

## Online Sovereignty: How Tribes Can Use Technology to Offer Internet-Based Gaming

Gavin Clarkson<sup>†</sup>

### I. Introduction

The Internet provides tremendous possibilities for tribal gaming interests but also many potential pitfalls. On the one hand, tribes stand to increase gaming revenues dramatically. This possibility is especially true for tribes located in remote places, far from major metropolitan centers. On the other hand, tribes face legal risks that pose significant barriers to entry.

Estimates place the number of online gamblers at 15 million and online gambling earnings in excess of six billion dollars annually.<sup>1</sup> Seven percent of online American consumers gamble over the Internet despite the legal grey area of such gambling.<sup>2</sup> Comparatively, in Europe, where such Internet gambling is legal, only 2.2% of online users gamble over the Internet.<sup>3</sup> The average American online gambler makes \$71,581 annually and spends \$185 per month on online and offline gambling.<sup>4</sup> Of online gamblers, 66% are male, and 50% have a college degree. Each gambler spends 7.4 hours online per week and has an online tenure of 3.2

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<sup>†</sup> Assistant Professor, University of Michigan School of Information, School of Law, and Native American Studies. Braden McCurrach provided invaluable research assistance in the development of this paper.

<sup>1</sup> See Note, *A Winning Hand: A Proposal for an International Regulatory Schema With Respect to the Growing Online Gambling Dilemma in the United State*, 37 VAND. J. TRANSNAT'L L. 1389, 1391 (2004).

<sup>2</sup> See Chris Charron and Charles Q. Strohm, *Online Gamblers: A Good Bet For Marketers*, FORRESTER ONLINE GAMING REPORT (April 22, 2003). Note that 66% of US adults (137 million) were online according to a Harris Research poll conducted in 2002. See Humphrey Taylor, *Internet Penetration at 66% of Adults (137 million) Nationwide*, THE HARRIS POLL #18 (April 17, 2002), available at, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=295](http://www.harrisinteractive.com/harris_poll/index.asp?PID=295) (last visited April 6, 2005).

<sup>3</sup> See Rebecca Ulph Jennings, *Web Betting and Gambling Struggle in Europe*, FORRESTER ONLINE GAMING REPORT (May 18, 2004) (European online gambling appears close to its maximum expansion. In 2001, the figure was 2.9% and in 2004 the figure is only 2.2%. Examining the numbers by European nation, 0.2% of online consumers gamble online in Spain, 0.3% in Italy, 1.8% in Britain, and 8.1% in France. Gaming experts say France, which is by far the most prolific online gambling nation, is especially nearing its ceiling).

<sup>4</sup> See *Online Gamblers: A Good Bet For Marketers*, *supra* note 2.

years.<sup>5</sup> In total, Americans make up one-half of online gamblers and are responsible for 60% of Internet gambling revenues.<sup>6</sup>

The purpose of this paper is to examine the legal cases and statutes that may apply to tribal Internet gambling and to suggest some possibilities for tribal Internet gambling that should not violate the existing legal framework. Part II examines states' attempts at the regulation of online gambling. Part III discusses the Indian Gaming Regulatory Act of 1988, which governs all tribal gaming. Part IV examines federal cases and statutes that factor into legal determinations of tribal Internet gaming proposals then suggests some possibilities that tribes might pursue to legally engage in class II and class III Internet gaming.

## **II. State Regulation of Online Gambling**

States have been active in adopting legislation concerning online gambling. Nevada has legalized online gambling with Internet casinos licensed by the state.<sup>7</sup> North Dakota recently introduced legislation to legalize Internet gambling.<sup>8</sup> After receiving word from the federal government that such legislation is probably illegal, however, a bill to "license, regulate, and tax Internet poker sites based in North Dakota" was soundly defeated March 21 by a vote of 44-3,

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<sup>5</sup> *Id.*

<sup>6</sup> I. NELSON ROSE, INTERNET GAMING LAW 66.

<sup>7</sup> See NEV. REV. STAT. ANN. §§ 463.016425; 463.750-463.780.

<sup>8</sup> See Dale Wetzel, *Internet Poker Bill: Feds Say It's Illegal*, WINNERONLINE.COM (March 8, 2005), available at <http://www.winneronline.com/articles/march2005/internet-poker-bill-feds-say-its-illegal.htm> (last visited April 6, 2005) ("In letters to Nevada and the U.S. Virgin Islands, Justice Department attorneys have said they believe Internet gambling runs afoul of federal laws against using wire communications to place bets..." Moreover, the federal money laundering statutes are applicable to unlawful Internet gambling businesses," Michael Chertoff, then an assistant U.S. attorney general, said in an August 2002 letter to the Nevada Gaming Control Board. David Nissman, U.S. attorney for the Virgin Islands, sent a letter similar to Chertoff's last December to the head of the territory's Casino Control Commission, in response to an Internet gambling regulation bill approved by the territorial legislature. "We believe that the acceptance of wagers by gambling businesses located in the Virgin Islands ... would itself violate federal law," Nissman wrote. The reasoning would apply if bets were placed either by people outside the Virgin Islands or within the territory, if the communications were routed outside the country, his letter said. He disputed the 5th Circuit federal appeals court's conclusions. Earlier, William Moschella, a U.S. Justice Department assistant attorney general, said in a July 2003 letter to Rep. John Conyers, D-Mich., that the agency believed the ruling was wrong, and that "the court did not consider other federal gambling statutes." "In addition to believing that this case was wrongly decided on the law, the United States was not a party in that case, and does not believe that it would constitute binding precedent in other (appeals courts)," Moschella wrote).

and a proposed constitutional amendment requiring the legislature to regulate Internet poker sites was defeated March 25 by a vote of 43-3.<sup>9</sup> Illinois, Louisiana, Nevada, Oregon, and South Dakota have all adopted statutes prohibiting either online gambling entirely or prohibiting all unregulated online gambling.<sup>10</sup> Others, like the Attorneys Generals of Indiana, Kansas, and Texas, have issued opinions declaring Internet gambling illegal under the laws of their respective states.<sup>11</sup> One motivation for Internet gambling legislation, in addition to all the speeches about protecting the morals of the community, is that states stand to lose revenue with online gamblers directing funds out-of-state or out of the country instead of spending this gambling money with state-sponsored lotteries or state-licensed casinos.

At the state court level, the New York Superior Court, in enjoining a New York company's Antigua-based casino, stated that not only did the Wire Act<sup>12</sup> apply, but the Travel Act<sup>13</sup> and Paraphernalia Act<sup>14</sup> were also applicable.<sup>15</sup>

### **III. Indian Gaming Regulatory Act**

The Indian Gaming Regulatory Act of 1988 (IGRA)<sup>16</sup> regulates all Indian gaming today and provides the framework for the agreements<sup>17</sup> that tribes and states negotiate to facilitate gaming. Meant to achieve “a principal goal of Federal Indian policy [which] is to promote tribal

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<sup>9</sup> See Dale Wetzel, *NORTH DAKOTA SENATE: Poker measure draws lousy hand in Senate*, GRAND FORKS HERALD, at leg (March 26, 2005).

<sup>10</sup> See Rebecca Porter, *Prosecutors, Plaintiffs Aim to Curb Internet Gambling*, 40-Aug TRIAL 14 (2004), see also LA. REV. STAT. ANN. § 14:90.3; 720 ILL. COMP. STAT. ANN. § 5/28-1(12).

<sup>11</sup> See 98 Op. Ind. Att’y Gen. 5, 1998 Ind. AG LEXIS 5 (1998); 96 Op. Kan. Att’y Gen. 31, 1996 Kan. AG LEXIS 31 (1996); 95 Op. Tx. Att’y Gen. DM-344, 1995 Tex. AG LEXIS 56 (1995), referenced in, Note, *Do Not Bet on Unilateral Prohibition of Internet Gambling to Eliminate Cyber-Casinos*, 1999 U. ILL. L. REV. 1045, 1048 (1999).

<sup>12</sup> The Federal Interstate Wire Act, 18 USC § 1084. See Part IV, *infra*.

<sup>13</sup> The Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprising Act, 18 USC § 1952.

<sup>14</sup> The Interstate Transportation of Wagering and Paraphernalia Act, 18 USC § 1953.

<sup>15</sup> See *People v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (Sup. Ct. N.Y. 1999).

<sup>16</sup> 25 U.S.C. § 2701 *et seq.*

<sup>17</sup> Referred to in the act as ‘tribal-state gaming compacts;’ presumably the terminology is meant to provide an analogue to contract law. Individuals and entities enter into contracts (legally-enforceable agreements); states enter into compacts (agreements between sovereigns).

economic development, tribal self-sufficiency, and strong tribal government,”<sup>18</sup> the IGRA mirrors the Supreme Court’s holding in *California v. Cabazon Band of Mission Indians*<sup>19</sup> in stating that “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”<sup>20</sup>

The intention of IGRA was to provide the framework for gaming regulation on Indian reservations. To that end, Congress established an independent regulatory agency, the National Indian Gaming Commission (NIGC),<sup>21</sup> with oversight authority to define and enforce national standards. Part of that standardization involved the classification of gaming operations:

- Class I gaming encompasses traditional games used in ceremonial and social settings<sup>22</sup> that are completely outside the scope of any but tribal regulation and control.<sup>23</sup>
- Class II gaming includes “the game of chance commonly known as bingo . . . including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo.”<sup>24</sup> Importantly, such games may still be defined as Class II even if they are played using a computer, an electronic device, or other technologic aid.<sup>25</sup> Also included in Class II are card games “not explicitly prohibited” by the State, provided they are otherwise in conformity with all other State laws and regulations.<sup>26</sup> Excluded from Class II are “banking card games” (e.g. baccarat, blackjack) and “electronic facsimiles of any game of chance or slot machines of any kind.”<sup>27</sup>
- Class III gaming consists of all gaming that is not class I or II.<sup>28</sup> This area is both the most contentious and the most profitable class of gaming.<sup>29</sup> This class includes so-called

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<sup>18</sup> 25 U.S.C. § 2701(3).

<sup>19</sup> 480 U.S. 202 (1987) (holding held that states cannot ban or regulate the conduct of Indian gaming operations on reservations without explicit Congressional consent).

<sup>20</sup> 25 U.S.C. § 2701(5).

<sup>21</sup> 25 U.S.C.A. § 2702(3).

<sup>22</sup> 25 U.S.C. § 2703(6).

<sup>23</sup> 25 U.S.C. § 2710(a)(1).

<sup>24</sup> 25 U.S.C. § 2703(7).

<sup>25</sup> *Id.*

<sup>26</sup> 25 U.S.C.A. § 2703 (7)(A)(ii)(I).

<sup>27</sup> 25 U.S.C.A. § 2703 (7)(B)(i)(ii).

<sup>28</sup> 25 U.S.C. 2703 §(8). The line between class II and class III gaming is not very distinct, though there has been some sharpening in recent years by courts.

<sup>29</sup> Note, *A Whole New Game: Recognizing the Changing Complexion of Indian Gaming by Removing the “Governor’s Veto” for Gaming on “After Acquired Lands,”* 37 U. MICH. J.L. REFORM 1227, 1245 (Summer 2004); see also Vito J. Racanelli, *Improved Odds*, BARRON’S, Sept. 6, 2004, at 21, 22. (“Slot-machine revenue-the money

‘Vegas-style’ games, such as house-banked card games,<sup>30</sup> roulette, slot machines, and the like.

Class III gaming operations also must be “conducted in conformance with a Tribal-State compact.”<sup>31</sup>

#### **IV. Federal Regulation of Online Gambling**

At the federal level, the Wire Act currently governs the transmission of wagers interstate.<sup>32</sup> The Wire Act states in the relevant part:

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 or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>33</sup>

Because the Wire Act was enacted in 1961, it does not specifically mention the Internet but only references a “wire communication facility.”<sup>34</sup> The Department of Justice has interpreted “wire communication facility” to include the Internet and has maintained that “taking and placing of

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the house keeps after all winning bets are paid-generates 50% to 80% of the take on the typical casino’s floor, far more than any other game.”)

<sup>30</sup> In house-banked games, players can win money from the house; by contrast, player-banked games only allow players to win from each other. See WILLIAM N. THOMPSON, GAMBLING IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, ISSUES, AND SOCIETY 188 (2001). (“A house-banked game is conducted by a gambling enterprise such as a casino, a lottery, a bingo hall, or an organized charity. The game is one in which the player opposes the gambling enterprise, and either the player or the enterprise wins the bet (unless there is a tie). There may be many players (thousands as in a lottery) or a single player (e.g., one player at a blackjack table), but there is only one house—one gambling enterprise. The house (enterprise) runs the game and puts its resources (money) against the resources (money) of all the players. Most, but not all, casino games are house-banked games.”); cf. *id.* at 292. (“In a player banked game, the money wagered by the players is either put against the funds of one other single player who acts as “the bank” (much as in a house-banked game), or it is put into a common pool of funds that is then distributed to the winner (or winners) when the game (hand) is over.”)

<sup>31</sup> 25 U.S.C. § 2710(d)(1)(C)

<sup>32</sup> See Transmission of Wagering Information, 18 U.S.C. § 1084 (1998).

<sup>33</sup> *Id.*

<sup>34</sup> See Note, *supra* note 1, at 1396.

bets on the Internet” or any “knowing ‘use’ of the Internet in connection with a gambling business” is in violation of the Act.<sup>35</sup>

The Wire Act was enacted to fight organized crime because, prior to its passage, states lacked the means to prosecute cross-border gamblers.<sup>36</sup> A safe harbor in the Act, § 1084(b), permits transmission of information assisting in the placement of a wager from a jurisdiction where it is legal to place a bet into a jurisdiction where it is legal to consummate a betting transaction. National gambling prosecutions averaged 60,000 annually in the 1970s, peaked at 87,000 in 1980, and dwindled to 10,000 annually in the late 1990s. As legal gambling has proliferated, national gambling prosecutions have dwindled. There have been no known prosecutions of individual bettors under the Wire Act.

The Transportation of Gambling Devices Act,<sup>37</sup> commonly known as the Johnson Act, “makes it unlawful to knowingly transport a gambling device to a state where such a device is prohibited by law.”<sup>38</sup> “The manufacturers and distributors of gaming devices for interstate commerce must register each year with the United States Department of Justice, and the devices must be appropriately marked for shipment.”<sup>39</sup> A “gambling device” is defined under the act as:

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, 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; or

(2) any other 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

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<sup>35</sup> *Id.*

<sup>36</sup> The following section is taken from a presentation by Robert L. Blumenfeld, Mendel Blumenfeld, LLP, entitled “The Wire Act in the Internet Gambling Era.”

<sup>37</sup> 15 U.S.C. 1171-1178.

<sup>38</sup> Jeffrey Rodefer, “Other Federal Anti-Gambling Statutes,” from *Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466*, GAMBLING LAW REVIEW, available at, <http://www.gambling-law-us.com/Federal-Laws/other-statutes.htm>.

<sup>39</sup> *Id.*

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; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.<sup>40</sup>

Professor Nelson Rose notes that the Johnson Act “[r]equires the device to be ‘designed and manufactured primarily for use in connection with gambling,’ which would exclude all but dedicated terminals.”<sup>41</sup> Recent efforts by the Department of Justice seek to more clearly define a “gambling device” under the Act. Statements by United States Attorney Tom Heffelfinger concerning the proposed changes, which seek to define the limits of Class II games, can be summarized as requiring passage of four tests:

[1] The game must require players to compete against other individuals. The players can’t compete against the machine. [2] Players must take an active role in the playing of the game. No automation is allowed. [3] Players can’t win prizes from games that are based in whole, or in part, on Class II machines. “Side games” are not allowed. [4] The Machine must be “readily distinguishable” from a slot machine or Class III device. It cannot resemble a slot machine in play of game, appearance, speed of play or graphics, for example.<sup>42</sup>

These four criteria are codified in the proposed amendment to the legislation as follows:

(B) the gambling device has been certified as, or is transported for the purpose of certifying it as, a Class II technologic aid pursuant to regulations adopted by the National Indian Gaming Commission that require that the gambling device

- (i) is limited to games that require the players to compete against other individuals in order to win one or more common prizes;
- (ii) requires the players to actively participate in the game;

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<sup>40</sup> Transportation of Gambling Devices Act of 1951, 15 U.S.C. §§ 1171.

<sup>41</sup> I. Nelson Rose, *Internet Gaming Outline*, available at, <http://www.gamblingandthelaw.com/internet.html>; see also I. NELSON ROSE, INTERNET GAMING LAW 153 (“[T]he Johnson Act at present only covers tangible slot machines, roulette wheels, and their sub-assemblies; intangible virtual casino games would not fall under this law if delivered entirely electronically to players.”).

<sup>42</sup> *DOJ proposes major change in Indian gaming law*, INDIANZ.COM, September 16, 2005, available at, <http://www.indianz.com/News/2005/010343.asp>.

(iii) does not allow players to win prizes for games based, in whole or in part, on games that do not constitute Class II gaming; and  
(iv) is readily distinguishable from Class III games based on the manner in which the players participate in the game and the appearance of the game to the players, including but not limited to the speed of play and depictions or graphics used in the game.<sup>43</sup>

The above proposed changes to the Johnson Act are aimed at more clearly distinguishing between Class II and Class III gaming devices and, as such, the applicability of these changes to possibilities of tribal intrastate Internet gaming are arguably minimal—the possibilities discussed in this article do not involve new gaming devices per se and the technologies discussed are not specifically or even usually employed in the pursuit of gaming.<sup>44</sup>

Prior to 1998 the Department of Justice was either not concerned about Internet gambling or did not believe it had jurisdiction to prosecute off-shore Internet gambling enterprises.<sup>45</sup> After 1998 the DOJ did an about face, however, and commenced to prosecute offshore Internet gambling operators, attacked payment processes that allowed gamblers to wager and play casino games over the Internet, and seized Internet gambling funds using the Patriot Act. Antigua, in response, commenced an action against the United States through the World Trade Organization in March 2003. Antigua claims the United States made a commitment to free trade in betting and gambling services and subsequently violated this agreement by enacting measures to

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<sup>43</sup> Proposed Johnson Act Amendments, DEPARTMENT OF JUSTICE, OFFICE OF TRIBAL JUSTICE WEBSITE, *available at*, <http://www.usdoj.gov/otj/johnson.html>.

<sup>44</sup> For an interesting discussion of Class II and Class III gaming distinctions in an online world, see INTERNET GAMING LAW 171 (“In the on-line gaming world, which has always been computerized and server fed, the division between so-called Class II and Class III was never a significant consideration. As with the Intranet games above [employed at Indian casinos], the differences between the Internet games are merely a matter of different subroutines in the software: specific games; random number generation patterns, game animation, and background sequences. As tribal gaming makes increasing use of Web sites and the Internet, it may no longer even make sense to attempt to distinguish Class II games from Class III by different playing mechanisms, or modes of play, for these will be virtually identical. The very division of gaming between Class II and Class III may have outlived its usefulness, and have to be changed. In the future it may be necessary to sort games by number of people participating, and/or payout and betting limits.”).

<sup>45</sup> See “The Wire Act in the Internet Gambling Era.”

interfere with its free trade commitment. In the initial proceedings, Antigua and Barbuda argued that the U.S. laws prohibiting the use of credit cards to settle Internet gambling debts threatened 3,000 jobs.<sup>46</sup> The U.S. responded that such laws helped to curb money laundering and to “protect[] vulnerable members of society against gambling (such as preventing kids using their parents credit card to gamble).”<sup>47</sup> In 2004 a WTO panel issued an opinion finding that “US federal (such as the Wire Wager Act) and state laws breached the general agreement on trade and services (GATS), international rules that came into effect in 1994.”<sup>48</sup> Recently, an appeals panel issued a ruling that the United States can maintain many of its restrictions on Internet gambling.<sup>49</sup> The panel did find that a 2000 law on horse betting does discriminate against other countries.<sup>50</sup> The key finding, however, was an exception in international trade laws whereby a county can enforce laws intended to protect the “public morals.”<sup>51</sup> The *New York Times* quoted Nelson Rose as saying, “Of course, both sides can say that they won. But the reality is that it’s a pretty big win for the United States.”<sup>52</sup> The *Times* also quoted Peter F. Allgeier, the acting United State trade representative: “This report essentially says that if we clarify existing U.S. Internet gambling restrictions in a certain way, we’ll be fine.”<sup>53</sup>

Recent attempts by Senator Kyl of Arizona to pass prohibitive Internet gaming legislation proved unsuccessful. The proposed legislation “aimed to curb Internet gambling by requiring

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<sup>46</sup> See John Leyden, *WTO Rules Against US Gambling Laws*, THE REGISTER (November 11, 2004), available at, [http://www.theregister.co.uk/2004/11/11/us\\_gambling\\_wto\\_rumble/](http://www.theregister.co.uk/2004/11/11/us_gambling_wto_rumble/).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; W.T.O Report of the Panel, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (November 10, 2004), available at, [http://www.wto.org/english/news\\_e/news\\_e.htm](http://www.wto.org/english/news_e/news_e.htm).

<sup>49</sup> See Fox Butterfield, *U.S. Limits on Internet Gambling are Backed*, N.Y. TIMES (April 8, 2005), at C14; W.T.O Report of the Appellate Body, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (April 7, 2005), available at, [http://www.wto.org/english/news\\_e/news\\_e.htm](http://www.wto.org/english/news_e/news_e.htm).

<sup>50</sup> *See id.*

<sup>51</sup> *See id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

banks and credit card companies to refuse payments to online gambling sites.”<sup>54</sup> The Senate voted down the proposed amendment to the appropriations bill on September 15, 2005.<sup>55</sup> Senator Barbara Mikulski of Maryland, speaking on behalf of an anonymous colleague who objected to the proposed amendment, noted that “the nature of [Kyl’s] legislation was not in order on the appropriations bill.”<sup>56</sup> The objection was sustained, and the amendment was defeated on a technicality.<sup>57</sup> This latest defeat marked the most current attempt by Senator Kyl at federal control of the burgeoning Internet gaming industry; Kyl has attempted and failed at similar legislation each of the last seven years.<sup>58</sup> Although the Kyl amendment did not pass, it is critically important to note that it would still have allowed Internet based gaming if “the bet or wager is placed and received or otherwise made within a single state.”<sup>59</sup>

The Internet has also expanded the reach of existing gambling formats (sportsbooks, table games) and made gambling more mobile and accessible than ever before.<sup>60</sup> An important new gambling format that has greatly increased in popularity is peer to peer gambling (P2P). This format includes proposition bets through betting exchanges, peer-to-peer poker, and fantasy leagues. This expansion has caused another basic scenario shift in law enforcement—where traditionally the focus has been on prosecuting the house and not the individual gambler, P2P gambling does not involve a house. Consequently, prosecution and jurisdiction of this gambling activity is uncertain under state and federal laws. Law enforcement maintains that the bet takes

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<sup>54</sup> *Id.*

<sup>55</sup> Benjamin Grove, *Legislation to outlaw online gambling suffers setback*, LAS VEGAS SUN, September 16, 2005, at C1.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Katherine Griffiths and Rachel Stevenson, *US politicians foiled in effort to ban web gaming*, INDEPENDENT (UK), September 16, 2005, at Business 57.

<sup>59</sup> Text of Kyl amendment, Congressional Record, p. S10132, September 15, 2005, 109<sup>th</sup> Congress.

<sup>60</sup> The following is taken from a presentation by Martin Owens, Jr., at the Global Gaming Expo entitled “P2P: Online Gambling’s Fastest-Growing Sector” (October 6, 2004). See also, Emily Kumler, *U.S. online gaming laws outdated, lawyer suggest*, LAS VEGAS REVIEW-JOURNAL (October 11, 2004), available at, [http://www.reviewjournal.com/lvrj\\_home/2004/Oct-11-Mon-2004/business/24936161.html](http://www.reviewjournal.com/lvrj_home/2004/Oct-11-Mon-2004/business/24936161.html).

place where the bettor is located while operators claim the bet takes place where the operators are located. Under the common law, in the case of a bargain made by an offer and an acceptance, the general rule is that where the contract itself is silent as to the place it is made, the contract will be deemed made in the place where the acceptance becomes operative. This rule would seem to suggest that the bet should be considered as taking place at the location where it is capable of being enforced, that is, where the bet is recorded and money passed. Thus, the rule from the common law seems to be in favor of operators on this issue.

Three federal cases are important regarding the legality of any attempted Internet gambling by tribes. Two federal cases have discussed the applicability of the Wire Act to Internet gambling. In *State v. Coeur D'Alene*, which involved an attempted Internet lottery by the tribe, the Eighth Circuit suggested the Wire Act could apply to online gambling but did not reach a final decision on the matter. The Fifth Circuit held that the Wire Act applied only to sports betting in *In re MasterCard Inc., Internet Gambling Litigation*, which involved a class action by online gamblers seeking relief from credit card debts incurred from gambling online. Finally, in *AT&T Corp. v. Coeur D'Alene*, the Ninth Circuit held that a final agency decision by the National Indian Gaming Commission approving a telephone-based lottery meant that the lottery was legal and in accordance with state laws until a further challenge by the federal government. These three cases are discussed, in turn, in the following sections.

The Eighth Circuit suggested the Wire Act was applicable to non-sports betting in *State v. Coeur D'Alene Tribe* (1999).<sup>61</sup> In this case the State of Missouri filed two state court actions seeking to enjoin Coeur D'Alene Tribe and its contractor from conducting an Internet gambling program with Missouri residents. The tribe and contractor removed actions to federal court and argued that IGRA completely preempted state regulation of tribal gaming. The court held that

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<sup>61</sup> *State v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999), *cert. denied*, 527 U.S. 1039 (1999).

although IGRA completely preempted states' attempts to regulate or prohibit gaming activities on Indian lands, it did not preempt states' attempts to regulate or prohibit gaming activities on non-Indian lands. The Eight Circuit stated,

On remand, the court must initially determine whether the Tribe's internet lottery is a gaming activity on Indian lands of the Tribe. *See* 25 U.S.C. §§ 2702(3), 2710(d). If the court concludes the lottery is not conducted on Indian lands when a participant plays from a computer located in Missouri, it must grant the State's motion to remand, and the issue of tribal sovereignty will be decided in the first instance by the state courts.<sup>62</sup>

In a footnote to this statement, the Court noted *AT&T Corp. v. Coeur D'Alene Tribe* (D. Idaho 1998) and the Wire Act.<sup>63</sup> The court footnoted to the 1998 decision by the District Court of Idaho in *AT&T Corp. v. Coeur D'Alene Tribe* that a wager placed to a tribal casino from a telephone off the reservation was not a bet on tribal lands.<sup>64</sup> It is important to note, however, that this decision was subsequently overruled by the Ninth Circuit.<sup>65</sup>

In *In re MasterCard Inc., Internet Gambling Litigation* (2002), the Fifth Circuit held that the Wire Act pertains only to sports betting, stating, "Because the Wire Act does not prohibit non-sports Internet gambling, any debts incurred in connection with such gambling are not illegal."<sup>66</sup> In this class action the gamblers used credit cards to buy credits on a website. The gamblers used their credits to gamble online, lost, and incurred debts. The gamblers then attempted to escape their debts by claiming they were illegal and therefore unenforceable.<sup>67</sup> The court found that these were legal debts because the transaction between the credit card holders and the credit card company was over after the holder purchased the credits. What they did with

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<sup>62</sup> *Id.* at 1109.

<sup>63</sup> *See id.* at n. 5.

<sup>64</sup> *See AT&T Corp. v. Coeur D'Alene Tribe*, 45 F. Supp. 2d 995 (D. Idaho 1998).

<sup>65</sup> *See AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), *amending and superseding* 283 F.3d 1156 (9th Cir. 2002), *and reversing* 45 F. Supp. 2d 995 (D. Idaho 1998).

<sup>66</sup> *In re MasterCard Inc., Internet Gambling Litig.*, 313 F.3d 257 (5th Cir. 2002).

<sup>67</sup> *See id.* at 260-61.

the credits afterward did not involve the credit card companies.<sup>68</sup> Consequently, tribes in the Fifth Circuit stand the best chance at not being prohibited by the Wire Act to conduct interstate gaming. This statement also assumes that the state where the tribe resides and the state of the gambler do not have their own prohibitions against Internet gambling. Other circuits have yet to rule on whether the Wire Act applied to all forms of gambling or solely sports betting.

In *AT&T Corp. v. Coeur D’Alene Tribe*, AT&T brought a declaratory judgment action against the Coeur D’Alene Tribe, seeking relief from tribal court judgment requiring the company to provide interstate toll-free service for the tribe’s interstate lottery.<sup>69</sup> The District Court of Idaho reversed in favor of AT&T. On appeal, the Ninth Circuit held that approval by National Indian Gaming Commission (NIGC) of a management contract and tribal resolution authorizing tribe’s national lottery constituted a final agency decision that the lottery complied with IGRA:

The NIGC is statutorily obliged to reject any lottery proposal that does not conform to IGRA. *See* 25 U.S.C. § 2706(b)(10) (requiring the NIGC to promulgate regulations and guidelines to implement IGRA); and 25 C.F.R. § 531.1(a) (“[A]ll gaming covered by the contract will be conducted in accordance with the Indian Gaming Regulatory Act.”). In fact, the NIGC has previously refused to approve management agreements when it believed the proposed gaming activity will not be conducted “on Indian lands” for IGRA purposes. *See, e.g., Miami Tribe of Oklahoma v. United States*, 5 F.Supp.2d 1213, 1218 (D.Kansas, 1998). The record contains ample and undisputed evidence that the Commission was aware that the Tribe planned to accept telephone orders from individuals outside the Reservation. Read in the context of a detailed regulatory scheme and multiple final agency actions by the NIGC, the NIGC’s approval of the Tribe’s management contract evidences the NIGC’s determination that IGRA permits operation of the Lottery even though it allows ticket sales via off-Reservation phone calls.

For their part, the *amici* states and the United States point to the opinion of a new NIGC Chairman, who believes that the Lottery is not protected by the IGRA insofar as it involves off Reservation ticket purchases. But even if the Chairman

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<sup>68</sup> *See* *In re MasterCard Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 482 (E.D. La. 2001), *affirmed*, 313 F.3d 257 (5th Cir. 2002).

<sup>69</sup> *See id.*

may undo the work of a predecessor under some circumstance, he may not do so here.

The United States and any of the *amici* states were free to challenge the NIGC's final agency decision directly in federal court under 25 U.S.C. § 2714. None did so. Unless and until the NIGC's decision is overturned by means of a proper challenge and appeal, the IGRA governs the Lottery.<sup>70</sup>

The Coeur D'Alene subsequently did not implement their lottery.<sup>71</sup> After much litigation, threats from federal and state authorities, and a proposed bill in Congress to make the tribe's lottery illegal,<sup>72</sup> the Coeur D'Alene abandoned the venture. The press speculated that "The tribe must have figured the fight wasn't worth it. It closed its virtual casino and invested in brick and mortar ventures. The Coeur D'Alene tribe is now one of Northern Idaho's largest employers."<sup>73</sup>

#### A. Remote Class II Gaming Legal Analysis

In addition to the Coeur D'Alene, other tribes have explored online gambling. In 2000 the Lac Vieux Desert Band of Chippewa Indians sought an opinion from the NIGC for a proposed Internet bingo game.<sup>74</sup> The Lac Vieux reasoned that the Internet was merely an aid in

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<sup>70</sup> See *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d at 909.

<sup>71</sup> See *Gambling in Cyberspace*, INDIAN COUNTRY TODAY (August 14, 2002) (noting abandoned attempts by the Coeur D'Alene to implement telephone-based and Internet lotteries).

<sup>72</sup> See Ryan D. Hammer, Note, *Does Internet Gambling Strengthen the U.S. Economy? Don't bet on it*, 54 FED. COMM. L.J. 103, 108-10 (2001) (Noting failed attempts by Congress to pass Internet Gambling Prohibition Act of 1997, S. 474, 105th Cong., and 1999, S. 692, 106th Cong.); see also Mark Trahan, *Internet-gambling bill has only one target*, LAS VEGAS REVIEW-JOURNAL, at 19B (August 14, 1998) (discussing proposed Federal ban on Internet-gambling and stating, "Since no state has set up its own Internet lottery, the bill really would do just one thing: Outlaw the Coeur D'Alene operation."); Tony Batt, *Senate approves pulling plug on Internet lottery*, LAS VEGAS REVIEW-JOURNAL, at 1A (July 24, 1998) (noting the proposed amendment to Internet Gambling Prohibition Act of 1997 to exempt Coeur D'Alene lottery from Internet gambling prohibition was voted down by count of 82-18 in the Senate).

<sup>73</sup> Mark Trahan, *Feds Can't Stop Internet Gambling*, SEATTLE POST-INTELLIGENCER, at B4 (April 5, 2001).

<sup>74</sup> See Kevin Washburn, "Re: Lac Vieux Desert Internet Bingo Operation," NIGC Opinion (October 26, 2000); see also Kevin V. Di Gregory, "Re: Use of the Internet to Conduct Bingo Gambling Operation," Opinion of the Department of Justice, Criminal Division (November 17, 2000) ("The Indian Gaming Regulatory Act authorizes tribal gaming activities only on Indian lands, and neither authorizes nor prohibits gambling activities off Indian lands. The lawfulness of interstate tribal gaming operations, conducted in whole or in part off Indian lands, is therefore determined by reference to the laws of the states in which the gambling activities occur, and federal law. If the activities of such gambling operations are conducted off Indian lands in violation of state laws, the gambling operations would also then potentially violate federal law. See, e.g., 19 U.S.C. §§ 1952, 1955. It appears to us that the Tribe's internet gambling business would be conducted, in part, off Indian lands, and that a number of specific

playing a class II bingo game.<sup>75</sup> A critical issue in Kevin Washburn’s NIGC response is whether or not an Internet casino is deemed to be on Indian lands. The letter states that the game would not be legal because the gambling did not take place on tribal lands.<sup>76</sup> In his letter Mr. Washburn relies on a district court decision from Idaho finding that Coeur D’Alene’s Internet lottery was not on Indian lands and therefore outside the scope of the IGRA.<sup>77</sup> This decision was subsequently overruled, and a decision on exactly what constitutes Indian lands has not been made.<sup>78</sup> In the litigation that followed this opinion, the District Court of the District of Columbia held that this NIGC letter did not represent a final agency decision under IGRA and, therefore, was not subject to judicial review.<sup>79</sup>

The NIGC Opinion stated, “Pursuant to IGRA, a tribe may engage in, or license and regulate, class II and class III gaming on Indian lands within the tribe’s jurisdiction if (1) the Indian gaming facility is located within a state that permits such gaming for any purpose by any person, organization, or entity, (2) such gaming is not otherwise specifically prohibited on Indian lands by federal law, and (3) the tribe adopts an ordinance or resolution which permits gaming that is then approved by the Chairman of the NIGC.”<sup>80</sup> As regards the first point of his opinion, that “the Indian gaming facility is located within a state that permits such gaming for any purpose by any person, organization, or entity,” the preceding discussion on state laws regarding Internet gambling will definitely be applicable to any attempts by tribes to engage in Internet gambling. Therefore, a number of states, either through Internet gambling prohibition statutes or

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gambling activities associated with that business would also occur off Indian lands. These activities include the placement of wagers by players, the registration and establishment of gambling accounts to play, and the distribution of winnings. Such off-Indian lands gambling activities fall outside of IGRA’s preemptive purview.”)

<sup>75</sup> See “Lac Vieux Internet Bingo Opinion” (October 26, 2000).

<sup>76</sup> See *id.*

<sup>77</sup> See *AT&T Corp. v. Coeur D’Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), *amending and superseding* 283 F.3d 1156 (9th Cir. 2002), *and reversing* 45 F. Supp. 2d 995 (D. Idaho 1998).

<sup>78</sup> See *id.*

<sup>79</sup> See *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Ashcroft*, 2004 WL 3168240 (D.D.C. 2004).

<sup>80</sup> “Lac Vieux Internet Bingo Opinion” (October 26, 2000).

interpretations of existing anti-gambling statutes, will effectively prohibit tribal Internet gambling. This limitation is not the case in a number of states, like Michigan, which have yet to voice opinions for or against Internet gambling. The second point, that “such gaming is not otherwise specifically prohibited on Indian lands by federal law,” currently is not at issue because the federal government has not *specifically* banned Internet gambling on tribal lands. Concerns still exist about applicable federal statutes for Internet gambling, discussed above.

The laws of agency play a crucial role in discussion of Internet gambling.<sup>81</sup> Mr. Washburn summarized the applicability of agency law to tribal gaming interests in a 2000 NIGC opinion.<sup>82</sup> This opinion was requested by Parker Games, Inc. and concerned a proposed bingo game, called National Indian Bingo (NIB), which involved a progressive jackpot played by connections linking several tribal casinos together.<sup>83</sup> In this game the player would purchase bingo cards at the casino. He could then wait and play the card himself at the casino, watching the drawings as they are broadcast on a screen, or designate the tribe to play his card on his behalf. The NIB opinion specified that:

NIB could be played by the purchaser/player or through a designated legal agent. Because the tribal gaming facility would not know the identities of the players who are present in person, the tribal gaming facility, acting as the legally appointed agent for each player, would play all of the cards purchased for a given drawing. To assure that each purchaser designates the tribal gaming facility as legal agent, the bingo card dispenser machine would dispense an original card with a tear off or peel off duplicate card attached. Each player would be required

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<sup>81</sup> “Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests assent or otherwise consents so to act.” RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tentative Draft No. 2 2001); “A person is (a) an individual; (b) an organization or association that has legal capacity to possess rights and incur obligations; (c) a government, political subdivision, or instrumentality or entity created by government; or (d) any other entity that has legal capacity to possess rights and incur obligations.” *Id.* at § 1.04(6) (Tentative Draft No. 2 2001); “An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.” *Id.* at § 2.01 (Tentative Draft No. 2 2001).

<sup>82</sup> See Kevin Washburn, “Re: National Indian Bingo Game Classification Opinion,” NIGC Opinion (November 14, 2000).

<sup>83</sup> “National Indian Bingo Opinion” (November 14, 2000).

to validate the original card by filling in the identifying information on the card and by designating the tribal gaming facility as legal agent to play the card and at time won, to claim, receive, and hold any prize for and on behalf of an absent purchaser.

Purchasers would further be required to tear or peel off and retain the duplicate and deposit the original in a secure deposit box. If the purchaser is present when the bingo game is played, the purchaser could play using the duplicate and covering the numbers when balls are drawn. If the purchaser is not physically present, the tribal gaming facility, acting as agent, would play the original card by covering the numbers on the original card when the bingo balls are drawn.

In either situation, the agent would play all original cards.<sup>84</sup> Summarizing the applicability of the law of agency under the IGRA, Mr. Washburn continues:

*IGRA contains no statutory prohibition on the use of agents to play the game of bingo. The bingo definition contained in IGRA requires only that the “holder of the card” cover the numbers. 25 U.S.C. § 2703 (7)(A)(i)(II). The “holder” is not defined. The holder in NIB [National Indian Bingo] is either the player or the player’s designated agent. Although the bingo definition in the NIGC regulations replaces the word “holder” with the word “player,” this is a distinction without a difference when the law of agency is applied to the analysis. It is a fundamental tenet of the law of agency that the acts of the agent are deemed to be the acts of the principal. See 3 Am. Jur. 2D Agency § 2 (1986); See also] Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 272 (5<sup>th</sup> Cir. 1980); U.S. v. Sylvanus, 192 F.2d 96, 108 (7<sup>th</sup> Cir. 1951); and Lux Art Van Service, Inc. v. Pollard, 344 F.2d 883, 887 (9<sup>th</sup> Cir. 1965). When the agent plays the NIB card for the player, the act of playing the card is deemed to be the act of the player/principal. The legal effect is that the agent is the player. Therefore, the use of agents violates neither IGRA’s provision regarding the holder nor NIGC’s regulations that discuss the player [emphasis added].<sup>85</sup>*

#### B. Remote Class II Gaming Possibilities

Given the state of existing law and the regulation of online and Indian gaming, several possibilities seem to exist that would allow tribes to legally engage in Internet gaming. One possibility that surfaces is that if gambling occurred entirely within a state that has not outlawed or otherwise regulated Internet gambling, such gambling might be permissible. The concern arises that it may be difficult to tell where online gamblers are based. However, a GPS

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

transponder attached to the gambler's computer could pinpoint his location and ensure that he is indeed within state lines before allowing him to log on to the gambling site.<sup>86</sup> Certain measures can be taken to ensure that all monetary transactions for gambling, as well as all the gambling activities, occur within the reservation or Indian property. For example, the tribe can require that all online gamblers establish accounts with tribal banks on the reservation, and that all money gambled online come from the on-reservation bank. Additionally, the tribes can further strengthen their position by maintaining all servers for connecting to the Internet on tribal property.

Another possibility for class II internet gaming would be to use video conferencing equipment, with a connection at a tribal casino and a connection at the gambler's residence within the same state. A video conference gaming system, using the law of agency, might provide a safe bet for tribes wanting to pursue Internet bingo. The gambler would grant his agent at the casino actual authority to cover the squares on the card as they are called and to voice "bingo" upon winning, personally instructing him by way of a video conferencing system to make these moves at each stage of the game. Another scenario could be as simple as granting an agent at the tribal casino actual authority to play the bingo card. With this scenario the agent would have express authority to mark off squares as they are called and to shout out "bingo" upon winning. A video conference system would allow the gambler to view all of this as it

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<sup>86</sup> The use of electronic technology is clearly permitted in class II games in cases where the technology is an aid to game and not the game itself. See Penny J. Coleman, "Re: NOVA Gaming Bingo System," NIGC Opinion (April 4, 2005), available at, <http://www.nigc.gov/nigc/documents/opinions/novagofin2.jsp> ("IGRA provides that class II games may utilize "electronic, computer, or other technological aids." 25 U.S.C. § 2703(7). NIGC regulations define a technological aid as "any machine or device that: (1) assists a player or the playing of a game; (2) is not an electronic or electromechanical facsimile; and (3) is operated in accordance with applicable Federal communications law." 25 C.F.R. § 502.7(a). In short, if a game contains the fundamental characteristics of a class II game and is played using an electronic or other technological device, the determining factor in its classification is whether the electronic device is an aid to the play of a game, in which case the game is class II, or whether the electronic device is a facsimile of a game, in which the game is class III.").

happens. The agent could even post the same card over the Internet and allow the gambler to fill in the squares as they are called out. The gambler would feel like he is playing the card in real time even though the agent is the one legally playing the card.

To get a better idea of this scenario, take the example of an agent on tribal grounds and a principal standing two feet outside of the tribal land, voicing instructions to his agent to cover a bingo square or to shout out “bingo.” If the acts of the agent are the acts of the principal, which Mr. Washburn writes to be “a fundamental tenet of the law of agency,” then this activity must be a permissible act. Next, consider the possibility of a video conferencing system, entirely intrastate, with the principal telling his agent to make certain gambling moves on his behalf. This scenario is merely an extension of the man two feet off tribal land. The two scenarios, from a legal perspective, are identical. And in both cases, “the legal effect is that the agent *is* the player.”

### C. Remote Class III Gaming Possibilities

Much of the preceding discussion is applicable to Internet gambling with class III gambling. Class III games are the most lucrative and include all house-banked card games and slot machines. All class III gaming is dependent on tribal-state compacts authorizing specific games. In the case of class III gambling via the Internet, tribes would potentially have to negotiate a compact to cover this “new” type of gaming. This negotiation might not be necessary if the tribe has already negotiated slot machines with a state. The existing compact might be interpreted as including intrastate Internet slot machine games. This argument gains persuasion when one invokes the laws of agency. Under the principles discussed above, all the gambling activity takes place on tribal land because “the agent is the player” and not the principal sitting at a computer terminal off the reservation. To illustrate, consider the example of

a gambler sitting at a slot machine in a tribal casino talking on a cell phone. The person on the other end tells the gambler to insert a dollar on her behalf and pull the lever for her. This phone call is an everyday occurrence at tribal casinos and clearly not in violation of tribal-state gaming compacts. The same principles of agency are involved in the Internet slot machine proposal.