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Internet Gaming on Indian Lands by Jennifer L. Carleton

With no federal Internet gaming bill on the horizon, state legislatures are again focused on whether and to what extent Internet gaming will be permitted. Nevada was the first state to adopt regulations and develop a licensing procedure for Internet gaming, which is currently limited to poker. Other states are currently considering legislation authorizing Internet gaming. These proposals cover a wide spectrum, from peer-to-peer poker to Internet lottery ticket sales. Any Indian nation with land in a state that is considering Internet gaming must analyze the impact of such proposed legislation. This analysis can be exceptionally complicated in light of the patchwork of potentially applicable federal laws.

Internet Gaming and the Land

One of the purposes of the Indian Gaming Regulatory Act ("IGRA") is to establish independent federal regulatory authority and standards for gaming on Indian lands.¹ IGRA only applies to gaming on "Indian lands," which are defined 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 tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.² A preliminary issue is consequently whether Internet gaming is "gaming on Indian lands," or on *any* lands at all.

A nexus to the land can be created at the place where a wager is placed, the place where a wager is accepted, or the place where core components, including servers and databases running the games and storing account information, are located. In a games classification advisory opinion, the National Indian Gaming Commission ("NIGC") noted that "the use of the Internet, even though the computer server may be located on Indian lands, would constitute off-reservation gaming to the extent any of the players were located off of Indian lands."³ Similarly, courts reviewing alleged violations of the Wire Act of 1961⁴ have looked to the use of wire communications for either "sending or receiving wagering information."⁵ A Wire Act violation may be committed both in the district where use of the wire facility occurred and the district where the communication was received.⁶ Although the Wire Act has since been interpreted by the Office of the United States Deputy Attorney General to apply only to sports wagering,⁷ this does not change the underlying premise that a nexus between the land and the Internet gaming activity can be created where a wager is placed or accepted.

Games Classification

Class II gaming is defined under IGRA as: (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith). . . 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.⁸ 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.⁹

Poker games that are not banked against the house are considered Class II games under IGRA if they are authorized by state law.¹⁰ It is unclear whether this definition excludes card games played by electronic means. There is some support in the Congressional record surrounding the adoption of IGRA for the position that electronic card games that are not banked against the house are Class II games:

As noted within the preamble to this earlier rulemaking, Congress intended for bingo, lotto, and games similar to bingo to be played in an electronic format, "even a wholly electronic format, provided that multiple players are playing with or against each other. ... A manual component to the game is not necessary." 67 Fed. Reg. 41,166, 41,171 (June 17, 2002). What is not allowed is a wholly electronic format that permits a player to play alone against a machine rather than with or against other players. So long as the electronic format - even a wholly electronic format - does not permit a player to play alone, the game by definition is not a facsimile.¹¹

However, in testimony before the Senate Committee on Indian Affairs in 1999, the Deputy Assistant General noted that although the IGRA allowed "some electronic coordination between gaming facilities conducted on Indian lands," he qualified this statement by opining that "to the extent that Indian Tribes seek to offer gaming to citizens of various states, where such gaming does not take place solely on Indian lands and is not authorized under state law, there is no compelling reason to exempt Indian Tribes from the otherwise generally applicable provisions of the legislation for such off-reservation gaming."¹²

Electronic games of chance are not considered Class II games under IGRA.¹³ Whether poker is a game of chance or a game of skill has been the subject of considerable debate. "Academics who have argued that poker should not be treated as a form of illegal gaming on the grounds that it is a 'game of skill' make the same argument with respect to sports betting."¹⁴ Poker is defined as a gaming game in both Nevada and New Jersey,¹⁵ and at least one federal court has held that poker is a game of chance: "Games of chance range from those that require no skill, such as a lottery . . . to those such as poker or blackjack which require considerable skill in calculating the probability of drawing particular cards. Nonetheless, the latter are as much games of chance as the former, [because] the outcome depends to a material degree upon the random distribution of cards."¹⁶ It is unclear how the NIGC will classify card games played by electronic means, or whether it considers poker to be a game of skill or a game of chance. If Internet poker is considered a Class II game, such gaming is not required to be offered pursuant to a compact.¹⁷ If Internet poker is considered a Class III game pursuant to IGRA, such gaming must be the subject of a compact between a state and a tribe.¹⁸

UIEGA

The Unlawful Internet Gambling Enforcement Act ("UIGEA") prohibits "unlawful internet gambling."¹⁹ Under UIGEA, unlawful internet gambling means "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made."²⁰ Unlawful internet gambling does not include, however, the "placing, receiving, or otherwise transmitting a bet or wager ... where the bet or wager does not violate any provision of ... IGRA."²¹ This safe harbor would not be applicable to any gaming that violated IGRA. Consequently, it becomes even more vital to understand how games offered by "electronic means" over the Internet will be classified. Such determinations will drive whether Indian nations may offer Internet gaming on their lands, whether such gaming must be the subject of a compact, and whether IGRA or UIEGA applies.

¹ 25 U.S.C. § 2702(3).

² 25 U.S.C. § 2703(4).

³ Mar. 13, 2011 letter from Kevin K. Washburn, General Counsel, NIGC, to Joseph Speck, Nic-A-Bob Productions, enclosing June 22, 1999 letter from Montie R. Deer, Chairman, NIGC, to Ernest L. Stensgar, Chairman, Coeur d'Alene Tribe, re: National Indian Lottery.

⁴ 18 U.S.C. § 1084.

⁵ *U.S. v. Reeder*, 614 F.2d 1179, 1185 (8th Cir. 1980), citing *U.S. v. Pezzino*, 535 F.2d 483, 484 (9th Cir. 1976).

⁶ *U.S. v. Synodinos*, 218 F. Supp. 479, 482 (D. Utah 1963).

⁷ Office of the United States Deputy Attorney General Memorandum Opinion dated September 20, 2011 at p. 2.

⁸ 25 U.S.C. § 2703(7)(A).

⁹ 25 U.S.C. § 2703(7)(B).

¹⁰ 25 U.S.C. § 2703(7)(A)(ii).

¹¹ Terri Poust, "Seeking Clarity – What Exactly is Class II Gaming?" *Indian Gaming* (December, 2006).

¹² Testimony of Kevin V. DiGregory, Deputy Assistant Attorney General, Dept. of Justice, Addressing Internet Gaming and Indian Gaming Before the Senate Committee on Indian Affairs, June 9, 1999.

¹³ 25 U.S.C. § 2703(7)(B).

¹⁴ *United States of America v. Chad Eli and John Campos*, 10 Cr. 336 (LAK), Government's Response to Defendants' Pre-Trial Motions, p. 18.

¹⁵ Nev. Stat. 463.0152; N.J. Stat. Ann. § 5:12-21.

¹⁶ *New York v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995).

¹⁷ 25 U.S.C. § 2710(b).

¹⁸ 25 U.S.C. § 2710(d)(1)(C).

¹⁹ 31 U.S.C. §§ 5361-5367.

²⁰ 31 U.S.C. § 5362(10).

²¹ *Id.*