Opinion issued on August 4, 1983, this office concluded that, because chance appears to dominate, blackjack is a "lottery." Very few courts have addressed this particular question, but those that have been in accord with this conclusion. See **State v. Eisen**, 16 N.C. App. 532, 192 S.E. 2d 613, 616 (1972) ("In ... blackjack ... we think the element of chance clearly dominates the element of skill; certainly the element of chance is present in such a manner as to thwart the exercise of skill or judgment").

#### **Poker.**

The game of poker<sup>FN6</sup> is more problematic. The Supreme Courts of Montana and Oregon have decided that poker is a game of skill "with one player pitting his skills and talents against those of other players." **Gallatin County v. D & R Music Vending**, 208 Mont. 138, 141, 676 P.2d 779, 781 (1984); **State v. Coats**, 158 Or. 122, 74 P.2d 1102, 1106 (1938). But the Supreme Court of Ohio has held that it is a game of chance. **Mil's Jennings of Ohio, Inc. v. Department of Liquor Control**, 70 Ohio St. 2d 95, 435 N.E. 2d 407, 409 (1982).

The tension inherent in those decisions is reflected in some of our own supreme court's pronouncements on the subjects of lotteries and poker. In **Bills v. People, supra**, 113 Colo. at 332, 157 P.2d at 142, the court found that the essential evil of lotteries is the cultivation and stimulation of the spirit of gambling. Later, in **In re Interrogatories of Governor, supra**, 196 Colo. at 357, 585 P.2d at 598, the court explained the intent of the framers of the Colorado Constitution to rid this state of that evil:

The framers of our constitution prohibited lotteries in the broadest terms at the time Article XVIII Section 2 was enacted. In so doing, they were seeking to suppress and restrain the spirit of gambling which is cultivated and stimulated by schemes whereby one is induced to hazard his earnings with the hope of large winnings.

These statements suggest that our constitutional prohibition against lotteries must be broadly interpreted -- perhaps broadly enough to include poker.

However, our supreme court has also stated:

There is no prohibition in our Constitution which prevents the legislature, or the people from authorizing certain forms of gambling. It unquestionably is true that all lotteries and gift

enterprises are forms of gambling, but it does not follow that all gambling is a "lottery" or "gift enterprise" as these terms are defined in law. **No one would contend that a game of poker, in which money is bet upon the relative value of the cards held by the participants constitutes a lottery,** but it most certainly is a form of gambling.

**Ginsberg v. Centennial Turf Club, supra**, 126 Colo. at 477, 251 P.2d at 929 (emphasis added). Although it is dicta in **Ginsberg**, the characterization that poker is not a lottery has recently been cited by the court in **Charnes v. Central City Opera House**, 773 P.2d 546, 551 (Colo. 1989).

While the call is a close one, I conclude that poker, as narrowly defined in Section 12-47.1-103(22), is a game in which skill, not chance, dominates, and that legislative authorization of certain forms of poker would not be prohibited by Article XVIII Section 2.<sup>FN7</sup> That is not to say that on a case-by-case basis some forms of poker could be construed as more akin to games of chance, or a "lottery." Of course the fact that poker is not constitutionally prohibited in all cases does not mean that it is legal; the prohibitions of Article 10 of Title 18 still apply. **See generally People v. Wheatridge Poker Club**, 194 Colo. 15, 569 P.2d 324 (1977). Poker remains illegal unless and until the Legislature acts to change the criminal statutes.

GALE A. NORTON  
Attorney General

JOHN J. KRAUSE  
Assistant Attorney General

CONSTITUTIONAL AMENDMENTS  
CONTEST  
GAMBLING

Colo. Const. Art. XVIII, Section 2  
Colo. Const. Art. XVIII, Section 9

LEGISLATIVE BRANCH  
House of Representatives

Colorado's constitutional law on lotteries does not prohibit the legislature from authorizing certain forms of gambling.

## Definitions, 25 U.S.C. 2703 [SEC. 4]

For purposes of this chapter--

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means--

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which--

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

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

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

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

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

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

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

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

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

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

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

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

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

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

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

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

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

(10) The term "Secretary" means the Secretary of the Interior.

# National Indian Gaming Commission

March 23, 1998

Philip Shea, Es.  
Shea & Wilks  
200 Wells Fargo Plaza  
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Phoenix, AZ 85003-1805

Dear Mr. Shea:

This letter responds to your inquiry as to whether the National Indian Gaming Commission regards non-banked poker games in Arizona as Class II card games under the Indian Gaming Regulatory Act (IGRA). For the reasons outlined below, I conclude that non-banked poker games are Class II card games and therefore subject to tribal and federal regulation only.

I understand that disagreement has arisen in Arizona between gaming tribes and the Arizona Department of Gaming (Department). The Department asserts that poker games played at Arizona reservations are illegal as operated inasmuch as they constitute gambling operated as a "business for benefit" contrary to Arizona law. The Department argues that because Tribal poker games do not comply with this provision of Arizona's gambling laws, that such noncompliance transforms poker into a Class III game that is lawful only if operated pursuant to a tribal-state compact. The Department does not argue that the card games are banked card games, nor does the Department assert that the games are being played contrary to State laws regarding hours or periods of operation or limitations on wagers or pot sizes.

The IGRA provides that Indian tribes have jurisdiction over Class II gaming, subject to oversight regulation by the NIGC. Pursuant to the IGRA, Class II gaming includes on-banking card games, such as poker, if such card games:

(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.

25 U.S.C. § 2703 (7)(A)(ii)

The issue of whether the "business for benefit" provision of state law applies to Indian tribes in Arizona raises the question of the extent to which the IGRA assimilates state law. It is our view that the IGRA preempts the application of all State law operating requirements save for those specified in the statute—pot size, hours, and wagers. The principle which applies to the issue is that enunciated by the court in United States v. Sisseton-Wahpeton Sioux Tribe, 397 F.2d 358, (8<sup>th</sup> Cir. 1990):

"we believe that the legislative history [of IGRA] reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state merely regulated, as opposed to completely barred, that particular gaming activity. "

*Id.* At 365. Thus, the classification of poker depends on whether the game is explicitly authorized or not explicitly prohibited by the laws of Arizona.

Gambling in Arizona is governed by the statutes at Chapter 33, Title 13, Arizona Revised Statutes, §§ 13-3301 through 13-3312. Arizona permits gambling under several circumstances, such as social, regulated, and charitable gambling. A.R.S. § 13-3302. Section 13-3304 prohibits "benefiting from gambling," but excepts from its provisions "amusement or regulated gambling," and provides that "benefiting from social gambling as a player is not unlawful under this section." Section 13-3303 makes it a crime to promote gambling, but excepts from its provisions activities associated with "amusement, regulated, or social gambling." Card games are not mentioned in the Arizona statutes. In fact, the statutes do not identify any particular forms of gambling; instead they are aimed at regulating the circumstances under which gambling may legally occur in Arizona. Poker is, therefore, permitted in Arizona.

The next step in the analysis is to determine whether poker is "played at any location in the State," pursuant to 25 U.S.C. § 2703(7)(A)(ii). Because poker is "not explicitly prohibited by the laws of the State," Poker is a class II game if it is played at any location in the state, subject to limits on hours or periods of operation and wagers or pot sizes. The Gila River Indian Community submitted ample evidence to show that poker is played in Arizona. Such evidence consists primarily of advertisements for charity functions at which poker games were offered, as well as an affidavit from a private investigator who witnessed poker tables at several events around the State. Importantly, the Department does not disagree that poker is played lawfully in the State of Arizona.

The only remaining consideration is whether poker is being "played in conformity with the 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" 25 U.S.C. § 2703 (7)(A)(ii). As indicated above, card games are not specifically mentioned in Arizona's gambling statutes. We are aware, therefore, of no laws or regulations establishing the limitations referred to in the IGRA.

As pointed out by the court in the *Sisseton* decision, the legislative history of IGRA supports this view, and reveals a Congressional intent to authorize only specific limited state law restrictions on Class II card games. The Senate Report accompanying the bill ultimately enacted as the IGRA, S. 555, discusses the section which requires non-banking card games to conform with state regulations on periods of operation and wagers or pot sizes:

Subparagraphs (I) and (II) [of 25 U.S.C. § 2703 (7)(A)(ii)] are to be read in conjunction with [25 U.S.C. § 2710] sections (a)(2) [which provides that class II gaming shall be within the jurisdiction of the Indian tribes] and (b)(1)(A) [which provides that an Indian tribe may engage in class II gaming if it is located within a State that permits such gaming for any purpose] to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs. The Committee notes that, while existing law does not require that Indian card games conform with State law, it agreed to adoption of bill language to provide that these card games be operated in conformity with laws of statewide application with respect to hours or periods of operation, or limitations on wagers or pot sizes for such card games.

S.Rep. No. 446, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. at 9 (1988), *reprinted in* U.S.C.C.A.N. 3071, 3979. (Emphasis added). Furthermore, the Senate Report states that:

Class II continues to be within tribal jurisdiction but will be subject to oversight regulation by the National Indian Gaming Commission; card game must be played under state-mandated hours and pot limits, if any.

S. Rep., *supra* at 7. Thus, Congress intended that non-banking card games did not have to conform with state law requirements other than those expressly stated. As long as the card games are explicitly authorized or not explicitly prohibited by the laws of the state, tribes may operate them, subject to the limits on hours and periods of operation, and wagers and pot sizes.

Therefore, because poker is a class II game in Arizona, I conclude that tribes may operate poker subject to tribal and NIGC regulation and any state regulation concerning hours or periods of operation and wager sizes.

Please be advised that this legal opinion is advisory in nature only and that it may be superseded, reversed, revised or reconsidered by the NIGC. Furthermore, if there are any changes made to the game as described, such changes might materially alter our conclusion.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/Penny Coleman

Penny Coleman

Deputy General Counsel



# INTERNATIONAL MASTERS OF GAMING LAW

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## NEWS

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May 16, 2005

The Iowa Racing & Gaming Commission's six month licensing process has been completed. Yesterday, the Commission voted to issue four new "excursion gambling boat" licenses. These casinos will not cruise, nor even float, but still will bear a resemblance to a riverboat.

Licenses were granted in Palo Alto (Emmetsburg in the northwest lakes region), Worth (near the Minnesota border along I-35), Black Hawk (Waterloo/Cedar Falls) and Washington (south of Cedar Rapids/Iowa City along Hwy 218 "Avenue of the Saints") counties.

The license recipients are:

Worth County - Peninsula Gaming, operator of the Dubuque Diamond Jo and the New Evangeline Downs racino,

Black Hawk County - Isle of Capri,

Washington County - Catfish Bend, operator of the boat in Burlington/Ft. Madison, Iowa and

Palo Alto County - Wild Rose Entertainment, a new entry into gaming, whose principals are Gary Kirke and Dr. Michael Richards of Des Moines.

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### POKER LAW BRIEFS

Week ending 3 26.05

North Dakota

A bill that would have allowed Internet poker sites to obtain a license and offer online poker from North Dakota was soundly defeated by the North Dakota legislature on a 44-3 vote. The defeat came after the bill was handily endorsed by the North Dakota House of Representative in this state with a bicameral legislature. Much of the opposition surfaced after the United States Department of Justice

penned a letter to the State Attorney General stating that such activity would violate Federal law. This is a dubious proposition and raises serious questions as to the propriety of the enforcement branch of the Federal government interjecting itself in state politics to influence state policy. 3.26.05

#### Connecticut

A bill pending in the Connecticut legislature that would allow bars and restaurants to hold poker and card tournaments has met resistance after the state attorney general questioned whether it would violate the compact between the state and the Mashantucket Pequot and Mohegan tribes. 3.24.05

#### Maryland

A bill in the Maryland legislature would allow churches, veterans groups, fraternal and civic groups and volunteer fire companies to hold card games once every year to raise funds. A copy of the bill is found here: <http://images.ibsys.com/2005/0324/4315753.pdf>  
3.25.05

#### Virginia

Police in Fairfax Virginia have embarked on a campaign to eliminate poker games. Two recent raids have resulted in 37 arrests with felony charges brought against the operators and misdemeanor charges brought against the players. 3.23.05

#### Louisiana

The Louisiana state police arrested two bar owners and three dealers in relationship to Texas Hold'em games played there. The State liquor officials and bar owners have different views as to the legality of such games where the bar does not take a rake. The State takes the position that the games are illegal because they indirectly profit the bar owners through increased liquor sales. 3.23.05.

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### INTERACTIVE LAW BRIEFS

#### United States Congress

Despite that billions will be bet in office pools and on the Internet in this week's NCAA tournament, former Nebraska head football coach and current congressman Tom Osbourne has reintroduced a bill that would prohibit wagering on college sports. This would really only

impact Nevada sports books because the other 98% of all wagering on College sports is already illegal in the United States. In essence, Congressman Osbourne is deciding that sending US dollars off-shore or into the hands of criminal enterprises is better than regulated gambling.

3.26.05

#### North Dakota

A bill that would have allowed Internet poker sites to obtain a license and offer online poker from North Dakota was soundly defeated by the North Dakota legislature on a 44-3 vote. The defeat came after the bill was handily endorsed by the North Dakota House of Representative in this state with a bicameral legislature. Much of the opposition surfaced after the United States Department of Justice penned a letter to the State Attorney General stating that such activity would violate Federal law. This is a dubious proposition and raises serious questions as to the propriety of the enforcement branch of the Federal government interjecting itself in state politics to influence state policy. 3.26.05

#### Illinois and Georgia

You know that it was inevitable despite how slowly the lottery bureaucracy works. The state lotteries are going online. Both Georgia and Illinois have pending legislation that would allow their state lotteries to start selling lottery tickets online. Hmmm... first online lottery tickets, then online Powerball, then online VLTs...the possibilities are staggering. 3.26.05

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# *Missouri Revised Statutes*

## **Chapter 313 Licensed Gaming Activities Section 313.800**

August 28, 2005

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### **Definitions--additional games of skill, commission approval, procedures.**

313.800. 1. As used in sections 313.800 to 313.850, unless the context clearly requires otherwise, the following terms mean:

- (1) "Adjusted gross receipts", the gross receipts from licensed gambling games and devices less winnings paid to wagerers;
- (2) "Applicant", any person applying for a license authorized under the provisions of sections 313.800 to 313.850;
- (3) "Bank", the elevations of ground which confine the waters of the Mississippi or Missouri Rivers at the ordinary high water mark as defined by common law;
- (4) "Capital, cultural, and special law enforcement purpose expenditures" shall include any disbursement, including disbursements for principal, interest, and costs of issuance and trustee administration related to any indebtedness, for the acquisition of land, land improvements, buildings and building improvements, vehicles, machinery, equipment, works of art, intersections, signage, signalization, parking lot, bus stop, station, garage, terminal, hanger, shelter, dock, wharf, rest area, river port, airport, light rail, railroad, other mass transit, pedestrian shopping malls and plazas, parks, lawns, trees, and other landscape, convention center, roads, traffic control devices, sidewalks, alleys, ramps, tunnels, overpasses and underpasses, utilities, streetscape, lighting, trash receptacles, marquees, paintings, murals, fountains, sculptures, water and sewer systems, dams, drainage systems, creek bank restoration, any asset with a useful life greater than one year, cultural events, and any expenditure related to a law enforcement

officer deployed as horse-mounted patrol, school resource or drug awareness resistance education (D.A.R.E) officer;

(5) "Cheat", to alter the selection of criteria which determine the result of a gambling game or the amount or frequency of payment in a gambling game;

(6) "Commission", the Missouri gaming commission;

(7) "Dock", the location in a city or county authorized under subsection 10 of section 313.812 which contains any natural or artificial space, inlet, hollow, or basin, in or adjacent to a bank of the Mississippi or Missouri Rivers, next to a wharf or landing devoted to the embarking of passengers on and disembarking of passengers from a gambling excursion but shall not include any artificial space created after May 20, 1994, and is located more than one thousand feet from the closest edge of the main channel of the river as established by the United States Army Corps of Engineers;

(8) "Excursion gambling boat", a boat, ferry or other floating facility licensed by the commission on which gambling games are allowed;

(9) "Fiscal year" shall for the purposes of subsections 3 and 4 of section 313.820 mean the fiscal year of a home dock city or county;

(10) "Floating facility", any facility built or originally built as a boat, ferry or barge licensed by the commission on which gambling games are allowed;

(11) "Gambling excursion", the time during which gambling games may be operated on an excursion gambling boat whether docked or during a cruise;

(12) "Gambling game" includes, but is not limited to, games of skill or games of chance on an excursion gambling boat but does not include gambling on sporting events; provided such games of chance are approved by amendment to the Missouri Constitution;

(13) "Games of chance", any gambling game in which the player's expected return is not favorably increased by his or her reason, foresight, dexterity, sagacity, design, information or strategy;

(14) "Games of skill", any gambling game in which there is an opportunity for the player to use his or her reason, foresight, dexterity, sagacity, design, information

or strategy to favorably increase the player's expected return; including, but not limited to, the gambling games known as "poker", "blackjack" (twenty-one), "craps", "Caribbean stud", "pai gow poker", "Texas hold'em", "double down stud", and any video representation of such games;

(15) "Gross receipts", the total sums wagered by patrons of licensed gambling games;

(16) "Holder of occupational license", a person licensed by the commission to perform an occupation within excursion gambling boat operations which the commission has identified as requiring a license;

(17) "Licensee", any person licensed under sections 313.800 to 313.850;

(18) "Mississippi River" and "Missouri River", the water, bed and banks of those rivers, including any space filled by the water of those rivers for docking purposes in a manner approved by the commission but shall not include any artificial space created after May 20, 1994, and is located more than one thousand feet from the closest edge of the main channel of the river as established by the United States Army Corps of Engineers;

(19) "Supplier", a person who sells or leases gambling equipment and gambling supplies to any licensee.

2. In addition to the games of skill referred to in subdivision (14) of subsection 1 of this section, the commission may approve other games of skill upon receiving a petition requesting approval of a gambling game from any applicant or licensee. The commission may set the matter for hearing by serving the applicant or licensee with written notice of the time and place of the hearing not less than five days prior to the date of the hearing and posting a public notice at each commission office. The commission shall require the applicant or licensee to pay the cost of placing a notice in a newspaper of general circulation in the applicant's or licensee's home dock city or county. The burden of proof that the gambling game is a game of skill is at all times on the petitioner. The petitioner shall have the affirmative responsibility of establishing his or her case by a preponderance of evidence including:

(1) Is it in the best interest of gaming to allow the game; and

(2) Is the gambling game a game of chance or a game of skill?

All testimony shall be given under oath or affirmation. Any citizen of this state shall have the opportunity to testify on the merits of the petition. The commission may subpoena witnesses to offer expert testimony. Upon conclusion of the hearing, the commission shall evaluate the record of the hearing and issue written findings of fact that shall be based exclusively on the evidence and on matters officially noticed. The commission shall then render a written decision on the merits which shall contain findings of fact, conclusions of law and a final commission order. The final commission order shall be within thirty days of the hearing. Copies of the final commission order shall be served on the petitioner by certified or overnight express mail, postage prepaid, or by personal delivery.

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Posted 1/17/2006 11:53 PM

## National poker craze drawing attention of law enforcement

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By Charisse Jones, USA TODAY

NEW YORK — A few evenings a month, Carl Skutsch used to head to the 14th Street Playstation in Manhattan



Cheryl Hines and Anthony Anderson compete on Bravo's original series *Celebrity Poker Showdown*

By Paul Drinkwater, [Bravo/nbcumv.com](#)

Despite its name and the free Oreos and pretzels, there was no electronic game in sight. Instead, Skutsch, a history teacher at the School of Visual Arts here, and a motley crew of investment bankers, cab drivers and retirees gathered in the non-descript office space and played poker — mostly Texas Hold 'Em.

Then in May, the Playstation was shut down, one of several underground poker clubs raided and closed by New York police last year. "I miss that world," says Skutsch, 42. "Every night a lot of the same faces would be around so people knew each other. There was a certain respect in the air."

In the past five years, poker has become a national craze. Hands are dealt on the Internet, and TV shows such as *Celebrity Poker Showdown* on Bravo draw huge audiences. A "royal flush" is becoming as familiar a sports phrase as a "Hail Mary."

With poker's growing popularity has come greater

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scrutiny by law enforcement agencies, and arrests and crackdowns are taking place from Baltimore and New York to Monterey, Calif. In October, a business group in San Jose was warned that it would break the law if it hosted a poker tournament to raise money for a library

It isn't illegal in most states to play poker at home among family and friends, but running a game and making a profit is often a crime, says I. Nelson Rose, a professor at Whittier Law School in Costa Mesa, Calif., and an expert on gambling laws. "There are different sets of laws for players as opposed to the operators. Most of the time, players are not breaking the law. Most of the time the operators, if they are running it for profit, are."

**A surge in popularity**

Poker has become so ubiquitous that some may not realize that they are committing a crime. In what Baltimore police said was the largest such raid in their city since 1932, 75 people were cited in November for playing in a poker game advertised in the local newspaper.

Gambling is illegal in Maryland unless the proceeds go to charity and the operator has a permit, says Patricia Deros, assistant state's attorney for Baltimore. The state's attorney ultimately did not prosecute the players, but the game's two operators and 13 dealers and employees were charged with running a gambling operation. In a separate incident in November, a Baltimore city police officer was among five people charged with participating in or running a poker game.

**Among other recent arrests**

- In December, police in Fairfax County, Va., charged two men, including an off-duty police officer, with operating an illegal poker game in a home. It is legal to play poker in Virginia, but it is a crime to operate a gambling establishment, charge an entrance fee or take a cut of the pot.
- A man was charged in February in Atwater, Calif., with running an illegal poker tournament in his sports bar. Seven others were charged in September in Monterey and Seaside, Calif., with illegally running poker tournaments and sports betting pools, according to a spokesman for the California state attorney general.
- About seven illegal poker clubs were closed down last year in New York City, says chief police spokesman Paul Browne. Some of the shuttered clubs were targeted after shootings occurred or weapons were found there. "If there's an incident or incidents that involve violence, then those locations are going to come to the top of the pile in terms of enforcement," he says.

Some lawmakers and fundraisers say it's time for the laws that penalize playing or profiting from poker to catch up with the times. "Changes in the law always trail changes in society," Rose says. "The laws dealing with gambling date from an era when there was a complete prohibition."

**Fundraiser for a library**

Rich De La Rosa, president of the Almaden Business Association in San Jose, said donors were pledging \$100 each to play in a Texas Hold 'Em tournament that was to raise money for the children's section of the Almaden library.

The group had already raised \$17,000 and the October fundraiser was only two days

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away when an agent with the state Department of Justice called De La Rosa

"He left me a message ... telling me what we were doing was illegal, and if we didn't cease and desist we'd be cited," De La Rosa says. "I honestly thought somebody was pulling our leg."

Under California law, "controlled games" such as poker can be played only in tribal casinos, licensed card rooms or private homes, says Nathan Barankin, spokesman for the state attorney general.

California State Assemblyman Alberto Torrico, however, has introduced legislation to allow non-profit organizations to host "casino night" fundraisers. There would be several restrictions: No cash prizes would be permitted, and 90% of the proceeds would have to go to a charitable cause.

New York state Sen. John Sabini is pushing to allow bars or restaurants to host poker tournaments offering prizes such as Yankees tickets or a trip to Las Vegas.

Because players spend money on food and drinks, businesses would earn more, and "that would trickle down to the state," Sabini says.

If gambling laws are relaxed, society should help those whose playing gets out of control, says Keith Whyte, executive director of the Washington, D.C.-based National Council on Problem Gambling.

Much as Carl Skutsch loves the game, he has mixed feelings about changing the laws that currently restrict it.

"I'm not entirely sure I want to see New York plastered with gambling joints on every corner," says Skutsch, who still plays poker with friends every Friday.

"I think it works that you have this no man's zone where it's not exactly legal but if you keep it low profile you won't get bothered."

After all, that's part of the excitement. "This secret world of card players," he says, "is a little bit of a thrill."

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