The National Congress of American Indians
Resolution #DEN-07-059

TITLE: Supporting Legislative Amendments to the Pension Protection Act and Regulatory Relief from Internal Revenue Service and Department of Labor, Based on Equal Government Status and Meaningful Consultation

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and to otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) established in 1944, is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, sovereign Indian tribes share a unique trust relationship with the United States of America, which is embodied in the Constitution of the United States, and the Federal Common Law through numerous court opinions, statutes, executive orders, and federal agency policies; and

WHEREAS, Executive Order 13175, Section 1(a) (November 6, 2000), entitled “Consultation and Coordination with Indian Tribal Governments”, requires that Executive Branch agencies of the United States consult with federally recognized Indian Tribes regarding “legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes;” and

WHEREAS, Executive Order 13175 and other executive orders and memoranda require that Executive agencies ensure that there is “meaningful” and “timely” tribal input when formulating policies or regulations that have substantial direct effects on Tribal Governments; and

WHEREAS, on August 17, 2006, the federal Pension Protection Act (“PPA”), Public Law 109-280, was signed into law, which in part amended the Internal Revenue Code and the Employee Retirement Income Security Act (“ERISA”) of 1974; and
WHEREAS, in order for Indian Tribes to maintain government plan status, the PPA now requires Tribes to divide employee health, pension and 401(k) plans into separate and distinct plans – plans for those programs that may be characterized as “essential” government functions and plans for a Tribe’s “commercial” enterprises; and

WHEREAS, such an arbitrary distinction does not apply to state governments, which are free to engage in any activities, including state lotteries, convention centers, and public golf courses, to raise public funds without jeopardizing the government status of their plans and trusts; and

WHEREAS, singling out tribal revenue generating activities runs contrary to the trust relationship between the Indian Tribes and the federal government as embodied in the United States Constitution and the Federal Common Law and in federal statutes, such as the Indian Gaming Regulatory Act (25 U.S.C. § 2501 et seq.) and the Indian Reorganization Act of 1934, and its progeny, and further erodes tribal sovereignty and self governance; and

WHEREAS, in the view of Tribes, and as supported by United States Supreme Court decisions, all economic development and subsidiary, commercial enterprises owned and controlled by Tribes that generate revenues for public purposes, including gaming facilities, are essential government functions. In this regard, the preliminary guidance issued by the IRS (Notice 2006-89 and Notice 2007-67) concluding that gaming would not qualify for government status fails to recognize that gaming revenues are expressly restricted by federal law for public purposes, including the funding of governmental operations, such as public safety, enrollment, education, health care and welfare; and

WHEREAS, the intent of other federal statutes, including but not limited to the Indian Gaming and Regulatory Act (25 U.S.C. § 2701 et seq.) the Indian Reorganization Act of 1934, the Indian Self-determination Act, and like statutes are in furtherance of long-standing Congressional policies designed to foster tribal self-government, tribal self-determination and self-sufficiency through the development of tribal commercial enterprises, such as casinos and other economic activities; and

WHEREAS, even if ERISA applies to Indian Tribes, Tribes should receive the same deference as other governments, which are free to generate revenues from things such as state lotteries without impacting their government plan status; and

WHEREAS, the PPA, if implemented under current IRS guidance (Notice 2006-89 and IRS Notice 2007-67) will require tribes to divide employee groups by the end of this year that have been covered together under plans that have received favorable government plan determination letters from the IRS for decades, placing an undue administrative cost and forcing potentially irreversible action before final regulations or consultation over what is meant by “commercial” or “essential”; and
WHEREAS, the NCAI finds that the governmental functions / commercial distinctions mandated under the PPA are contrary to the Federal Common Law and Congressional policies, and will have a substantial and direct legal, financial, and political effect on Tribal Governments, as described herein, and further, that the foregoing IRS Notices were issued without any meaningful consultation with Tribes that would provide timely input on the proposed IRS policy and regulations covering Tribal benefit plans; and

WHEREAS, the NCAI further finds that the U.S. Congress should amend the PPA so that Tribes are accorded the same “governmental” status under ERISA and the Internal Revenue Code as other governments, which would exempt Tribes from the essential governmental function / commercial distinctions tests currently set forth in the PPA; and

WHEREAS, the NCAI further finds that Tribes should be afforded a waiver, pursuant to Executive Order 13175, for any regulatory requirements that Tribes artificially separate their enterprises into “commercial” or non-essential government entities, until exhaustion of all government-to-government consultation rights and pending regulatory and legislative efforts to clarify the government status of Tribes.

NOW THEREFORE BE IT RESOLVED, that the NCAI hereby opposes implementation of the PPA by requiring Tribes to divide employee benefit plans into separate and distinct plans for those programs that may be characterized as essential government functions and for a Tribe’s economic subsidiaries or “commercial” enterprises; and

BE IT FURTHER RESOLVED, that the NCAI hereby requests the IRS and DOL to provide a waiver of the PPA as authorized by Section 6 of Executive Order 13175 for all Tribes until such time as all government-to-government consultation rights and pending legislative efforts to clarify the Tribes’ government status of Tribes and their economic subsidiaries or commercial enterprises have been exhausted, or until final regulations, after consultation, have been issued on this matter; and

BE IT FURTHER RESOLVED, that the NCAI hereby requests members of the United States Congress to amend the ERISA and Internal Revenue Code provisions added by the PPA to provide the same “governmental” status under ERISA and the Internal Revenue Code as other governments; and

BE IT FURTHER RESOLVED, that the NCAI hereby requests the IRS, pending consultation, to expand its good faith administrative relief under Notice 2006-89 and Notice 2007-67 to all business activities engaged in by Tribe’s that generate revenue for public purposes, to lift the artificial distinctions drawn in those notices, and to delete the restrictions in those notices prohibiting tribes from amending their plan rights, benefits and features as a condition for receiving good faith relief; and
BE IT FURTHER RESOLVED, that the NCAI President is hereby directed to execute and forward letters to the United States Congress, the Commissioner of the IRS, the Secretary of Labor, and the President with a copy of this Resolution, requesting: (1) an amendment to the PPA as described herein; (2), in the interim, that the IRS and DOL be directed to provide a compliance waiver and other good faith relief as above described; and (3) that no further action be taken by the IRS or DOL in the enforcement of the PPA without meaningful tribal consultation within the meaning of Executive Order 13175; and

BE IT FINALLY RESOLVED, that this resolution shall remain the policy of the NCAI unless it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2007 Annual Session of the National Congress of American Indians, held at the Hyatt Regency Denver at the Colorado Convention Center in Denver, Colorado on November 11-16, 2007, with a quorum present.

[Signature]
President

ATTEST:

[Signature]
Recording Secretary