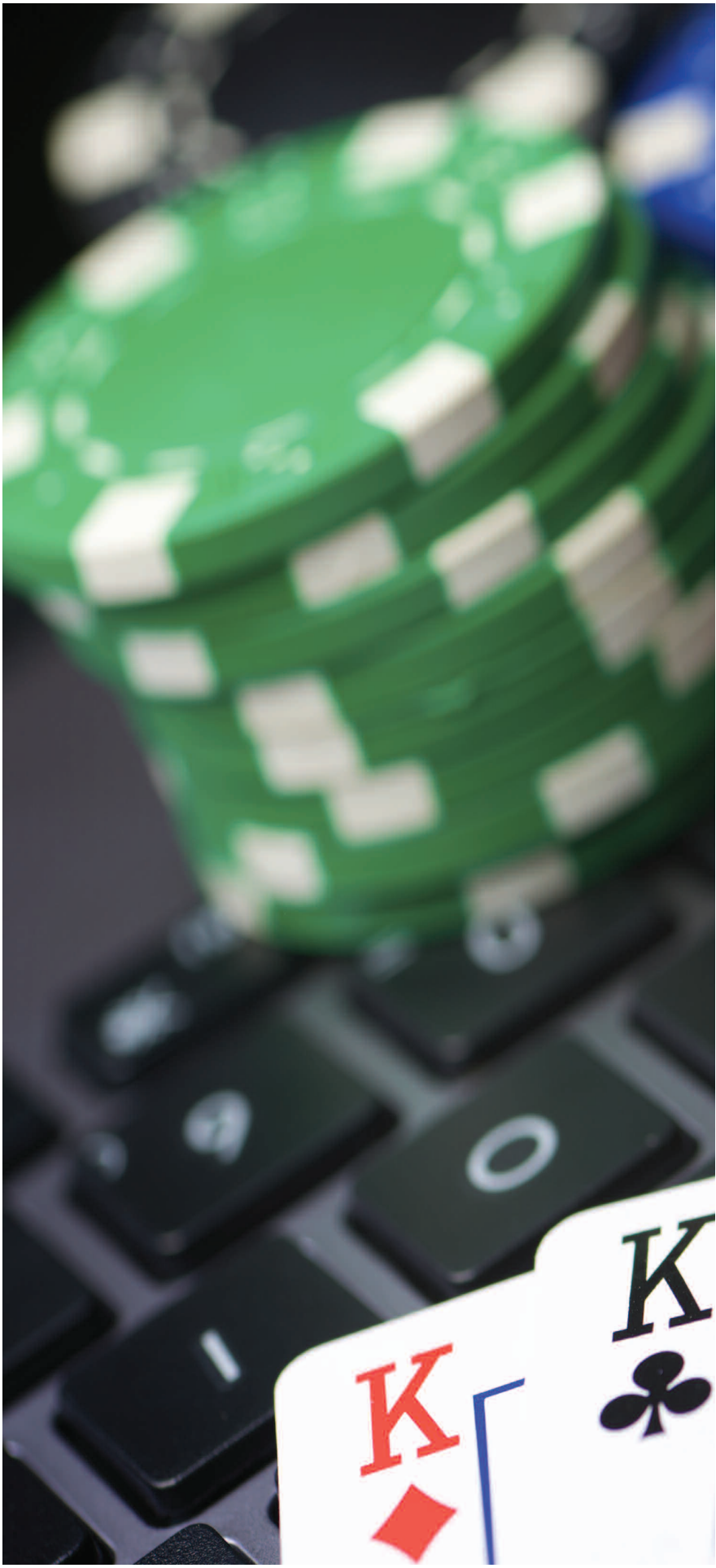
Internet Gaming on Indian Lands

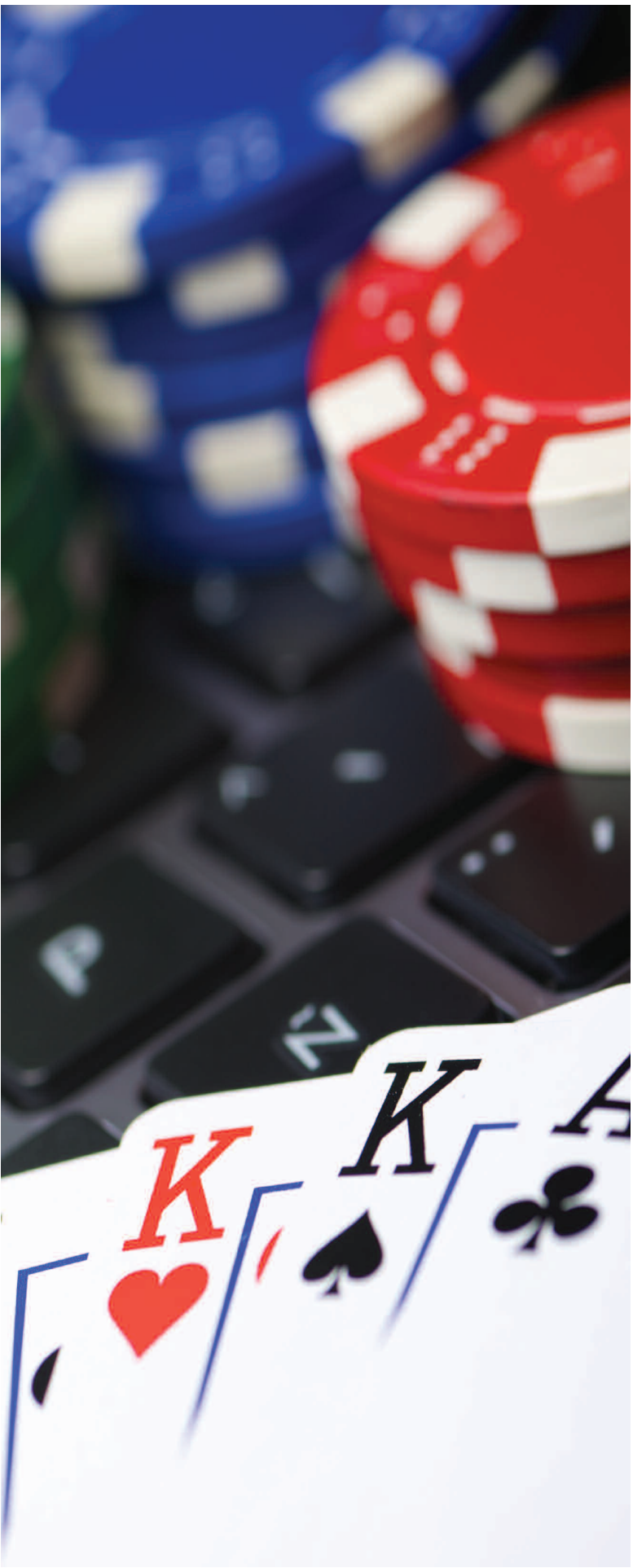
By Jennifer L. Carleton



The uncertainty created by the Department of Justice and the resultant litigation surrounding the Wire Act of 1961[1] ("Wire Act") has caused confusion regarding exactly what type of internet gaming is lawful. On Indian lands, that confusion is compounded by a lack of clear guidance from the National Indian Gaming Commission ("NIGC") regarding internet games conducted by Indian tribes.

IGRA

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 ("IGRA")[2] establishes the jurisdictional framework that currently governs Indian 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.



IGRA establishes three classes of games with a different regulatory scheme for each:

Class I. Class I gaming is "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 bingo (whether or not electronic, computer, or other technological aids are used in connection therewith) and, if played in the same location as 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.[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.[4]

Indian Lands

It is unclear whether tribes can accept wagers from players 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. The NIGC has stated in numerous opinions that IGRA only applies to gaming on "Indian lands."[6] Therefore, a preliminary issue is whether internet gaming is gaming on "Indian lands," or on any lands at all.

A jurisdictional and regulatory nexus to the land can arguably be created at the place where a wager is placed, a wager is accepted, or where core components, including servers and databases running the games and storing account information, are located.[7] In a games classification advisory opinion, the NIGC noted that "the use of the Internet, even though the computer server may be located on Indian lands, would constitute off-reservation gaming to the extent any of the players were located off of Indian lands."[8]

Wire Act

The Wire Act prohibits persons involved in a gambling business from transmitting several types of wagering-related communications:

> 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.[9]

The U.S. Department of Justice ("DOJ") issued an opinion in 2011 that the prohibitions contained in the Wire Act applied only to sports betting. In an opinion publicly released on January 14, 2019, the DOJ reversed its 2011 opinion, concluding that only one of four parts of the Wire Act apply to sports betting, while the other three apply to any form of wagering. Specifically, the DOJ's 2019 opinion stated 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 transmissions prohibited.

Many U.S. jurisdictions currently have some form of legal online gambling (poker, casino gaming, sports betting and lottery). Generally speaking, 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 take place on an intrastate basis.

UIGEA

The Unlawful Internet Gambling Enforcement Act ("UIGEA") prohibits "unlawful Internet gambling."[10] 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."[11] 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 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 as long as the wager or bet is initiated and received in the same state.[12] "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."

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 U.S. Deputy Attorney General issued a memorandum on January 15, 2019, stating that the 2019 DOJ opinion will not take effect for 90 days, giving the DOJ time to develop prosecutorial guidelines: "As an exercise of discretion, Department of Justice attorneys should refrain from applying Section 1084(a) in criminal or civil actions to persons who engaged in conduct violating the Wire Act in reliance on the 2011 OLC opinion prior to the date of this memorandum, and for 90 days thereafter. A 90-day window will give businesses that relied on the 2011 OLC opinion time to bring their operations into compliance with federal law. This is an internal exercise of prosecutorial discretion; it is not a safe harbor for violations of the Wire Act. I am designating the Criminal Division's Organized Crime and Gang Section (OCGS) 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.

Johnson Act

The Johnson Act generally prohibits the manufacture, possession, use, sale, or transportation of any "gambling device" in Indian Country, the District of Columbia, and possessions of the United States.[13] It also requires all persons manufacturing, using, selling, transporting, or providing for the use of others to register with the DOJ and certain disclosures when gambling devices are shipped. However, there is an exception contained in the Johnson Act for any machine or mechanical device primarily designed and manufactured for use at a race track in connection with pari mutual betting.[14] IGRA includes an exception to the Johnson Act prohibition against gambling devices on Indian lands. Specifically, IGRA provides that "the provisions of section 1175 of title 15 shall not apply to any gaming conducted under a Tribal-State compact that (A) is entered into under paragraph (3) [IGRA, 25 U.S.C. § 2710(d)(3)] by a State in which gambling devices are legal, and (B) is in effect."[15]

For any proposed internet gambling on Indian lands, there is an initial question as to whether the equipment would be considered a "gambling device" under the Johnson Act. "In 1951, Congress enacted the Slot Machine Act, the purpose of which was to support the policy of those states that outlawed slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment

of such machines or devices into such states. Of critical importance to the efficacy of the Slot Machine Act of 1951 was its definition of 'gambling device.'"[16] The term "gambling device" has been held to encompass pinball machines, merchandise vending machines, electronic point maker slot machines and pull-tab machines. There do not appear to have been any federal prosecutions under the Johnson Act for the transportation of sports book equipment across state lines.

If betting equipment is considered a "gambling device" under the Johnson Act, it must then be determined if the exception to the Johnson Act under IGRA applies. Courts to review this issue have applied the exception to the Johnson Act under IGRA to uphold the operation of slot machines where there was a tribal-state gaming compact, but where there was no such compact, courts have held that the operation of slot machines violated the Johnson Act. IGRA's exception to the Johnson Act for Class III gaming devices does not apply where no tribal-state compact had been negotiated to allow a tribe's use of such devices.[17]

Game Classification

Whether a particular type of online gambling is subject to state regulatory jurisdiction depends on whether the gambling is considered Class II or Class III.

Technological Aids

If an online offering is considered a "technological aid" to gaming, then the underlying game is reviewed to determine if it is (1) a Class II game or Class III game and (2) the subject of a tribal-state 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.[18] 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, and electronic cards for participants in bingo games."[19]

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.[20] 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

Poker games that are not banked against the house are considered Class II games under IGRA if they are authorized by state law.[21] 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 Attorney General noted that although 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."[22]

Electronic games of chance are not considered Class II games under IGRA.[23] 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 whether the NIGC 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. If internet poker is considered a Class III game, such gaming must be the subject of a compact between a state and a tribe.[24]

Lotteries

The NIGC has stated that lotteries constitute Class III gaming under IGRA.[25] The NIGC noted that players purchasing lottery tickets for the National Indian Lottery outside of the tribe's Indian lands were not subject to IGRA. "It follows that 'wagering,' 'gambling' or 'gaming' occur in both the location from which a bet, or 'offer,' is tendered and the location in which the bet is accepted or received."[26] The operation of a lottery, including the sale of state-issued lottery tickets, must be authorized pursuant to an approved tribal ordinance and a tribal-state compact.

Sports Wagering

The NIGC has expressly defined Class III gaming to include "[a]ny sports betting and pari-mutuel wagering."[27] This definition does not expressly exempt any form of sports betting and treats pari-mutuel wagering as Class III despite the fact that players wager amongst themselves. The NIGC's Office of General Counsel has also advised gaming operators that "sports betting ... is a Class III form of gaming."[28] The game that was the subject of the General Counsel opinion allowed players to compete against other players. Nevertheless, the Office of General Counsel concluded that this form of sports wagering constituted Class III gaming. The NIGC went on to find that this game could not be the subject of a tribal-state compact because "if sports betting is unlawful in a state, it is unlawful for tribes in that state to engage in it."

While most traditional sports betting would likely be treated as Class III gaming, some forms of sports wagering could potentially be considered Class II despite this language in the NIGC's regulations and the opinion from the Office of General Counsel. IGRA exempts from the definition of a Class II game "any banking card game." Consequently, peer-to-peer games are traditionally viewed as Class II. House-banked poker, for example, is considered a Class III game under IGRA and the NIGC's regulations, but peer-to-peer poker is considered Class II.

Sports wagering can generally be classified in one of three categories – pari-mutuel wagering, fixed odds wagering, and exchange wagering. Pari-mutuel wagering is based on all wagers being placed in a common pool. After a percentage of the pool is taken out by the house, winners share the remainder based on their wager. Exchange wagering is peer-to-peer betting in which the house brings the players together in exchange for a commission. One or more players proposes a wager and one or more other players accept the wager. In fixed odds wagering, odds and payout are determined in advance by the player and the house. Fixed odds wagering includes money line, point spread, parlay, proposition, and in-game wagering.

Both pari-mutuel and exchange wagering are forms of peer-to-peer wagering. As such, there is a reasonable argument that pari-mutuel and exchange sports wagering should be treated as Class II

gaming under IGRA. The definition of a "house banking game" under IGRA is broad enough to include forms of gaming other than cards. However, IGRA addresses the distinction between Class II and Class III only as it relates to card games, not other forms of gaming.

Proxy Play

The NIGC has considered proxy play under IGRA and has concluded that "the use of proxy players violates neither IGRA's provision regarding the holder nor NIGC's regulations that discuss the player."[29]

The NIGC first considered the use of proxy players in 1995 in relation to the play of MegaBingo, a Class II game "conducted on a daily basis with over 50 Indian tribes, linked by closed circuit telephone lines and satellite television. Agents charge the purchaser of the proxy service a fee for purchasing a bingo card(s) at the Indian bingo hall and playing that bingo card(s) on their behalf. The agent is not an employee of any licensed class II establishment, but rather functions as an employee of Multimedia Games, Inc., who is responsible for the payment of all prizes won by the purchaser of the proxy service. The agents are located on Indian lands. Agents play the card for their principal, the purchaser. This concept is known as "proxy play." It involves the use of computer-aided technology to assist the agent or "proxy player" to track the bingo cards for a number of proxy play purchasers."[30] The NIGC held that the game was played on Indian lands, as "[t]here is no statutory prohibition against the use of agents for the conduct of bingo. Accordingly, the acts of the agent, which occur on Indian lands, are deemed to be the acts of the principal." Unfortunately, however, the opinion does not go into any detail regarding how the proxy was initially engaged by the player (either in person, over the telephone, or over the internet), how the player indicated to the proxy how many cards, which denominations, or other "instructions" were given to the proxy, or how the player and the proxy were compensated (through an internet account, etc).

In a separate opinion, the NIGC held that a proxy was acting as the player's agent: "Bingo Nation can be played by either the purchaser of the card or by a designated proxy player. IGRA contains no statutory prohibition on the use of agents to play the game of bingo – it simply requires that, for a game to be defined as Class II, the "holder of the card" cover the numbers.[31] IGRA does not further define the meaning of "holder" and, in Bingo Nation, the holder is either the player or the proxy designated by the player.[32] Although the Class II definition in the NIGC regulations replaced the word "holder" with the word "player," as the NIGC Office of General Counsel has previously stated, "this is a distinction without a difference when the law of agency is applied to the analysis."[33] 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.[34] When the proxy plays the bingo card for the player in Bingo Nation, the act of playing the card is deemed to be the act of the player. The legal effect is that the proxy is the player. Therefore, the use of proxy players violates neither IGRA's provision regarding the holder nor NIGC's regulations that discuss the player."[35]

Concierge Wagering

In California v. Iipay Nation of Santa Ysabel, the Ninth Circuit considered whether a concierge bingo service operated over the internet was a violation of UIGEA or IGRA.[36] The tribe's operation of server-based bingo that allowed patrons to play computerized bingo over the internet was held by the Ninth Circuit to violate UIGEA, even if all of the gaming activity associated with the game occurred on Indian lands. As the court stated, "[t]he patrons' act of placing a bet or wager on a game while located in California constitutes gaming activity that is not located on Indian lands, violates the UIGEA, and is not protected by IGRA. Further, even if *Iipay* is correct that all of the 'gaming activity' occurs on Indian lands, the patrons' act of placing bets or wagers over the internet while located in a jurisdiction where those bets or wagers is illegal makes *Iipay's* decision to accept financial payments associated with those bets or wagers a violation of the UIGEA."[37]

Iipay argued that the gaming activity related to the concierge service occurred exclusively on its Indian lands and, thus, was Class II activity under the exclusive jurisdiction of the tribe.[38] The Ninth Circuit disagreed, finding that the

patron's decision to submit a requested wager of a particular monetary denomination was not merely a pre-gaming communication with the proxy.[39] *Iipay* argued that the patron's selection of a wager amount and clicking "Submit Request!" was a pre-gaming communication with the proxy, not "gaming activity." Citing U.S. Supreme Court precedent, the Ninth Circuit used this position to conclude that if an activity is not "gaming activity" it cannot be protected by IGRA.[40] The court found that the tribe had violated the UIGEA because a bet or wager was initiated through the internet and the activity was not protected by IGRA.

Conclusion

As technology advances and states continue to expand the type of legal gaming available, tribal gaming operations will work to keep pace. Clear and concise guidance from the NIGC on the scope of IGRA's application to internet wagering would enable tribes to remain competitive in this constantly evolving market.

Jennifer Carleton spent the first decade of her career as in-house counsel for an Indian tribe, and the last 12 years representing public and private gaming companies in an extensive range of multi-jurisdictional corporate and regulatory matters. She is licensed in the States of Nevada, Illinois, and Wisconsin and is currently a partner in the Las Vegas office of Howard & Howard, a 150-year-old firm specializing in business law.

[1] 18 U.S.C. §1804.
[2] P. L.100 - 497, 25 U.S.C. § 2701 et seq.
[3] 25 U.S.C. § 2703(3).
[4] 25 U.S.C. § 2703(8).
[5] 25 U.S.C. § 2702(3).
[6] 25 U.S.C. § 2703(4).
[7] *See New York v. World Wide Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (N.Y. Sup. 1999).
[8] March 13, 2011, letter from Kevin K Washburn, General Counsel, Nat'l Indian Gaming Comm'n, to Joseph Speck, Nic-A-Bob Productions, enclosing June 22, 1999 letter from Montie R Deer, Chairman, Nat'l Indian Gaming Comm'n, to Ernest L Stensgar, Chairman, Coeur d'Alene Tribe, re: Nat'l Indian Lottery.
[9] 18 U.S.C. § 1084(a).
[10] 31 U.S.C. §§ 5361-5367.
[11] 31 U.S.C. § 5362(10).
[12] 31 U.S.C. §5362(10)(E).
[13] 15 U.S.C. § 1171(a).
[14] 15 U.S.C. § 1178.
[15] 25 U.S.C. § 2710(d)(6).
[16] What constitutes gambling device within meaning of 15 U.S.C.A. § 1171(a) so as to be subject to forfeiture under Gambling Devices Act of 1962 (15 U.S.C.A. § 1171-1178), 83 A.L.R. Fed. 177).
[17] (U.S. v. Cook, 922 F.2d 1026 (2d Cir. 1991); *U.S. v. Shoalwater Bay Indian Tribe*, 205 F.3d 1353 (9th Cir. 1999); *In re Indian Gaming Related Cases*, 2000 WL 1257265 (N.D. Cal. 2000)), or when a compact did not allow for a specific type of gaming (*Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996)).
[18] 25 C.F.R. § 502.7.
[19] *Id.*
[20] 25 U.S.C. § 2703(7)(B); 25 C.F.R. § 502.8.
[21] 25 U.S.C. § 2703(7)(A)(ii).
[22] Testimony of Kevin V. DiGregory, Deputy Asst. Att'y Gen., Dept. of Justice, Addressing Internet Gaming and Indian Gaming Before the S. Comm. on Indian Affairs, June 9, 1999.
[23] 25 U.S.C. § 2703(7)(B).
[24] 25 U.S.C. § 2710(b)); 25 U.S.C. § 2710(d)(1)(C).
[25] 25 C.F.R. § 502.4(d).
[26] *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), Brief of Amicus Curiae United States, 1999WL 33622333, 13-14.
[27] 25 C.F.R. § 502.4(c).
[28] WIN Sports Betting Game Classification Op., Nat'l Indian Gaming Comm'n (March 13, 2001) available at https://www.nigc.gov/images/uploads/game-opinions/nationalindianbingo111400.pdf.
[29] Bingo Nation Game Classification Op., Nat'l Indian Gaming Comm'n (June 27, 2014) available at https://www.nigc.gov/images/uploads/game-opinions/2014.06.27%20Bingo%20Nation%20Game%20Classification%20Opinion.pdf .
[30] MegaBingo Game Classification Op., Nat'l Indian Gaming Comm'n, (July 26, 1995) available at https://www.nigc.gov/images/uploads/game-opinions/megabingo072695.pdf ("MegaBingo Opinion").
[31] Citing 25 USC § 2703(7)(A)(i)(II).
[32] Citing MegaBingo Opinion.
[33] Citing Nat'l Indian Bingo Game Classification Op., Nat'l Indian Gaming Comm'n (Nov. 14, 2000) available at https://www.nigc.gov/images/uploads/game-opinions/nationalindianbingo111400.pdf ("2000 National Indian Bingo Opinion").
[34] Citing 3 Am.Jur. 2D Agency § 2 (1986).
[35] Citing 2000 National Indian Bingo Opinion.
[36] 898 F.3d 960 (2018).
[37] *Id.* at 968-69.
[38] *Id.* at 965.
[39] *Id.* at 966-67.
[40] *Id.* at 967 (citing Mich. v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2032-33 (2014)).