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SENATE

{ REPORT
{ 104-349

TO REPEAL CERTAIN PROVISIONS OF LAW RELATING TO TRADING WITH INDIANS

—————
AUGUST 1, 1996.—Ordered to be printed
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Mr. MCCAIN, from the Committee on Indian Affairs,
submitted the following

REPORT

[To accompany S. 199]

The Committee on Indian Affairs, to which was referred the bill (S. 199) to repeal certain provisions of law relating to trading with Indians, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 199 is to repeal the Trading with Indians Act (18 U.S.C. § 437).

BACKGROUND ON THE TRADING WITH INDIANS ACT

S. 199 repeals the Trading with Indians Act. The Trading with Indians law was originally enacted in the 1800's to protect Indians from unscrupulous Indian agents and other Federal employees who were using their positions of trust to engage in private business dealings that exploited Indians. The original 1834 Act, codified at 25 U.S.C. 68, imposed a complete ban on any person employed by the Federal government in Indian Affairs from having any interest in transactions with Indians except on behalf of the United States government. The penalty for conviction of a violation of this Act included a \$5,000 fine and removal from Federal employment. In 1874, the Congress enacted a law, which was codified at 25 U.S.C. 87 and has since been repealed, that applied restrictions on all employees of the United States or its agencies involving contracts with Indians or the Federal government for purchases, transportation,

or delivery of goods or supplies for Indians or for the removal of Indians.

In 1939, these laws governing trade with Indians were amended to permit Federal employees, pursuant to Secretarial regulations, to purchase arts and crafts from Indians, so long as a purchase was not for the purpose of resale. These amendments were intended to make clear that the laws governing trade with Indians were not intended to prevent Indian employees of the Federal government from receiving benefits made available to Indians either by the Federal government or by their tribe. In 1948, the Congress imposed severe restrictions on all Federal employees, whether employed in Indian Affairs or not, from having any interest in contracts for the purchase or delivery of supplies or goods to Indians. This law superseded the provisions of the 1874 Act and was codified at 18 U.S.C. 437. The penalties established under the 1948 law included a fine of up to \$5,000, up to six months' imprisonment, and removal from office.

In 1980, the Congress replaced all existing laws relating to "Trading with Indians" by repealing both the 1834 and 1939 Acts, and by modifying the 1948 Act. Under current law, employees of the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS) are prohibited, with limited exceptions, from engaging in trade with Indians except where such trade has been authorized by the President by regulation.

The current provisions of the "Trading with Indians" laws, including the criminal prohibitions against commercial trading with Indians, have had a significant adverse impact on employee retention within the Indian Health Service and the Bureau of Indian Affairs. Because the prohibitions in current law also apply to the spouses of BIA and IHS employees, these adverse impacts are far-reaching. If a spouse is engaged in a business which is wholly-unrelated to matters affecting the Indian Health Service or the Bureau of Indian Affairs, they are in violation of the Trading with Indians Act. In addition, a Federal employee can violate the Trading with Indians Act by simply selling their used car to another Indian. Although these statutes served an admirable purpose when enacted in the 1800's, they are now relics of a very different era. The important public purposes served by the original Trading with Indians Act are now adequately protected by the Standards of Ethical Conduct for Employees of the Executive Branch.

LEGISLATIVE HISTORY

S. 199 was introduced by Senator Kyl, for himself and Senator McCain, on February 1, 1995 and was referred to the Committee on Indian Affairs.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on July 24, 1996, the Committee on Indian Affairs ordered the bill to be favorably reported to the Senate without amendment, with the recommendation that it do pass.

SECTION-BY-SECTION ANALYSIS

SECTION 1. REPEAL

Section 1 of the bill repeals Section 437 of title 18, United States Code, the Trading with Indians Act.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 199 as calculated by the Congressional Budget Office is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 1, 1996.

Hon. JOHN MCCAIN,
*Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 199, a bill to repeal certain provisions relating to trading with Indians, as ordered reported by the Senate Committee on Indian Affairs on July 24, 1996. CBO estimates that enacting this bill would have no significant impact on the federal budget. The bill contains no private-sector or intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) and would impose no costs on state, local, or tribal governments. Because enactment of S. 199 could affect direct spending and receipts, pay-as-you-go procedures would apply to the bill. However, CBO estimates that any impact on direct spending and receipts would be negligible.

S. 199 would repeal section 437 of Title 18 of the United States Code. Section 437 prohibits any employee of the Bureau of Indian Affairs or the Indian Health Service from purchasing any service or any real or personal property from any person of Native American descent.

Since S. 199 would repeal certain criminal penalties, the government might collect fewer fines if the bill is enacted. We estimate, however, that any fine collections would continue to be negligible, as they have been to date. Collections of such fines are recorded in the budget as governmental receipts, or revenues. They are deposited in the Crime Victims Fund and spent in the following year. Because the decrease in direct spending would be the same as any loss in the amount of fines collected with a one-year lag, the change in direct spending also would be negligible.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Rachel Robertson.

Sincerely,

JUNE E. O'NEILL, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 199 will have a minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee has received no official communications from the Administration on the provisions of the bill.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the enactment of S. 199 will result in the following changes in 18 U.S.C. section 437, with existing language which is to be deleted in black brackets and the new language to be added in italic:

18 U.S.C. 437

§ 437. [Federal employees contracting or trading with Indians

[(a) Except as provided in subsection (b), whoever, being an officer, employee, or agent of the Bureau of Indian Affairs or the Indian Health Service has (other than as a lawful representative of the United States) any interest, in such officer, employee, or agent's name, or in the name of another person where such officer, employee, or agent benefits or appears to benefit from such interest—

[(1) in any contract made or under negotiation with any Indian, for the purchase or transportation or delivery of goods or supplies for any Indian, or

[(2) in any purchase or sale of any service or real or personal property (or any interest therein) from or to any Indian, or colludes with any person attempting to obtain any such contract, purchase, or sale, shall be fined under this title or imprisoned not more than six months or both, and shall be removed from office, notwithstanding any other provision of law concerning termination from Federal employment.

[(b)(1) Notwithstanding the provisions of subsection (a) and in accordance with paragraph (2) of this subsection, the President or his designee may prescribe rules and regulations under which any officer, employee, or agent of the Bureau of Indian Affairs or of the Indian Health Service may purchase from or sell to any Indian any service or any real or personal property or any interest therein.

[(2) No rule or regulation prescribed pursuant to paragraph (1) of this subsection shall permit any officer, employee, or agent referred to in that paragraph—

[(A) to make any purchase from or sale to an Indian of any real or personal property (or any interest therein) for the purpose of commercially selling, reselling, trading, or bartering such property; or

[(B) to have any interest in any purchase or sale involving property or funds which are either held in trust by the United States for Indians or which are purchased, sold, utilized, or received in connection with a contract or grant to an Indian from the Bureau of Indian Affairs or the Indian Health Service, if such officer, employee, or agent is employed in the office or installation of such Bureau or Service which recommends, approves, executes, or administers such transaction, grant, or

contract on behalf of the United States: Provided, That such officer, employee, or agent may have such an interest if such purchase or sale is approved by the Secretary of the Interior in the case of a Bureau of Indian Affairs officer, employee, or agent, or by the Secretary of Health, Education, and Welfare in the case of an Indian Health Service officer, employee, or agent, or a designee of such Secretary who is not employed at such office or installation: Provided further, That (1) any such designee may not be a relative by blood or marriage of the officer, employee, or agent engaging in such purchase or sale; (2) with respect to purchases or sales by any officer, employee, or agent employed at the reservation, agency, or service unit level, such designee must be employed at not less than one grade level higher than such officer, employee, or agent at the Washington, District of Columbia, central office or at an area office installation other than that with authority over such reservation, agency, or service unit; (3) with respect to purchases or sales by any officer, employee, or agent employed at the area office level, such designee must be employed at not less than one grade level higher than such officer, employee, or agent at the Washington, District of Columbia, central office; and (4) the Secretary must approve purchases or sales by any officer, employee, or agent employed at the Washington, District of Columbia, central office; or

[(C) to acquire any interest in property held in trust, or subject to restriction against alienation imposed, by the United States unless the conveyance or granting of such interest in such property is otherwise authorized by law.

[(c) Except as provided in subsection (b)(2), nothing contained in this section shall be construed as preventing any officer, employee, or agent of the Bureau of Indian Affairs or the Indian Health Service who is an Indian, of whatever degree of Indian blood, from obtaining or receiving any benefit or benefits made available to Indians generally or to any member of his or her particular tribe, under any Act of Congress, nor to prevent any such officer, employee, or agent who is an Indian from being a member of or receiving benefits by reason of his or her membership in any Indian tribe, corporation, or cooperative association organized by Indians, when authorized under such rules and regulations as the Secretary of the Interior or the Secretary of Health, Education, and Welfare, or their designee shall prescribe.

[(d) For purposes of this section, the term "Indian" means any member of an Indian tribe recognized as eligible for the services provided by the Bureau of Indian Affairs who is residing on a Federal Indian Reservation, on land held in trust by the United States for Indians, or on land subject to a restriction against alienation imposed by the United States. The term shall also include any such tribe and any Indian owned or controlled organization located on such a reservation or land.

[(e) For purposes of this section, the term "Bureau of Indian Affairs" means the Bureau of Indian Affairs and the Office of the As-

Assistant Secretary for Indian Affairs, both in the Department of the Interior.]

