



Innovations in Internet Gaming on Indian Lands

by Jennifer L. Carleton

Nevada, New Jersey and Delaware are currently offering Internet gaming, with Colorado, Illinois, Pennsylvania and a host of other U.S. states rumored to be scrutinizing some form of gaming over the Internet. These proposals cover a wide spectrum, from peer-to-peer poker to Internet lottery ticket sales. An Indian tribe with land in a state that is considering Internet gaming should carefully analyze the impact of all such legislation.

Some tribes have chosen not to wait for state action to define the contours of permissible Internet gaming. The Tribal Internet Gaming Alliance was established in October of 2013 to work collectively to bring Internet gaming to Indian Country. Formed by the Lac du Flambeau Band of Lake Superior Chippewa Indians, the Alliance has received endorsements from other Indian nations and was featured in a *USA Today* story on Internet gaming in December 2013. The purpose of the Alliance is to fast-track development of Internet games and strengthen lobbying readiness for the legalization of off-reservation Internet gaming.

Internet Gaming on Indian Lands

A preliminary issue with the offering of Internet gaming by an Indian tribe is whether Internet gaming is “gaming on Indian lands,” or on any lands. The Indian Gaming Regulatory Act (IGRA) establishes independent federal regulatory authority and standards for gaming on Indian lands. However, 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.

A connection to the land can be created at the place where a wager is accepted, the place where a wager is placed, 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.” Similarly, courts reviewing alleged violations of the Wire Act of 1961 have looked to the use of wire communications for either “sending or receiving wagering information.” 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. Although the Wire Act has since been interpreted by the Office of the United States Deputy Attorney General to apply only to sports wagering, this does not change the underlying premise that a connection between the land and the Internet gaming activity can be created where a wager is placed or accepted.

The Unlawful Internet Gambling Enforcement Act (UIGEA) prohibits “unlawful Internet gambling.” 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.” 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.”

Liquidity and Compacting

New Jersey, Nevada and Delaware, along with any other state or Indian tribe that authorizes Internet gaming on its lands, face a “liquidity problem.” The problem, simply stated, is that the size of the pool of potential Internet gamblers is limited by the number of persons located within the state or on the reservation at any given time. Reciprocal agreements (compacts between states, between a state and a tribe or between tribes) to allow for the placement or receipt of wagers between jurisdictions where such wagers are legal might provide relief from this liquidity problem.

The Cheyenne and Arapaho Tribes of Oklahoma have identified what they believe to be a creative way to overcome the liquidity issue. Despite the fact that the state of Oklahoma has not enacted legislation authorizing Internet gaming, these tribes entered into a compact with Oklahoma allowing for the tribes to offer Internet gaming to players outside of the U.S. Presumably, the tribes would execute some form of reciprocal agreement with a foreign government that authorizes Internet gaming, such as Gibraltar or the Isle of Man. The terms of this compact with Oklahoma are currently being reviewed by the NIGC.

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. 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.

Electronic games of chance are not considered Class II games under IGRA. It is unclear how the NIGC will classify card games played by electronic means. If card games played by electronic means are considered Class II games, such gaming is not required to be offered pursuant to a state compact. If card games played by electronic means are considered Class III games pursuant to IGRA, such gaming must be the subject of a compact between a state and a tribe. 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.

The Alturas Indian Rancheria Tribe of California has announced its intent to launch what it has dubbed the “first tribal online bingo site in the United States” using proxy play connection to servers on the reservation. Using virtual private network assisted play technology, the tribe takes the position that players can play Class II games with a proxy in which the system connects wagers to servers located on its Indian lands. According to its press release, the tribe will only offer Class II games on its site and will only accept wagers from individuals located in a state that also allows Class II wagering.

Conclusion

Tribes have shown that they understand the current state of the law, or lack thereof, with regard to Internet gaming and that they are unwilling to wait for Congress or the states to act. With no federal Internet gaming bill on the horizon, tribes will continue to advance innovative ways to provide Internet play to their customers. ♣

Jennifer L. Carleton is a member of the Gaming Law team at Brownstein Hyatt Farber Schreck. She can be reached by calling (702) 464-7086 or email jcarleton@bhfs.com.



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