American Indian Law Review

Volume 24 | Number 2

1-1-2001

Rolling the Dice on the Cyber-Reservation: The Confluence of Internet Gaming and Federal Indian Law

David B. Jordan

NOTES

ROLLING THE DICE ON THE CYBER-RESERVATION: THE CONFLUENCE OF INTERNET GAMING AND FEDERAL INDIAN LAW

*David B. Jordan**

In 1968, during an era of dramatically changing social and political values, the United States ended the traumatic and devastating saga of the Native Americans who had suffered through policies of removal, assimilation, and outright termination, by passing the Indian Civil Rights Act. The Civil Rights Act was more than just a bill of personal rights, but a marked transformation in the status of Indian tribes in the United States. The new era brought a policy of self-determination, teaching the tribes not to assimilate, but to become economically and politically independent. The following three decades provided Indian tribes with economic development opportunities that subsequently converted small poor settlements of Native Americans into wealthy, powerful tribal communities. These tribal communities garnered the real power of Indian law, *tribal sovereignty*, and used this doctrine as a negotiating tool, an economic sword, and a judicial shield to provide advantages and leverage to Native American tribes. The largest economic dragon slain was that of the gambling industry. In 1996, gaming industry revenues from Indian tribes alone topped $5.4 billion annually,[1] and in 1997 those estimates grew to $6.4 billion.[2]

The big gaming dollar for the tribes has only fueled the economic fire. A brand-new industry in gaming, via the Internet, has exploded and now is responsible for more than an estimated 200 gambling web sites throughout the world.[3] Tribal economic development groups, in efforts to maintain tribal social programs, minimize dependence on federal grant money, and provide capital for other economic and government projects, are looking for new opportunities to both increase consumer traffic and increase revenues. Internet gaming provides at least an alternative.

---

*Third-year student, University of Oklahoma College of Law. This article was submitted for course credit in May 1999.

1. *See* Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798, 798 (1999).

2. *See* National Gaming Impact Study Comm'n, National Gaming Impact Study Commission Report 6-2 (June 18, 1999).

3. *See* John E. Hogan, *World Wide Wager: The Feasibility of Internet Gambling Regulation*, 8 SETON HALL CONS. L.J. 815, 820 (1998).

I. Internet Gaming: A Brief Lesson

Internet gaming, at first perception, seems to the lay observer to be a subject that is as broad as the Internet itself, jutting across local, state, national, and international boundaries; imposing iniquitous values on the cultures of societies across the world, spreading the seed of organized crime far beyond the sheltered enclaves the "mafia" has receded to in recent decades, and depleting communities of valuable dollars required to prop up the declining welfare of the common citizen. However, Internet gaming is actually a very narrow slice of the electronic gaming industry. Internet gaming has come to be used to describe gambling activities that take place via the Internet, or more narrowly, the World Wide Web and local access servers. The common thread of Internet gaming is consumer access through personal computers at remote locations, like home, for instance, and the connection of those personal computers to a network that provides access to gaming.

Other types of electronic gaming include: any gaming that takes place over traditional telephone lines; electronic slot machines located at popular casinos across the country; networked keno, lottery, and bingo games that span in size from local networks of players to nation wide electronic bingo games; and pari-mutual and off-track betting parlors that link horse races and horse race results by telephone, cable, or satellite from across the country to facilitate wagering.

Scholars and legislators frequently address electronic gaming as a whole. As legislators draft regulations addressing the Internet, they frequently define it in such a way as to include other forms of electronic gaming. Intentionally, or not, the inclusion shows the lack of understanding that the legislatures and the courts have in determining exactly what the Internet really is. Also, electronic gaming, by many, is regarded as bucking the gambling system. Many believe that traditional gaming is not as destructive as it could be to the welfare of our citizens because it requires an affirmative, deliberate, and at times sluggish action to gamble. Electronic gaming has brought incredible efficiency to the gambling industry. In the time that a person at Harrah's can make a bet on the roulette wheel and wait for the little ball to drop onto double zero, a person using an electronic gaming device can make ten to twenty of the same bets. This efficiency increases the risk to the consumer, and creates a distrust for the electronic gaming industry.

A. Applicable Federal Statutes

Gaming in the United States, both as a business and a source of recreation, dates back to the birth of our nation. Although primarily a field of law left for the states, federal regulation of gaming has grown since 1903, when the Supreme Court ruled that the Commerce Clause allowed

Congress to regulate intrastate gaming activities.[4] Since 1906, Congress has enacted several federal statutes to aid in the federal regulation of gaming activities.

Currently, there is no Federal Law governing Internet gaming; however, a myriad of other federal regulations exist that possibly impact Internet gaming. The Gaming Devices Act of 1951, or more popularly known as the Johnson Act, was enacted in 1951 to prohibit the interstate transportation of gaming devices.[5]

The Interstate Wire Act of 1961 prohibits the interstate transportation of wagering information or wagers by wire. The Wire Act criminalizes those engaged in the business of gambling, and not the gambler.[6] The Wire Act states that "whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money . . . as a result of . . . wagers, or for information assisting in the placing of . . . wagers, shall be fined . . . or imprisoned . . . ."[7] The act specifically excludes transmissions of information used in news reporting of sporting events or contests.[8] In addition, the act excludes the transmission of information assisting in the placement of wagers from a state or country where the sports betting or contest is legal. This exception allows, for example, Nevada bookmakers to broadcast betting lines on various sporting events. One particular concern of the statute is that transmission has been defined by the Seventh Circuit as "sending" and not "receiving."[9] However, other circuits have determined that the section embraces those involved in the reception of wagers as well as those involved in sending wagers.[10]

The Wire Act is the strongest weapon the Department of Justice has in assaulting Internet gaming at present. However, the act was not tailored to the Internet medium, and instead was drafted with telephone and telegraph

4. Champion v. Ames, 188 U.S. 321, 327 (1903).

5. *See* 15 U.S.C. § 1171-1177 (1994); *see also* James H. Frey, *Federal Involvement in U.S. Gaming Regulations*, 556 ANNALS AM. ACAD. POL & SOC. SCI. 138, 142 (March 1998).

6. *See* 18 U.S.C. § 1084 (1994); *see also* Frey, *supra* note 5, at 142.

7. 18 U.S.C. § 1084(a) (1994).

8. *See id.* § 1084(b).

9. *See* United States v. Stonehouse, 452 F.2d 455 (7th Cir. 1971); Telephone Sys., Inc. v. Illinois Bell Tel. Co., 220 F. Supp. 621 (N.D. Ill. 1963), *aff'd*, 376 U.S. 782 (1964).

10. *See* United States v. Skalroff, 506 U.S. 837 (5th Cir. 1975), *cert. denied*, 423 U.S. 874 (1975); United States v. Tomeo, 459 F.2d 445 (10th Cir. 1972), *cert. denied*, 409 U.S. 914 (1972); *see also* Sagansky v. United States, 358 F.2d 195 (1st Cir. 1966) (determining that a person holding himself out as being in the business of betting, and does in fact accept offers of bets, does violate the Wire Act).

wires in mind. The circuit split concerning whether reception is sufficient to impose criminal liability on a business engaged in betting is particularly troublesome. In the Internet medium, the user actually contacts a site at a different location and transmits information to that site. In the context of gambling, bettors send bets, credit card numbers, addresses, etc. to these gambling sites, and these passive sites never "interact" with the bettor. Gaming operations can set up passive websites and avoid criminal liability, at least in jurisdictions favoring the Seventh and Fifth Circuit opinions. However, as with most legislative loopholes, courts are usually quick to interpret in favor of the broad sweep of legislation. In the alternative, Congress is usually swift in remedying judicial exceptions that criminals can jump through.

Another interesting face of the Wire Act is the "interstate" requirement. "Interstate" has been defined by courts as requiring only one interstate phone call to meet the standard for criminal liability.[11] However, within the context of the Internet, a transmission *could* take place between both parties within a state, and still the technology of the Internet could send the transmission through servers that are an "interstate" wire communication facility. In addition, the Wire Act never considered satellite technology, where, there is never a use of wire communications. Conceivably, Joe from Texas could send a satellite transmission containing wager information to Bob in Hawaii, never use a wire communication facility, and never fall under the purview of the Wire Act.

The Organized Crime Control Act of 1970 sought to deter organized crime by prohibiting gambling businesses that had a volume that exceeded a particular amount.[12] The act specifically imposes Federal criminal liability on those involved in illegal gambling businesses, that is, a gambling business which violates a state law, involves five or more persons in the business, and either remains in business for more than thirty days, or has a gross revenue on anyone day of more than $2000.[13] Primarily, this statute simply provides a federal criminal action for activities that the state would prosecute anyway.

The Amateur and Professional Sports Protection Act prohibits states (including Indian tribes) from authorizing sports betting.[14] Congress grandfathered in those states that already authorized legal sports betting.[15]

---

11. *See* United States v. Swank, 441 F.2d 264 (9th Cir. 1971); *see also* United States v. Kelley, 254 F. Supp. 9 (D.C.N.Y. 1966) (holding violation of this act can occur when defendant uses interstate communication facility through another, even though other person is not engaged in business of betting).

12. *See* 18 U.S.C. § 1955 (1994 & Supp. IV 1998); *see also* Frey, *supra* note 5, at 142.

13. *See* 18 U.S.C. § 1955(a), (b) (1994 & Supp. IV 1998).

14. *See* 28 U.S.C §§ 3701-0374 (1994); *see also* Nelson Rose, Gambling and the Law, The Law of Internet Gaming 12 (1999) (on file with author).

15. *See* 28 U.S.C. §§ 3704(a)(1), (2) (1994); *see also* Rose, *supra* note 14, at 14-15.

This act essentially cut off the rapid growth of sports wagering throughout the country, and limited that wagering to those states that had state laws permitting such activity prior to the enactment of the act. In addition, the act specifically applies to Indian tribes, as noted in section 3704(b).[16]

The general lottery statutes at 18 U.S.C. §§ 1301-1307 put both prohibitions and restrictions on importation, shipping, or use of U.S. mails for lottery material.[17]

The most draconian of federal statutes is the Racketeer Influenced and Corrupt Organizations Act (RICO). This act converts state gambling offenses into federal crimes when an organization has committed two predicate crimes more than two years.[18]

B. Applicable State Statutes

Aside from the limited federal control over gambling, especially when it involves interstate activity, regulation of gambling has primarily remained the role of the state. States regulate gaming and prohibit gaming for a variety of reasons. Those that choose to prohibit certain types of gaming typically do so because of the moral composition of their communities. However, gaming prohibition has also been driven by strong economic considerations of both the state welfare systems, as well as traditional gaming operations competing for the elusive disposable income of the consumer. Studies of gaming activity in communities have attempted to show conclusive links between gambling and a decline in quality of life among the consumers. In addition, the powerful entertainment dollar garnered by mega-industries, such as sporting events, recreational facilities, and even legalized gaming itself, and fueled by pedantic lobbyists, operates to pork barrel legislation prohibiting gambling.

Gaming regulation, as opposed to the prohibition of the same, is regarded as somewhat of a different animal. Many states, giving into the tantalizing appeal of the tax revenues that gaming can command, have set aside the virtuous prohibition of gambling in favor of regulation that will balance the state interests of revenue and control of organized crime, and the gaming industries' interests of high profit margins and internal control.

Although Congress has not conclusively addressed the Internet gaming issue as of yet, states have been regulating and prohibiting Internet gaming for several years. This is not unpredicted. States have always had more at stake in dealing with gambling then the federal government; especially as it deals with crimes involved with gaming.

---

16. *See* 28 U.S.C. §§ 3702, 3704(b) (1994).

17. *See* 18 U.S.C. §§ 1301-1307 (1994 & Supp. IV 1998); *see also* Rose, *supra* note 14, at 16.

18. *See* 18 U.S.C. §§ 1961-1968 (1994 & Supp. IV 1998); *see also* Rose, *supra* note 14, at 16.

In Nevada, for instance, the first explicit prohibition of Internet gaming — and explicit exceptions — was passed in 1997.[19] The law prohibited any Internet operator from anywhere in the world from accepting bets or wagers from any person within the State of Nevada.[20] In addition, the law also imposed criminal liability on the person in the State of Nevada placing the bet or wager.[21] In addition, the state extends criminal liability, as long as the requisite element of knowledge exists, to online servers, such as America Online.[22] Coincidentally, the statute expressly exempts from the foundational elements of the criminal liability any wagers made to Nevada-licensed gaming operations.[23] Presumably, Nevada could license gaming operations physically located outside of the state (St. Thomas, for example) to both allow out-of-staters to game on the Internet within Nevada. The statute did not address this scenario, obviously because of the gaming lobby. The statute also permits Nevada to sell state licenses for hefty sums to other states or even other nations allowing gaming by Nevada residents to out-of-state gaming facilities.

In 1997, Louisiana outlawed gambling on a computer.[24] Gambling on a computer was defined as "conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit when accessing the Internet, World Web, or any part thereof by way of any computer, computer system, computer network, computer software, or any server."[25] Louisiana also exempts from its laws certain electronic poker machines used on river boats and pari-mutual racing, which relies heavily on computers for transmission of race information from the track to off-track betting parlors.[26]

Several states have made the pro-active choice to regulate cybergaming. In Pennsylvania, off-track betting parlors for horse racing now allow wagers to be accepted via a computer.[27] In New York, off-track betting parlors have already begun accepting online wagers for horse racing.[28] In Oregon, the state has allowed wagering through "electronic media" as long as the money is deposited in advance.[29] Maryland currently allows telephone wagering, where courts have reluctantly extended this inclusion to other wire communications, such as computers.[30]

---

19. *See* Rose, *supra* note 14, at 21.
20. *See id.*; *see also* S. 318, 69th Legis. (Nev. 1997) (codified in NEV. REV. STAT. §§ 465.091-465.094 (1997)).
21. *See* Rose, *supra* note 14, at 21; *see also* S. 318.
22. *See* Rose, *supra* note 14, at 21; *see also* S. 318.
23. *See* Rose, *supra* note 14, at 21; *see also* S. 318.
24. *See* Rose, *supra* note 14, at 21; *see also* LA. REV. STAT. ANN. § 14:90.3 (West 1997).
25. LA. REV. STAT. ANN. § 14:90.3; *see also* Rose, *supra* note 14, at 21-22.
26. *See* LA. REV. STAT. ANN. § 14:90.3.
27. *See* Rose, *supra* note 14, at 24; *see also* 4 PA. CONS. STAT. § 325.218(b) (1995).
28. *See* Rose, *supra* note 14, at 24; *see also* N.Y. RAC. PARI-M. § 1012 (McKinney 1998).
29. *See* Rose, *supra* note 14, at 25; *see also* OR. REV. STAT. § 462.142 (1998).
30. *See* Rose, *supra* note 14, at 25; *see also* MD. CODE ANN., BUS. REG. tit. 11, § 11-805

II. Federal Indian Law: The Basics

A. Tribal Sovereignty

Federal Indian law has its modern roots in the famous case of *Worcester v. Georgia*,[31] where Justice Marshall stated, in the most quoted of all Supreme Court cases, "Indian nations had always been considered as distinct, independent, political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial . . . ."[32] This adoptive affirmation by the Supreme Court provided the basic framework by which federal Indian law subsequently developed over the next 160 years. The key element in federal Indian law is the recognition of tribal sovereignty tempered with a guardian-ward relationship with the federal government. The federal government has regarded Indian tribes as beyond the purview of state control, yet squarely within the control of the federal government. However, many traditional Euro-American values do not apply to Indian tribes. For instance, in *Talton v. Mayes*,[33] the Supreme Court held that the Bill of Rights did not apply to Indian tribes.[34]

This tribal sovereignty doctrine provides Indian tribes with a great deal of leverage, as control by state laws is a rarity. In addition, Indian tribes, although considered a political classification and not a cultural classification,[35] still benefit from a great deal of deference provided by the conscience of Congress. Even over the last twenty years and the supposed erosion of tribal sovereignty, the doctrine remains a powerful force in the ability of Indian tribes to independently control their social, cultural, political, and economic future.

B. Tribal Sovereign Immunity

One unique aspect of tribal sovereignty, and one quite applicable to the area of gaming, is the doctrine of sovereign immunity. Sovereign immunity has long been regarded in modern jurisprudence as a defense for a sovereign from suit. The literal interpretation, "the king could do no wrong," affords a sovereign an opportunity to shield itself from actions brought by citizens or nations, unless that sovereign expressly opened itself up for suit.

Tribal sovereign immunity was extended to Indian tribes, reflecting the recognition of the Supreme Court as to Indian tribes as sovereigns. Although its initial inception into Indian law is questionable, the doctrine has become

---

(1998).

31. 31 U.S. (6 Pet.) 515 (1832).
32. *Id.* at 559.
33. 163 U.S. 376 (1896).
34. *Id.* at 384.
35. Morton v. Mancari, 417 U.S. 535, 552-53 (1974).

firmly rooted and is now an incredibly valuable tool for Indian tribes as they begin to flex their political and economic muscle. Most recently, the Supreme Court ruled in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[36] that absent an express waiver by the tribes or Congress, Indian tribes are immune from suit in both federal and state courts for activities of both commercial and governmental nature that arise either on or off of Indian land.[37]

C. Indian Gaming: The Early Years

Federal Indian law began its real trek into gaming in 1987 when the Supreme Court decided *California v. Cabazon Band of Mission Indians*.[38] The case involved the power of California to enforce a law prohibiting bingo and poker games over the Mission Indians.[39] California was one of a few limited states that were given express power from Congress to extend its criminal jurisdiction to Indian land located within the territory of the state. The Supreme Court held that the issue as to jurisdiction turned on whether the law against bingo games was *prohibitive* in nature or *regulative* in nature.[40] The Court held that only if the game was *prohibitive* may a Public Law 280 state[41] restrict the ability of an Indian tribe to offer a similar game. The distinction between *prohibitive* and *regulative* laws depends on the existence of any state law allowing other types of gaming, such as church bingo, horse races, and lotteries. The true threat of *Cabazon* was that almost all states offered some form of gaming and would find that their gaming laws lacked *prohibitive* or *criminal* effect. The result of *Cabazon* was that Indian gaming exploded.[42]

One interesting aspect of *Cabazon* is the Supreme Court held the tribes were proper to offer gaming on Indian land to *non*-Indians. This unique position should be analyzed as to a tribe's ability to extend Internet gaming to *non*-Indians on or *off* of Indian land. *Cabazon* was a jurisdictional case, and thus it would not be a stretch to believe that the permissibility of participation of *non*-Indians in Indian gaming extended to their geographical location on Indian land engaging in gaming activity.

As a result of the explosion of Indian gaming, and subsequent concern by state legislatures and powerful Las Vegas and Atlantic City lobbying groups, Congress passed in 1988 the Indian Gaming Regulatory Act.[43] The quick

36. 523 U.S. 751 (1998).

37. *Id.* at 759-60.

38. 480 U.S. 202 (1987).

39. *Id.* at 202.

40. *Id.*

41. This was the Public Law that extended criminal jurisdictions of states into Indian land. Public Law 280 was limited to only a handful of states, and primarily had little or no effect on gaming after *Cabazon*. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588.

42. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 286 (1998).

43. Indian Gaming Regulatory Act, 18 U.S.C. § 1166, 25 U.S.C. §§ 2701-2721 (1994); *See*

federal response to the *Cabazon* decision thwarted a multitude of looming questions concerning the effect that *Cabazon* had on many of the other court rulings and statutes, such as the Organized Crime Control Act.[44]

D. Indian Gaming Regulatory Act

The Indian Gaming Regulatory Act (IGRA) essentially divided gaming activities into three classes. Class I gaming included social games for nominal value or traditional Indian gaming activities associated with tribal ceremonies.[45] Class I gaming represents those forms of gaming that have the least impact on the economic and criminal concerns of the tribe, state, and the United States. Consequently Class I gaming is within the exclusive jurisdiction of the tribe, and neither the state nor the federal governments have any control of this gaming under IGRA. This concession by the United States in IGRA, however, is of nominal value, because Class I serves very little purpose to the economic and political engine of the Indian tribes.

Class II gaming includes card games not played against the "house," such as some forms of poker, and bingo, "whether or not electronic, computer, or other technologic aids are used"[46] and other similar games such as lotto, tip jars, and pull tabs.[47] Class II gaming is permitted to be licensed by the Indian tribe for gaming on Indian land if the state permitted "such gaming."[48] This language appears to be drawn from the rationale behind *Cabazon*. The distinction between gaming allowed, as in *Cabazon*, is whether "such gaming" was permitted in the state. However, much litigation has followed concerning the meaning of "such gaming"; does "such gaming" mean the particular type of gaming or the class of which the particular type of gaming is included?

Although a state cannot regulate Class II gaming, this class is subject to regulation by the National Indian Gaming Commission (NIGC).[49] The NIGC has promulgated volumes of regulations concerning Class II gaming. Those regulations include requirements for licensing and distribution of revenues.[50]

Class III gaming is defined as the residual of gambling activities outside of the parameters of Class I and II gaming.[51] Class III gaming includes house card games, including baccarat and blackjack; casino games, such as roulette and craps; slot machines and electronic facsimiles of any game of chance; and lotteries.[52] Class III gaming is only within the jurisdiction of an

---

also 134 CONG. REC. H8146-01 (1988).

44. 18 U.S.C. § 1955 (1994 & Supp. IV 1998); *see also* CANBY, *supra* note 42, at 286-87.
45. *See* CANBY, *supra* note 42, at 288; *see also* 25 U.S.C. § 2703(6) (1994).
46. 25 U.S.C. § 2703(7) (1994).
47. *See* CANBY, *supra* note 42, at 289; *see also* Class II Gaming, 25 C.F.R. § 502.3 (1992).
48. 25 U.S.C. § 2703(7) (1994).
49. *See id.* § 2704-2708; *see also* CANBY, *supra* note 42, at 289.
50. *See, e.g.*, 25 C.F.R. §§ 501-577 (1995).
51. *See* 25 C.F.R. § 502.4 (1995).
52. *See* 25 C.F.R. § 502.4.

Indian tribe when the tribe has entered into a tribal-state compact to permit such gaming activity on Indian land.[53] These negotiated compacts include provisions that address subjects such as criminal jurisdiction and revenue distribution. IGRA, in its original form in 1988, allowed tribes, in conjunction with the federal government, to force states to negotiate in good faith.[54] However, the Supreme Court ruled in *Seminole Tribe of Florida v. Florida*[55] that 25 U.S.C. § 2710(d)(7)[56] unconstitutionally abrogated the states' Eleventh Amendment sovereign immunity from suit.[57] IGRA, as it related to the Indian tribes' assurance that the states would negotiate in good faith, lost the statutory power it was intended to have when Congress drafted the statute.

III. Confluence of Internet Gaming & Federal Indian Law

A. Internet Gaming and the Class Distinction

Internet gaming should first be considered as to placement in the IGRA classification system. Internet gaming should not be automatically placed into Class III gaming simply because a computerized system resembles "electronic facsimiles of any game of chance," such as electronic slot machines.[58] The real distinction of Internet gaming is not the type of game that takes place but the location of the gaming activity. A quick review of the classification system of gaming under IGRA highlights that distinctions are made between the classes based on *value*, such as the inclusion of social games of nominal value within the Class I category. Distinctions are also made between classes based on *house take*, such as the distinction between non-bank card games (poker) in Class II gaming and bank card games (blackjack) in Class III gaming.

However, court decisions have added another distinction to the classification system. The courts have generally held that the provision in section 2703(8) regulating Class III gaming moves all "electronic facsimiles"[59] of games of chance from Class II to Class III. This language seems on its face to contradict the language in section 2703(7) which includes in Class II gaming "the game of chance commonly known as bingo . . . whether or not electronic, computer, or other technologic aids are used . . . ."[60] 25 C.F.R. §§ 502.7-502.8 attempt to clear up this ambiguity.

---

53. *See* 25 U.S.C. § 2703(8) (1994).

54. *See id.* § 2710(d)(3)(A) ("[T]he State shall negotiate with the Indian tribe in good faith to enter into such a compact.").

55. 517 U.S. 44 (1996).

56. This provision essentially authorized the tribe to bring a cause of action against the State for failure to negotiate in good faith.

57. *Seminole*, 517 U.S. at 60.

58. 25 U.S.C. § 2703(8) (1994).

59. *Id.*

60. *Id.* § 2703(7).

Section 502.7 defines "electronic, computer or other technologic aid" as *not* a game of chance, but merely an aid to assist a player or the playing of a game and is "readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile . . . ."[61] Section 502.8 defines "electronic or electromechanical facsimile as any device described in 15 U.S.C. § 1171 (a)(2) or (b)"[62] stating:

> (2) machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property . . . .[63]

The distinction has been litigated often, including recently in *Diamond Game Enterprises, Inc. v. Reno*[64] where the court held that the distinction between *electronic aid* and *electronic facsimile* is that the *electronic aid* "must operate to broaden the participation levels of participants in a common game."[65] The court also held an electronic aid "is distinguishable from a 'facsimile' in which a single participant plays with or against a machine rather than with or against other players."[66] The second element concerning whether the *aid* and the *facsimile* are distinguishable takes into account whether the player perceives that they are playing a computer or a group of people.[67] The *Diamond* court discussing the legislative intent, stated that the drafters envisioned *electronic aid* to allow for tribes to broaden participation throughout either the local gaming site, or among other tribes through use of cable, telephone lines, or satellite.[68]

This leaves open the possibility that Indian tribes could operate gaming operations over the Internet, with the intent to broaden participation as long as the game is not played against a computer but against other participants, and the player is *aware* that they are playing against other participants instead of a computer. The game played over the Internet could be any outlined in Class II gaming that meets the foundational requirements,[69] such a poker or bingo. The result of the Class II classification is that the Indian tribe is no

61. 25 C.F.R. § 502.7 (1998).
62. 25 C.F.R. § 502.8 (1998).
63. 15 U.S.C. § 1171(a)(2), (3) (1994).
64. 9 F. Supp. 2d 13 (D.D.C. 1998).
65. *Id.* at 19-20.
66. *Id.*
67. *Id.* at 21.
68. *Id.* at 20.
69. *See supra* text accompanying notes 46-48.

longer required to form a tribal-state compact. Class II gaming operations afford Indian tribes additional economic and political independence because the state is no longer an influence in the management and regulation of the gaming activity.

B. Internet Gaming: The Search for the Location

Critical in the concept of Internet gaming is determining where the gaming is taking place. As a beginning point, IGRA only extends the boundaries for permissible Indian gaming operations to the borders of Indian land.[70] The logical extension to this foundation is that Indian gaming is not permitted off of Indian land. However, Internet gaming provides a problematic determination for courts and legislatures. Does the Internet gaming take place at the location of the server, where the networks connect and the actual wager is taken? Does the Internet gaming take place at the geographical location of the player, who through a device, such as a personal computer, places a bet by dialing into a network? This distinction has provided legal dilemmas for courts determining other Internet issues, including criminal and civil jurisdiction, domicile, international law and federal interstate laws. In many situations, courts are forced to apply, by analogy, statutes addressing areas of law dissimilar to Internet gaming. The District Court of Idaho recently ruled in *AT&T Corp. v. Coeur d'Alene Tribe*[71] that, when a wager is place by telephone from off of a reservation, an Internet lottery is not on Indian land. This doctrine runs parallel to the reasoning within the Interstate Wire Act, stating that gaming must be legal in the state from which the phone call is made.[72] If Indian tribes cannot shake the doctrine that Internet gaming takes place at the location of the bettor, the opportunities for expansive computerized gaming will be limited. The reasoning in the *AT&T* case was that if tribes offer Internet lotteries to states across the country, then not only do tribes need to compact with the state from which they originate, but also with each state the lottery reaches. The legal workload of such an undertaking would certainly exceed the resulting growth in revenue potential for Indian tribes, and seems to be an implausible alternative.

The multistate compacting concerns could be modified in two other ways. The Indian tribes could block access on the Internet sites by filtering out players that were not located geographically in states that allowed Internet gaming. This filtering technology is not without its limitations, and is easily circumvented. Courts might find that Indian tribes circumvented the filters and continued to offer, negligently, Internet gaming to states with a prohibition on Internet gaming. The other alternative is to simply engage in multistate compacting, but on a limited scale. Section 2710(d) of IGRA

70. *See* 25 U.S.C. § 2710(a),(b) & (d) (1994).
71. 45 F. Supp. 2d 995, 1001 (D. Idaho 1998).
72. *See* Rose, *supra* note 14, at 26; *see also* Interstate Wire Act, 18 U.S.C. § 1084(a) (1994).

authorizes gaming if "located in a State that permits such gaming."[73] If the previous doctrine of Internet gaming laid out in *AT&T* were to remain intact, gaming takes place at the bettor's location and not at the location of the server or network. It is interesting to note that if the doctrine were to change, and Internet gaming actually *takes place* on Indian land, then under section 2710(d) there would be no need for multistate compacting.

C. The Confluence and the Coeur d'Alene Tribe

An important segue at this point is the recent tribulations of the Coeur d'Alene Tribe of Idaho. The Coeur d'Alene began a nationwide lottery in early 1998 that was offered to thirty-six states that had legalized lotteries.[74] Under the basic philosophy of IGRA, the tribe believed that if a compact was created with Idaho that would allow Class III lottery gaming to take place on the Coeur d'Alene reservation, then the tribe could offer such gaming to any state that allowed "such gaming."[75] This rationale failed to impress the Eighth Circuit. In *Nixon v. Coeur d'Alene Tribe*[76] the court impliedly directed the district court to find Internet gaming is conducted on non-Indian land, and thus not preempted by IGRA.[77] The Coeur d'Alene tribe was also involved in the *AT&T* case discussed *supra*, where the court held that the Interstate Wire Act allowed AT&T to discontinue service to support the nationwide tribal lottery when the district court found that Indian gaming was taking place on non-Indian land.[78] Although the lottery site was operated at <www.uslottery.com>, the site has subsequently been shutdown as of January 1999 until a ruling can be made at the district court level.

D. The Confluence and the St. Regis Mohawk Tribe

A similar alternative is being sported by the St. Regis Mohawk tribe of New York. Recently, news sources reported that the St. Regis tribe begun the process of developing Internet gaming by hiring an Internet development company to build the software and hardware package needed to support an Internet gaming system. The St. Regis tribe is currently under a tribal-state compact for Class III gaming, which includes keno, blackjack, bingo, and pull-tabs. The tribe believes that the *Coeur d'Alene* problems have been circumvented because:

---

73. 25 U.S.C. § 2710(d) (1994).

74. Nixon v. Coeur d'Alene Tribe, 164 F.3d 1102, 1104 (8th Cir. 1999).

75. *Id.* at 1109.

76. 164 F.3d 1102 (8th Cir. 1999).

77. *Id.* at 1109. The *Nixon* Court ultimately believed that the decision as to whether Indian gaming occurred on or off reservation was a matter for the trier of fact, but strongly stated that the determination of whether that gaming occurred on or off Indian land was determinative of the power of IGRA to preempt the gaming activity. *Id.* at 1108.

78. AT&T Corp. v. Coeur d'Alene Tribe, 45 F. Supp. 2d 995, 1001 (D. Idaho 1998).

(1) The Interstate Wire Act is thwarted because the bettors would be from the State of New York, where, according to the tribe, the transmission of gaming information is legal because NY specifically permits off-track betting and the purchase of lottery tickets by electronic transmission of gaming information.[79]

(2) The tribe is protected from a state injunction, under the theory that the federal government has exclusive jurisdiction over tribal gaming.[80]

(3) Additionally, the tribe is immune from suit unless a specific violation of the compact is plead.[81]

However, the St. Regis tribe must still deal with the problem of placing geographic filters on the interactive web site, so as to not suffer the same fate as the Coeur d'Alene tribe. Although the St. Regis web site has been reported to be under development, Thomas Cook, a member of the St. Regis Mohawk tribal gaming commission denies that the tribe itself has undertaken any preparation for an Internet gaming site.[82]

E. Internet Gambling Prohibition Act: The Future of Internet Gaming

On March 23, 1999, Sen. Jon Kyl (R.-Ariz.) introduced an amendment to the Interstate Wire Act, Senate Bill 692, the Internet Gambling Prohibition Act[83] to prohibit Internet gaming.[84] Kyl had unsuccessfully sponsored a similar bill in the 105th Congress, in which the Senate passed the Act in a 90-10 vote, yet died in the House at the end of the term.[85] Senate Bill 692 includes language that states "it shall be unlawful for a person engaged in a gambling business to use the Internet or any other interactive computer service . . . to place [or] receive a . . . bet or wager . . . ."[86] However, the Internet Gambling Prohibition Act contains some convenient exceptions. Those exceptions include: intrastate lotteries; multi-state lotteries using a "private network"; any wagers based on horse racing, as long as a closed-loop subscriber-based service is used, and wagering on horse races is legal in that state; and fantasy sports games or contests.[87] The bill, as amended (Senate Bill 2782), passed the Senate by unanimous consent in November 1999, and is currently before the House Judiciary Committee.[88]

---

79. *N.Y. Tribe Wants Internet Casino*, ASSOC. PRESS ONLINE, Apr. 18, 1998, *available in* 1998 WL 6652938.

80. *Id.*

81. *Id.*

82. Telephone Interview with Thomas Cook, Member, Gaming Commission, St. Regis Mohawk Tribe (May 6, 1999).

83. *See* S. 692, 106th Cong. (1999).

84. 145 CONG. REC. 3123-02, 3144 (1999).

85. *See* Debra Baker, *Betting on Cyberspace*, ABA JOURNAL, Mar. 1999, at 54.

86. S. 692, 106th Cong. § 2(a) (1999).

87. *Id.*

88. *See* 145 CONG. REC. 14,863 (1999). The bill is still in the House Judiciary Committee

The proposed Act was amended on the same day it passed by an amendment introduced by Sen. Ben Nighthorse Campbell (R.-Colo.) providing language addressing many of the concerns of Indian tribes.[89] The amendment essentially sheltered electronic Indian gaming from the effects of IGRA.[90] The amendment provided that IGRA "does not apply to any otherwise lawful bet or wager that is placed, received, or otherwise made on any game that constitutes class II gaming or class III gaming, or the sending, receiving, or inviting of information assisting in the placing of any such bet or wager."[91] However, the amendment compromised a position that Indian tribes, including the Coeur D' Alene, argued; that physical presence is not expressly required under the Indian Gaming Regulatory Act, and hence should not be required for otherwise legal Indian gaming operations. The amendment states that each person placing or receiving the bet, or transmitting the betting information must be "physically located on Indian lands" and that the game must be "conducted on a closed-loop subscriber-based system or a private network"[92] The amendment also requires that tribal-state compacts must include references to use of the Internet or interactive computer service on a closed-loop subscriber-based system or private network.[93]

The language of the amendment within the Kyl bill seems to foreclose any opportunities that Indian tribes have to extend tribal gaming outside of the geographic borders of the respective Indian land. This bill would then preclude operations such as the <www.uslottery.com> site developed by the Coeur D'Alene, who attempted to allow for non-Indian land access to an Indian lottery located in Washington state. However, the bill does not seem to disturb operations like Megabingo[94] that connect dozens of Indian gaming sites across the country in a "national bingo," simply because all the participants, as well as the gaming providers, are located on Indian land. The bill has yet to become law, however, its unanimous passage in the Senate seems to be an omen for the future of Internet gaming.

Conclusion

There are still a few questions to be pondered for tribes, and their inclusion in the end of this article should provide a spark for future inquiry into the nebulous area of Internet Indian gaming. Can tribes solicit non-U.S. citizens to participate in Internet gaming activities? Is the Internet bettor really gaming

---

as of publication.

89. *See id.*

90. *See* 145 CONG. REC. 14865 (1999) (amending S. 692).

91. S. 692 § 2(f)(4)(A).

92. *Id.* § 2(f)(4)(A)(ii).

93. *Id.* § 2(f)(4)(A)(iv)(II).

94. Jess Green, *Indian Gaming 1998*, *in* SOVEREIGNTY SYMPOSIUM XI: IN THE SERVICE OF THE LAW 36 (1998).

off-reservation while on their personal computer at home or on-reservation where the server is located? Is Class II Internet gaming fair game for tribes or also excluded by the proposed Internet Gambling Prohibition Act?

Many questions remain, and as a result, the sovereign Indian nations can and will continue to push the Internet gaming envelope. The bureaucratic federal government should take the time to answer the theoretical questions that exist in the blurry areas between Internet gaming law and Indian law. Barring the passage of the Kyl bill, tribes should continue to experiment with electronic aids in promoting Indian gaming on the reservation through the use of the Internet. Tribes can take advantage not only of the ability to compact with states, but also the doctrine of tribal sovereign immunity. The National Gaming Impact Commission itself admitted in its lengthy 1999 report that dozens of questions still exist as to the proper application of Internet gaming to the tribal setting. Until the questions to these questions are clear, tribes should continue to develop and implement new and creative ways to deliver legal Indian gaming to capitalize on a public eager to spend money to reinforce the self-determination goals of Indian tribes as supported by the United States.