Gaming in the United States: Native American: overview

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A Q&A guide to gaming in the United States: Native American.

The Q&A provides a high level overview of the legislative framework of gambling regulation; the regulatory authorities; gambling products; land-based gambling; regulation and licensing; online gambling; B2B and B2C operations; mobile gaming and interactive gambling; social gaming; blockchain technology; gambling debts; tax; advertising and developments and reform.

To compare answers across multiple jurisdictions, visit the *Gaming Country Q&A Tool*.

This Q&A is part of the *Gaming Global Guide*. The gaming global guide serves as a starting point for understanding the regulatory framework of land-based and online gaming.

To avoid confusion with the country India, this chapter uses the terminology "Native American" rather than "Indian", with the exception of references to the names of legislation, regulatory bodies, defined terms and direct quotes.

Legislative framework of gambling regulation

Overview

1. What legislation applies to gambling?

The present system of regulation of Native American gaming grew out of the division of jurisdiction among the federal government, the states, and the tribes. The Indian Gaming Regulatory Act 1988 (IGRA) is a United States federal law, which establishes the jurisdictional framework that currently governs Native American gaming. The regulatory scheme under IGRA represents the most direct and comprehensive involvement of the federal government in gaming regulation. IGRA occupies the field of Native American gaming regulation and also provides for the application of state law to a significant degree (*Public Law 100 - 497, 25 U.S.C. § 2701 et seq*).

Definitions of gambling

2. What is the legal definition of gambling in your jurisdiction and what falls within this definition?

General definition
IGRA establishes three classes of games with a different regulatory scheme for each.

Class I. Class I gaming is defined as traditional Native American gaming and social gaming for minimal prizes. Regulatory authority over class I gaming is vested exclusively in tribal governments.

Class II. Class II gaming is defined as the game of chance commonly known as bingo (whether or not electronic, computer, or other technological aids are used in connection therewith) and if played in the same location as the bingo, pull tabs, punch board, tip jars, instant bingo and other games similar to bingo.

Class II gaming also includes non-banked card games, that is, games that are played exclusively against other players rather than against the house or a player acting as a bank. IGRA specifically excludes slot machines or electronic facsimiles of any game of chance from the definition of class II games.

Native American tribes retain their authority to conduct, license, and regulate class II gaming provided that the state in which the tribe is located permits such gaming for any purpose and the tribal government adopts a gaming ordinance approved by the National Indian Gaming Commission. Tribal governments are responsible for regulating class II gaming with oversight from the National Indian Gaming Commission (*25 U.S.C. § 2703(3)*).

Class III. The definition of class III gaming is extremely broad. It includes all forms of gaming that are not class I or II. Generally, class III is referred to as casino-style gaming. The following are included in the class III category:

- Games commonly played at casinos (such as slot machines, blackjack, craps, and roulette).
- Wagering games and electronic facsimiles of any game of chance.

IGRA restricts tribal authority to conduct class III gaming. Before a tribe can lawfully conduct class III gaming, the following conditions must be met:

- The particular form of class III gaming that the tribe wants to conduct must be permitted in the state in which the tribe is located.
- The tribe and the state must have negotiated a compact that has been approved by the Secretary of the Interior, or the Secretary must have approved regulatory procedures.
- The tribe must have adopted a tribal gaming ordinance that has been approved by the Chairman of the National Indian Gaming Commission.

(*25 U.S.C. § 2703(8).*)

Online gambling

It is unclear whether tribes can accept online wagers from bettors who are not on Indian lands. One of the purposes of IGRA is to establish independent federal regulatory authority and standards for gaming on Indian lands (*25 U.S.C. § 2702(3)*). IGRA only applies to gaming on "Indian lands", which are defined as :

- All lands within the limits of any Indian reservation.
- Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any tribe or individual subject to restriction by the United States against alienation and over which a tribe exercises governmental power.

(*25 U.S.C. § 2703(4).*)

Therefore, a preliminary issue is whether internet gaming is gaming on "Indian lands", or on any lands at all.

A nexus to the land can be created at the place where:

- A wager is placed.
- A wager is accepted.
- Core components, including servers and databases running the games and storing account information, are located.

In a games classification advisory opinion, the National Indian Gaming Commission noted that "the use of the Internet, even though the computer server may be located on Indian lands, would constitute off-reservation gaming to the extent any of the players were located off of Indian lands" (*13 March 2011, letter from Kevin K Washburn, General Counsel, NIGC, to Joseph Speck, Nic-A-Bob Productions, enclosing 22 June 1999, letter from Montie R Deer, Chairman, NIGC, to Ernest L Stensgar, Chairman, Coeur d'Alene Tribe, re: National Indian Lottery*).

Whether a particular type of online gambling must be the subject of a compact with the state depends on whether the gambling is considered class II or class III. If an online offering is considered a "technological aid" to gaming, then the underlying game is reviewed to determine if it is a class II game or a class III game and consequently the subject of a compact.

Electronic, computer or other technologic aid means any machine or device that:

- Assists a player or the playing of a game;
- Is not an electronic or electromechanical facsimile; and
- Is operated in accordance with applicable federal communications law.

Electronic, computer or other technologic aids include, but are not limited to, machines or devices that:

- Broaden the participation levels in a common game;
- Facilitate communication between and among gaming sites; or
- Allow a player to play a game with or against other players rather than with or against a machine.

(*25 C.F.R. 502.7.*)

Examples of electronic, computer or other technologic aids include, among others:

- Pull tab dispensers and/or readers.
- Telephones.
- Cables.
- Televisions.
- Screens.
- Satellites.
- Bingo blowers.
- Electronic player stations.
- Electronic cards for participants in bingo games.

(*25 C.F.R. 502.7.*)

Technological aids facilitate communication between and among gaming sites and allow patrons to play games with, or against, others rather than against a machine. Technological aids are distinguishable from electronic or electromechanical facsimiles of games. Electronic facsimiles, also known as electromechanical facsimiles, incorporate all the characteristics of the game, and completely replicate the entire game. Electronic facsimiles are considered class III games and must be the subject of a compact under IGRA (*25 U.S.C. § 2703(7)(B); 25 C.F.R.502.8*). Therefore, whether an online game is either a technological aid (class II) or an electronic facsimile (class III) will dictate whether it must be the subject of a tribal-state compact.

Poker games that are not banked against the house are considered class II games under IGRA if they are authorised by state law (*25 U.S.C. § 2703(7)(A)(ii)*). It is unclear whether this definition excludes card games played by electronic means. There is some support in the Congressional Record surrounding the adoption of IGRA for the position that electronic card games that are not banked against the house are class II games. In testimony before the Senate Committee on Indian Affairs in 1999, the Deputy Assistant General noted that although the IGRA allowed "some electronic co-ordination between gaming facilities conducted on Indian lands," he qualified this statement by opining that "to the extent that Indian tribes seek to offer gaming to citizens of various states, where such gaming does not take place solely on Indian lands and is not authorised under state law, there is no compelling reason to exempt Indian tribes from the otherwise generally applicable provisions of the legislation for such off-reservation gaming" (*Testimony of Kevin V DiGregory, Deputy Assistant Attorney General, Dept. of Justice, Addressing Internet Gaming and Indian Gaming Before the Senate Committee on Indian Affairs, 9 June 1999*).

Electronic games of chance are not considered class II games under IGRA (*25 U.S.C. § 2703(7)(B)*). Whether poker is a game of chance or a game of skill has been the subject of considerable debate. Poker is defined as a gambling game in both Nevada and New Jersey, and at least one federal court has held that poker is a game of chance. It is unclear how the National Indian Gaming Commission will classify card games played by electronic means, or whether it considers poker to be a game of skill or a game of chance. If internet poker is considered a class II game, such gaming is not required to be offered pursuant to a compact (*25 U.S.C. § 2710(b)*). If internet poker is considered a class III game, such gaming must be the subject of a compact between a state and a tribe (*25 U.S.C. § 2710(d)(1)(C)*).

Land-based gambling

IGRA only applies to gaming on "Indian lands" (*see above, General definition*) (*25 U.S.C. § 2703(4)*). A tribe seeking to acquire land into trust must apply to the Bureau of Indian Affairs and comply with the regulations in 25 C.F.R. Part 151, which implement the Secretary of the Interior's trust acquisition authority under the Indian Reorganization Act. The tribe must submit a fee-to-trust application to the Bureau of Indian Affairs requesting that the Department of the Interior accept trust title to certain lands. The application must include details regarding the tribe's plans for the land (for example, government buildings, casino-resort complex and so on).

A tribe's fee-to-trust application must meet two threshold requirements of the Secretary of the Interior's land acquisition policy set forth in 25 C.F.R.151.3. First, land can be acquired in trust status for a Native American tribe or individual. A "tribe" includes any Native American tribe or nation "which is recognized by the Secretary as eligible to receive the special programmes and services from the Bureau of Indian Affairs" (*25 C.F.R.151.2*). Second, land can be acquired for a tribe in trust status when the:

- Property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area.
- Tribe already owns an interest in the land (that is, the tribe owns an interest in an off-reservation asset and seeks to consolidate that interest).
- Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Native American housing.

The tribe's trust application must also address the Secretary of the Interior's statutory authority for the acquisition of the land into trust under 25 C.F.R.151.10(a). In light of the United States Supreme Court's February 2009 decision in *Carcieri v Salazar*, the Secretary of the Interior must make a determination as to whether the tribe was "under federal jurisdiction" in 1934, when the Indian Reorganization Act was enacted. This analysis is highly fact specific, and must include evidence of the tribe's continuous political existence and a continuous course of dealings that reflects federal supervision of the tribe and its members prior to, and including, 1934 (for example, treaty negotiations, federal appointment of tribal leaders, secretarial approval of attorney contracts, and the provision of Indian Services such as probate and homesteading) (*555 U.S. 379 (2009)*).

The trust application must also address:

- The need of the tribe for additional land (*25 C.F.R. 151.10(B)*).
- The purposes for which the land will be used (*25 C.F.R. 151.10(C)*).
- The impact on the state and its political subdivisions resulting from the removal of land from the tax rolls (*25 C.F.R. 151.10(E)*).
- The consideration of jurisdictional problems and potential conflicts of land use that may arise (*25 C.F.R. 151.10(F)*).
- Whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust (*25 C.F.R. 151.10(G)*).
- Compliance with environmental laws (*25 C.F.R. 151.10(H)*).
- The location of the land relative to state boundaries and its distance from the boundaries of the tribe's reservation (*25 C.F.R. 151.11(B)*).
- The anticipated economic benefits associated with the proposed use (*25 C.F.R. 151.11(C)*).

Certain lands that are acquired after the passage of IGRA in 1988 are treated under the statute as though they were part of reservation lands and, therefore, are eligible for gaming purposes. These types of lands include lands that are located within or contiguous to the boundaries of the tribe's reservation, or are within the tribe's last recognised reservation within the state(s) within which such tribe is presently located. Lands that are taken into trust for the settlement of a land claim, as part of an initial reservation, or as restoration of lands for a tribe that is restored to federal recognition are excepted from the IGRA's prohibition to place certain tribes on equal footing. If lands acquired in trust after 18 October 1988, do not qualify for gaming under an exception, a tribe can still conduct gaming if the Secretary of the Interior makes a two-part determination that approves of gaming on the land, and the governor of the state in which the land is located concurs.

Regulatory authorities

3. What are the regulatory or governmental bodies that are responsible for supervising gambling?

Regulatory authority over class I gaming is vested exclusively in tribal governments. Tribal governments are responsible for regulating class II gaming with National Indian Gaming Commission oversight (*25 U.S.C. § 2703(3)*). IGRA restricts tribal authority to conduct class III gaming. Before a tribe can lawfully conduct class III gaming, the following conditions must be met:

- The particular form of class III gaming that the tribe wants to conduct must be permitted in the state in which the tribe is located.
- The tribe and the state must have negotiated a compact that has been approved by the Secretary of the Interior, or the Secretary must have approved regulatory procedures.
- The tribe must have adopted a tribal gaming ordinance that has been approved by the Chairman of the National Indian Gaming Commission.

(*25 U.S.C. § 2703(8).*)

When a Native American tribe and a state negotiate a compact under IGRA, there must be a discussion of the allocation of gaming regulatory oversight between the tribe and the state. However, these discussions do not always result in bright-line compact provisions defining the role of each regulatory agency. IGRA occupies the field of Native American gaming regulation, but also provides for the application of state law to a significant degree, by extending all state gambling laws into Indian country. However, "gambling" does not include any gaming regulated by the National Indian Gaming Commission, or any gaming conducted according to a compact approved by the Secretary of the Interior. The federal government has exclusive jurisdiction to enforce those state gambling laws extended to Indian country unless the tribe, by compact, consents to the state's exercise of that jurisdiction (*25 U.S.C. § 2711(c)(1)-(2)*).

While this regulatory scheme represents the most direct and comprehensive involvement of the federal government in gaming regulation, IGRA does not require a compact to address the allocation of state and tribal regulatory jurisdiction. IGRA provides that compacts can include provisions relating to "the application of the criminal and civil

laws and regulations of the Indian tribe or the state" concerning the gaming activity, and "the allocation of criminal and civil jurisdiction between the state and the Indian tribe" necessary to enforce such laws and regulations (*25 U.S.C. § 2710(d)(3)(B)*). States and tribes consequently enjoy a great deal of freedom in their compact negotiations to allocate jurisdiction over Native American gaming.

While IGRA does not specify how the parties to a compact will allocate regulatory jurisdiction, it does identify general areas that can be addressed in a compact, including:

- The application of the criminal and civil laws and regulations of the tribe, or the state, that are directly related to, and necessary for, the licensing and regulation of such activity.
- The allocation of criminal and civil jurisdiction between the state and the tribe necessary for the enforcement of such laws and regulations.
- The assessment by the state of such activities in such amounts necessary to defray the costs of regulating such activity.
- Standards for the operation of such activity and maintenance of the gaming facility, including licensing.
- Any other subjects that are directly related to the operation of gaming activities.

(*25 U.S.C. § 2710(d)(3)(c)(i)-(vii).*)

While the regulatory scheme for class III gaming under IGRA intended many regulatory issues to be addressed in tribal-state compacts, it left a number of key functions in federal hands, including approval authority over compacts, management contracts and tribal gaming ordinances.

Congress also vested the National Indian Gaming Commission with broad authority to issue regulations in furtherance of the purposes of the IGRA. Accordingly, the National Indian Gaming Commission plays a key role in the regulation of class II and III gaming.

In practice, it is usually the tribal gaming authorities that exercise the primary regulatory functions such as:

- Licensing of key employees.
- Establishing minimum internal controls and rules of play.
- Auditing records and financial disclosures.
- Investigating complaints.

The state exercises concurrent jurisdiction over dealings with patrons and third parties. However, without a comprehensive review of the applicable compact and tribal gaming ordinance, it is impossible to predict whether a state commission, tribal regulatory authority, or some combination of the two regulate a particular activity.

Gambling products

4. What gambling products have been specifically identified by legislation, and what different requirements have been established for each?

See *Question 2, General definition*.

Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission also contain definitions for various gambling products.

Lottery
Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission contain restrictions on gaming and lotteries applicable to individual tribal operations. The National Indian Gaming Commission has stated that lotteries constitute class III gaming under the IGRA (*25 C.F.R. 502.4(d)*).

The operation of a lottery, including the sale of state-issued lottery tickets, must be authorised under an approved tribal ordinance and a tribal-state compact that is in effect. In addition:

- The tribe must use that income in accordance with the IGRA.
- The state must pay an annual fee to the National Indian Gaming Commission.
- The licensing standards for such gaming must be as restrictive as those established by state law.
- Licences for people or entities must be denied if they would not be eligible to receive a state licence to conduct the same activity.
- State law standards must apply to the purpose, entity, pot limits and horns of operation.

Further, other mandates of the IGRA and the National Indian Gaming Commission regulations must be abided by, including the requirements to:

- Submit annual audits for the gaming operation to the National Indian Gaming Commission.
- Ensure that the construction, maintenance, and operation of the gaming facility adequately protects the environment, public health and safety.
- Maintain facility licence standards.

Land-based gambling

Regulation/licensing

5. What is the licensing regime (if any) for land-based gambling?

Available licences
There is no restriction on the number of tribes that can conduct gaming in the United States.

Eligibility
IGRA only applies to gaming on "Indian lands", which are defined as:

- All lands within the limits of any Indian reservation.
- Any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any tribe or individual subject to restriction by the United States against alienation and over which a tribe exercises governmental power.

(*25 U.S.C. § 2703(4).*)

Application procedure
A tribe can only conduct gaming on "Indian lands", as defined under IGRA. IGRA contains a general prohibition against gaming on lands acquired into trust after 17 October 1988. Indian lands opinions are issued by either the:

- National Indian Gaming Commission.
- Department of the Interior, Division of Indian Affairs, Office of the Solicitor.

There are exceptions to this prohibition for lands within or contiguous to the tribe's existing reservation, for initial reservations of newly recognised tribes or restored lands of restored tribes, and for lands acquired in settlement of land claims.

There is a further exception to the prohibition on gaming on lands acquired after 1988, that is, the Secretary of the Interior, after consultation with appropriate tribal, state, and local officials, can approve such gaming on newly acquired lands if he determines that it would be in the best interest of the tribe and its members, and would not be detrimental to the surrounding community. This exception only applies if the governor of the relevant state concurs. This entire issue is of great importance to tribes that are not otherwise geographically well situated for gaming operations. Some tribes, particularly those who participated in the eastern land settlement claims, are subject to special legislative exemptions from the applicability of IGRA and care must be taken to examine the statutes governing any particular tribe.

A tribe's fee-to-trust application must meet two threshold requirements of the Secretary of the Interior's land acquisition policy set out in 25 C.F.R. 151.3 (*see Question 2, Land-based gambling*). The tribe's trust application must also address the Secretary of the Interior's statutory authority for the acquisition of the land into trust under 25 C.F.R. 151.10(a) (*see Question 2, Land-based gambling*).

Duration of licence and cost
There is no cost to a tribe to file an application with the Bureau of Indian Affairs, the Department of the Interior, or the National Indian Gaming Commission related to its ability to conduct gaming. A tribe's approvals from the Secretary of the Interior, the National Indian Gaming Commission, or the Bureau of Indian Affairs do not expire.

Changes of corporate control

Native American tribes retain their authority to conduct gaming on Indian lands provided that the state in which the tribe is located permits such gaming for any purpose and the tribal government adopts a gaming ordinance approved by the National Indian Gaming Commission. Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission contain restrictions on changes of corporate control applicable to entities that do business with individual tribal operations. For example, the National Indian Gaming Commission requires that the ten persons who have the greatest direct or indirect financial interest in an Indian gaming management contract be subject to a background investigation (*25 C.F.R. 537.1(a)(3)*).

6. What are the limitations or requirements imposed on land-based gambling operators?

Prohibitions

A management contract is defined under the National Indian Gaming Commission regulations as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation" (*25 C.F.R. 502.15*). A collateral agreement is "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organisations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)" (*25 C.F.R. 502.5*).

The National Indian Gaming Commission determines the suitability of the management contractors, which involves a time-consuming, expensive, and thorough investigation. The Code of Federal Regulations also prescribes certain mandatory provisions and imposes substantial limitations on management contracts. Unfortunately, there is no definitive guidance on when an agreement that concerns the operation of a Native American casino is considered a management contract. Parties should avoid contracts that reference the provision of operating capital, the establishment of operating hours, the hiring, firing, training, and promoting of employees, the maintenance of the casino's books and records, and the preparation of the casino's financial statements and reports. The National Indian Gaming Commission has taken the position that no entity other than a tribe may possess a "proprietary interest" in a tribe's gaming activity. If an agreement violates the proprietary interest rule, the National Indian Gaming Commission can correct the violation through an enforcement action. An enforcement action places the tribe at risk of fines and closure of its casino.

Restrictions

Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission contain restrictions on gaming applicable to individual tribal operations.

Anti-money laundering legislation

Anti-money laundering is addressed at the federal level. For further information, see *Gaming law in the United States (Nevada): overview*.

Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission contain restrictions on gaming and anti-money laundering requirements applicable to individual tribal operations.

Online gambling

Regulation/licensing

7. What is the licensing regime (if any) for online gambling?

Available licences
See*Question 2*.

Eligibility
See*Question 2*.

Application procedure
See*Question 2*.

Duration of licence and cost
See*Question 2*.

Changes of corporate control
See *Question 5, Changes of corporate control*.

8. What are the limitations or requirements imposed on online gambling operators?

See*Question 2*.

B2B and B2C

9. Is there a distinction between the law applicable between B2B operations and B2C operations in online gambling?

Legislation does not address the distinctions between the law applicable to B2B operations and B2C operations in online gambling.

Technical measures

10. What technical measures are in place (if any) to protect consumers from unlicensed operators, such as ISP blocking and payment blocking?

Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission may contain technical measures to protect consumers.

Mobile gambling and interactive gambling

11. What differences (if any) are there between the regulation of mobile gambling and interactive gambling on television?

This is addressed on a case-by-case basis in the relevant state.

Social gaming

12. How is social gaming regulated in your jurisdiction?

See *Question 2, Online gambling*.

Blockchain technology

13. To what extent is blockchain used in gambling in your jurisdiction? How is it regulated?

Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission may contain specific guidance on the use of blockchain technology applicable to individual tribal operations.

Gambling debts

14. Are gambling debts enforceable in your jurisdiction?

Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission may contain specific guidance on the enforcement of gambling debts.

State law may also apply to the enforcement of debts in a particular jurisdiction.

Tax

15. What are the applicable tax regimes for land-based and online gambling?

Land-based gambling
Except for any assessments that may be agreed to between the state and the tribe in a compact to defray the costs of regulation, IGRA prohibits state taxation of Native American gaming activity. Nothing in the IGRA "shall be interpreted as conferring upon a state or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in gaming" (*25 U.S.C. § 2710(d)(4)*). This provision of IGRA has led to contentious negotiations between states seeking to increase revenues and tribes arguing exemption from state taxation.

Often referred to as "revenue sharing", the amount that a tribe pays to a state under a compact is always the most controversial and heated topic in any compact negotiation. Even when a tribe agrees to a payment, this does not preclude subsequent litigation. Class II gaming is regulated primarily by tribes and is not subject to a compact requirement or any revenue sharing with states. Class III gaming must be the subject of a compact that is likely to include revenue sharing provisions.

Online gambling
See above, *Land-based gambling*.

Advertising

16. To what extent is the advertising of gambling permitted in your jurisdiction? To the extent that advertising is permitted, how is it regulated?

Tribal-state compacts, tribal ordinances, and the minimum internal control standards of the National Indian Gaming Commission may contain restrictions on casino advertising.

State law may also apply to casino advertising in a particular jurisdiction.

Developments and reform

Legal development

17. Has the legal status of land-based and online gambling changed significantly in recent years, and if so how?

Land-based gambling

In light of the United States Supreme Court's February 2009 decision in *Carcieri v Salazar*, the Secretary of the Interior must make a determination as to whether the tribe was "under federal jurisdiction" when the Indian Reorganization Act was enacted in 1934. This analysis is highly fact specific, and must include evidence of the tribe's continuous political existence and a continuous course of dealings that reflects federal supervision of the tribe and its members prior to, and including, 1934 (for example, treaty negotiations, federal appointment of tribal leaders, secretarial approval of attorney contracts, and the provision of Indian Services such as probate and homesteading) (*555 U.S. 379 (2009)*).

In 2012, the United States Supreme Court held that a person may challenge a decision to take land into trust for a tribe up to six years after the land was taken into trust (*Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v Patchak*; *Salazar v Patchak, 132 S. Ct. 2199 (2012)*). Until this ruling, it was generally accepted that a person could challenge the decision to take land into trust before the land's acceptance into trust for a tribe.

Online gambling

The Wire Act of 1961 (*18 U.S.C. § 1084*) (Wire Act) prohibits persons involved in a gambling business from transmitting several types of wagering-related communications (see *18 U.S.C. § 1084(a)*).

The Department of Justice (DOJ) issued an opinion in 2011 that the prohibitions contained in the Wire Act applied only to sports betting. On 14 January 2019, the DOJ reversed its 2011 opinion, concluding that only one of four parts of the Wire Act applies to sports betting, while the other three apply to any form of wagering. Specifically, the DOJ's 2019 opinion states that Section 1084(a) consists of two general clauses, each of which prohibits two kinds of wire transmissions, creating four prohibitions in total. The first clause bars anyone in the gambling business from knowingly using a wire communication facility to transmit "bets or wagers" or "information assisting in the placing of bets or wagers on any sporting event or contest." The second clause bars any such person from transmitting wire communications that entitle the recipient to "receive money or credit" either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." It concludes that the "sporting event or contest" limitation only applies to knowingly using a wire communication facility to transmit "information assisting in the placing of bets or wagers on any sporting event or contest." It does not apply to the other three prohibitions.

It is important to note that the prohibitions contained in the Wire Act apply to the transmission of information "in interstate or foreign commerce" only. In other words, the intrastate transmission of information is not prohibited by the Wire Act, regardless of the position of the DOJ on the types of prohibited transmissions.

Many US jurisdictions currently have some form of legal online gambling (such as poker, casino gaming, sports betting and lottery). Generally, if a wager is consistent with applicable law in the place from which it originated, and is also consistent with applicable law in the place it is received, then the wager does not violate federal law. However, transactional data can sometimes route across state lines even if the actual gaming takes place on an intrastate basis.

The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) prohibits "unlawful Internet gambling" (*31 U.S.C. §§ 5361-5367*). Under UIGEA, unlawful internet gambling means "to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable federal or state law in the state or tribal lands in which the bet or wager is initiated, received, or otherwise made" (*31 U.S.C. § 5362(10)*).

However, unlawful internet gambling does not include the "placing, receiving, or otherwise transmitting a bet or wager ... where the bet or wager does not violate any provision of ... the Indian Gaming Regulatory Act". This safe harbour would not be applicable to any gaming that violated the IGRA.

Consequently, it has become vital to understand how games offered by "electronic means" over the internet will be classified. Such determinations will drive whether tribes may offer Internet gaming on their lands, whether such gaming must be the subject of a compact, and whether IGRA or UIEGA applies.

The UIGEA further allows for wagers and bets to be routed interstate provided that the wager or bet is initiated and received in the same state. "The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made" (*31 U.S.C. §5362(10)(E)*).

It is unclear whether the routing of transactional data across state lines is prohibited under the DOJ's latest interpretation of the Wire Act when the actual gaming is taking place on an intrastate basis. The US Deputy Attorney issued a memorandum on 15 January 2019, stating that the 2019 DOJ opinion will not take effect for 90 days from the date of the memorandum, giving the DOJ time to develop prosecutorial guidelines. Further, the Deputy Attorney designated the Criminal Division's Organized Crime and Gang Section to review and approve proposed Wire Act charges. The Justice Manual will include a new review and approval process for prosecutions pursuant to the Wire Act. It is likely that these prosecutorial guidelines will address the interstate routing of intrastate gaming data.

Reform

18. What, if any, are the likely short-term and long-term developments/legislative amendments concerning gambling in your jurisdiction? Are there any proposals for reform?

Land-based gambling
There are no current legislative proposals to amend the IGRA.

Online gambling
It is unlikely any federal laws regulating online gambling will be passed in the next legislative session.

Social gaming
There are no current legislative proposals to address social gaming at the federal level.

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Publications

- *Anticipating and Solving Deal Issues, RSM/Howard & Howard CLE Series, 28 November 2018*
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