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Gambling and the Law®: Change Indian Gaming Can Believe In

Indian casinos may soon overtake commercial casinos. Total gaming revenues for tribes appear to be more than \$26 billion a year, while the American Gaming Association reported the 12 commercial casino states generated less than \$31 billion in 2009.

But Indian gaming is getting a boost from changes in the law, or, more particularly, from those who make the laws.

The most dramatic change is the result of the election of President Barack Obama. Even though Republicans have been able to stymie the Democrats' majorities in Congress, they cannot do much about the Presidents' power to make appointments.

The first battleground over Indian gaming is often the Department of Interior, which includes the Bureau of Indian Affairs. George W. Bush appointed Dirk Kempthorne, who was so anti-gaming that he would change the rules when it looked like he would have to approve an expansion.

For example, Kempthorne forbid tribes to acquire new land for gaming that was not within commuting distance of their current location.

Obama replaced Kempthorne with Colorado Senator Ken Salazar, a self-proclaimed political moderate. Salazar can reverse this decision, since it was a "Guidance Memorandum," issued without hearings or public input.

Salazar is also changing the process for recognizing tribes. During the Bush years, 15 tribes applied for federal recognition, 13 were denied, in a process that took years. Within months of taking office, Salazar's Interior recognized the Shinnecocks on Long Island.

Obama also acted quickly to appoint the head of the Bureau of Indian Affairs, a position the Bush Administration left vacant for years. Larry Echo Hawk, a Brigham Young University law professor, opposed Indian gaming when he was Attorney General of Idaho, but he has mended his fences with Idaho's gaming tribes.

First Lady Michelle Obama made it clear during a speech to the Interior Department that the President is going to fulfill his promise to appoint a senior White House adviser for tribal issues. She said that American Indians have a "wonderful

partner in the White House right now.”

Another federal agency that has changed is the National Indian Gaming Commission (“NIGC”). It is unfair to call former Chairman Philip Hogen an opponent of tribal gaming. In early February, 2009, for example, he ruled in favor of the Seneca Nation in its fight to keep open its casino in downtown Buffalo.

But Hogen alienated many tribes and their suppliers by fighting to establish clear distinctions between Class II and Class III gaming devices. Class II machines are technically electronic aids for games like bingo, and Hogen felt they should look and play differently from Class III slot machines. Hogen’s proposals would have slowed down the Class II devices and forced players to press buttons to daub electronic bingo cards and to declare winning patterns.

In June 2010 Tracie Stevens was named Hogen’s permanent replacement. Stevens, the first Native American woman to head the Commission, was Echo Hawk’s Senior Advisor on tribal issues, including gaming. In fact, all three Commissioners now have strong backgrounds in Indian gaming. And given Obama’s support for issues impacting Indian’s welfare, it is not surprising that these appointments are even more friendly toward tribes than those under the prior Republican administration. They may also be less willing to listen to the federal Department of Justice, which has Bush carry-overs who remain opposed to expanding gaming.

Congress is faced, again, with calls to amend the IGRA. Although no one is completely satisfied with the present federal statute, gaming tribes feel that opening the IGRA to amendment risks undoing all that Indian gaming has accomplished over the last 20 years.

And why chance it? Once the recession is over, this will be a very good time indeed for Indian gaming.

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© Copyright 2010. Professor I Nelson Rose is recognized as one of the world’s leading experts on gambling law. He is a consultant and expert witness for federal, state and tribal governments and industry. His latest books, INTERNET GAMING LAW (1st & 2nd editions), BLACKJACK AND THE LAW and GAMING LAW: CASES AND MATERIALS, are available through his website, www.GAMBLINGANDTHELAW.com.