



## Gambling on Internet Gaming

by Penny Coleman

Last year during the lame duck congressional session, Senator Reid did not manage to pass federal legislation governing Internet poker or any other kind of Internet gaming. But that didn't mean that Congress and the powerful poker lobby have not stopped trying to pass Internet legislation. Most continue to bet, however, against federal legislation.

Assuming there is no federal legislation, how will the Indian Gaming Regulatory Act (IGRA), Internet gaming and tribal sovereignty intersect under present law? IGRA governs some, but not all aspects of tribal Internet gaming. Furthermore, tribes will be able to provide Internet gaming under their inherent authority but must still maintain that delicate balance between maintaining tribal sovereignty and acquiescing to the needs of the other sovereigns they must work with.

### The King Bill

The most recent effort to enact federal legislation is Congressman King's bill which:

- 1) Prohibits Internet gambling except as governed by the Bill;
- 2) Includes Indian tribes within its scope;
- 3) Establishes an Office of Internet Gambling Oversight with the Department of the Treasury;
- 4) Provides that tribes and states are opted into Internet gambling unless they opt out within 120 days;
- 5) Provides that a state's decision to opt in or out does not affect a tribe's authority to opt in or out;
- 6) Establishes a common federal standard for regulating Internet gambling preempting all other tribe and state jurisdictions;
- 7) But does not impact existing laws that establish rules for Internet gambling to the extent that the laws offer such gambling wholly within the boundary of that tribe or state;
- 8) Appears to preclude tribes from both owning and regulating an Internet gambling enterprise unless the Secretary of the Treasury licenses the tribe and determines that it is a suitable applicant;

9) And finally claims not to affect gaming under the IGRA but preempts the Act as to Internet gaming including Class II Internet gaming which will then be subject to Treasury regulation rather than the National Indian Gaming Commission.

This proposal is probably not as completely adverse to tribes as previous Internet gaming legislative drafts but is unlikely to be satisfactory to tribes or states. Furthermore, the consensus appears to be that this bill has little chance of gaining any traction in Congress.

### The Case Against Federal Legislation

States and tribal nations are addressing Internet gaming much more proactively. As they do so, they will want to protect their investments in Internet gaming by preventing federal legislation that adversely impacts their opportunities.

While several states specifically prohibit Internet gaming, California, Texas, Massachusetts and Illinois have introduced legislation authorizing Internet gaming. Hawaii, Iowa and Mississippi introduced legislation in 2013 which died due to failure to meet committee deadlines. Nevada, New Jersey, Delaware and the U.S. Virgin Islands enacted legislation which authorized some forms of Internet gaming. Vermont passed legislation requiring the state lottery commission to study online lottery sales. Several other states are considering legislation authorizing lottery sales over the Internet.

Meanwhile, tribes are providing games on the Internet between tribal jurisdictions and developing non-gambling websites in preparation for the bigger population base the state and international markets provide. For example, one proposed consortium offers a treaty-based agreement between tribal nations that allows tribes to pool their resources, begin free play immediately, fast track the development of Class II mobile phone games, and provide consolidated lobbying efforts on Internet gaming. And at least one tribe plans to conduct international Internet gaming.

With this continued forward momentum, and considering the historically slow but certain authorization of gaming throughout the United States, we can expect that many states and tribes will eventually authorize Internet gaming. As with slot machines and poker, states will see money flowing

from their states to other jurisdictions that authorize Internet gaming and will adopt Internet gaming as inevitable. By authorizing Internet gaming, the states and tribes' momentum becomes a political force which will eventually preclude federal legislation. None of the jurisdictions which have already authorized Internet gaming will be willing to share its authority over Internet gaming or the all-important tax revenue derived from Internet gaming.

If federal legislation is unlikely, then how can tribal nations proceed? Will IGRA impact tribes' Internet gaming opportunities?

### The Relationship Between Internet Gaming and IGRA

IGRA governs all gaming on Indian lands. If a tribal nation provides any aspects of Internet gaming on its Indian lands, then the tribe must meet IGRA's requirements. This means that (1) the gaming must be legal under IGRA; (2) tribes must be the sole proprietors of the gaming operation; (3) for Class III, a gaming compact must be in

effect; (4) if someone other than the tribe is managing the Internet operation, the NIGC must approve the management contract with the third party; and (5) finally, the NIGC must work out how to oversee gaming that has an extra-territorial component.

### Legal Under IGRA

First, tribes can conduct Internet gaming now. The NIGC did not identify any IGRA provision that precluded Internet gaming. Rather, it consistently deferred to the Department of Justice (DOJ) on the legality of Internet gaming. Therefore, by concluding in its recent opinion that the Wire Act is limited to wagering on sporting events or contests, the DOJ eliminated the federal barrier to Internet gaming.

IGRA's reach is also limited to Indian lands. Therefore, beyond Indian lands, tribes must work with the individual jurisdictions, the individual states and tribes to provide Internet gaming within those jurisdictions.

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**Sole Proprietors**

Second, under IGRA, a tribe must be the sole proprietor of the gaming on its Indian lands. This requirement causes some uncertainty over OTB operations in Indian Country. OTB's are generally owned by an off-reservation organization that manages the operation and charges a fee to provide the opportunity for tribal customers to bet on the races. Fitting this type of operation into the IGRA structure has been difficult. Internet gaming operations will present similar problems. If an off-reservation operation manages and provides Internet gaming on the tribe's lands, is the tribe still the sole proprietor? The tribe will need to determine whether Internet gaming has to be provided through the tribe's gaming system and managed and provided directly through the tribe.

**Gaming Compact**

Third, while a compact is required for Class III gaming, it is not clear whether an IGRA compact is required in the state that the tribe provides the Internet gaming. IGRA establishes that "Class III gaming activities shall be lawful on Indian lands only if such activities are... located in a state

that permits such gaming for any person, organization or entity and conducted in conformance with a tribal-state compact... that is in effect." 25 U.S.C. 2710(d)(1). This legislative directive, like the rest of IGRA, is limited to establishing a regulatory compact for gaming on Indian lands. Since most Internet gaming will occur off of Indian lands, the impact or utility of a regulatory compact is unclear.

Furthermore, to the extent that existing compacts do govern Internet gaming, many tribes may not need to revise their compacts. Although some may argue otherwise, there is no apparent basis for concluding that Internet gaming is a class of gaming under IGRA. The IGRA classes of gaming, I, II and III, are gambling games while the Internet is a delivery mechanism. It is the system for providing poker or bingo or Class III gaming to tribal customers.

This means, of course, that there are good arguments that poker, bingo and pull tabs can all be played online without a traditional IGRA compact. All are traditionally Class II and therefore not subject to regulation under a compact. More importantly, the use of the Internet does not necessarily convert such gaming into Class III. Following a number of court decisions on bingo and pull tab machines, the NIGC concluded in December 2009 that a machine used with certain card games is a Class II technologic aid because the device did not replicate the game by incorporating all of the characteristics of the game. Similarly, computers and Internet lines do not automatically convert Class II games into Class III games. Consequently, Class III compacts are not relevant to such Class II games. Consequently, the more important agreements for tribal nations will not be tribal-state compacts under IGRA but mutual agreements with other jurisdictions similar to the state agreements that authorize Power Ball and Mega Millions in 44 jurisdictions.

**Management Contract**

Fourth, management of gaming operations are governed by IGRA to the extent that the gaming happens on Indian lands. The NIGC dealt with a management contract in Idaho where a tribal nation intended to provide Internet gaming on Indian lands and within the state. The NIGC approved the management contract but later argued in subsequent litigation that it did not intend to approve off-reservation Internet gaming. To my knowledge, this issue has not arisen again and the NIGC's approach is not certain. The DOJ's withdrawal of its objection to Internet gaming under the Wire Act bodes well for any management contract approval.

**NIGC Role**

The fifth IGRA issue, NIGC's role in governing Internet gaming, may be a non-issue. The NIGC's role, regulating

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*"If there is no federal Internet legislation, tribal nations do not confront further legislative abrogation of its sovereignty. Tribes will, however, have the option to work with other jurisdictions if they so choose. As a result, tribes maintain control over any impacts and can choose whether or not to accept any impact on tribal sovereignty."*

gaming on Indian lands, necessarily limits its regulatory authority. We can expect its role to be similar to its role in regulating OTB. In other words, it will do little to oversee Internet gaming but it may take action if it identifies Internet gaming offered on Indian lands that is not owned and operated by the tribe.

### **Tribal Sovereignty**

What this means for tribal sovereignty is definitely positive. If there is no federal Internet legislation, tribal nations do not confront further legislative abrogation of its sovereignty. Tribes will, however, have the option to work with

other jurisdictions if they so choose. As a result, tribes maintain control over any impacts and can choose whether or not to accept any impact on tribal sovereignty.

With the reduced threat of federal legislation, tribes will definitely be winners if they move to benefit from the expected substantial increase in Internet gaming opportunities as states and tribes progressively adopt and authorize Internet gaming. ♣

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