



Tornado Warning for Class II Gaming

by D. Michael McBride III

A tornado warning affecting Class II Indian gaming has been issued. Although storm spotters have long reported three, impending, super cell storms, the storm system recently gained structure and intensity. It now poses an imminent threat to tribal sovereignty and the economic viability of Class II gaming. Indian Tribes are advised to take immediate action to protect Indian gaming.

The super cells are comprised of the following:

- The National Indian Gaming Commission's (NIGC) proposed classification standards and definitions for "electronic or electromechanical facsimiles" published on May 25, 2006;
- Recent efforts by the United States Justice Department (DOJ) to induce the United States Congress to amend the Johnson Gambling Devices Act; and
- Senate Bill 2078 amending the Indian Gaming Regulatory Act (IGRA).

Each proposal is fueled by a myriad of conditions, including appeals by the DOJ and the NIGC for bright line clarity between Class II and Class III games, the Jack Abramoff scandal and the ascendancy of Indian gaming as the most successful federal economic development policy in history. The desire by many non-Indian observers to restrict Class II Indian gaming provides additional power to the storms. Although the Senate report accompanying the IGRA states that tribes should have maximum flexibility to use technology in Class II gaming, the DOJ and NIGC appear committed to the notion that Congress could not have envisioned and would not condone the present advances in technology.

NIGC Tempest: Classification Regulations

On May 25, 2006, the NIGC published 27 pages of proposed classification regulations, commentary and definitions for "electronic or electromechanical facsimiles" after a 26 month effort. Publishing the rules starts a quick rule-making process and adds a new Part 546 to federal regulations governing Indian gaming. Despite the formation of a tribal advisory committee to provide comments to the six drafts of the classification rules, the NIGC for the most part did not incorporate tribal input. The NIGC found the tribal consultation process to be problematic, noting that "there were many times during the development of the proposed regulations that the tribal committee representatives strongly disagreed with decisions made by the Commission."

The NIGC apparently was influenced by the DOJ's opinion that IGRA was not consistent with the Johnson Act and

technologically-aided games should be slowed down and made sharply distinguishable from their Class III counterparts. The NIGC planned to publish its rules in April 2005, but instead engaged in five months of negotiations to attempt to allay the DOJ's concerns. Eventually "so much time has elapsed that it is unlikely that the proposed legislation will pass the 109th Congress," the NIGC wrote. Nonetheless, "the need to regulate Class II technologic aids has not diminished and the Commission is compelled to proceed with these regulations."

The NIGC regulations threaten the economic viability of Class II gaming by imposing arbitrary requirements to slow the Class II games down, require multiple bingo draws and releases, create significant time delays in bingo games, require a certain size for the bingo cards including half of a video display screen, mandate written notifications that a device is a bingo game and emasculate any electronics in the game of pull tabs. The NIGC proposes these regulations even though there are no such restrictions on Class II games within IGRA.

The NIGC targets the electronic format "because in an electronic format it becomes too easy to use features such as the instantaneousness, rather than serial, release of numbers and the automatic covering (daubing) of those numbers on a player's electronic card as a pretext to fundamentally change or distort the nature of the game such that it becomes an 'electronic facsimile' of the game." The NIGC has concerns that technology "distorts" Class II games and "in many respects, the current generation of electronic bingo games shows features that turn bingo on its head." In carrying out this perceived mandate, the NIGC picks and chooses from various federal cases to cobble together bright line restrictions.

Protecting Class II gaming from the storms is important to Class III gaming tribes as well. Only tribes and the NIGC regulate Class II games – not states. A number of states still refuse to negotiate in good faith with tribes for Class III compacts, and without a "Seminole fix," tribes are powerless to take states to court as Congress intended when it enacted the IGRA. Many tribes either cannot achieve meaningful negotiated compacts or are severely restricted in the number of games they can offer.

The Johnson Act Storm

After several unsuccessful attempts to engraft new criminal prohibitions on the framework of the IGRA through the courts, the DOJ mounted an effort to disrupt Indian gaming and tribal economies by amending the Johnson Act. The DOJ announced its intentions at the October G2E meeting and then held quick "consultations" in Indian Country from November 2005 and to January 2006. The DOJ then sent

its proposal to the Office of Management and Budget.

On June 7, 2006 the DOJ through William E. Mochella, Assistant Attorney General, introduced a legislative proposal “to provide for the use of gambling devices as technologic aids.” The DOJ’s proposal appeared to be stalled, but is now introduced to both the House and the Senate. The proposal still lacks a known sponsor.

In the proposed congressional findings and purposes, the DOJ writes that “when the Indian Gaming Regulatory Act was enacted, Congress intended that tribes be allowed to use technologic aides and Class II gaming, but that there be clear distinction between the machines used in Class II gaming and those used in Class III gaming under the IGRA.”

The DOJ and the NIGC appeared to have joined together for a one-two punch against Class II technologic aids. The DOJ’s proposed findings further acknowledge that the NIGC is the federal agency with oversight authority for Class II gaming, but that the NIGC “should issue regulations setting forth specific requirements for gambling devices that can be used as technologic aids.”

The amendments incorporate references to the IGRA, the NIGC and “technologic aids” to sweep in Class II technologic aids as prohibited gambling devices and subject users, possessors and manufacturers to federal prosecution, fines and jail time. The legislation also significantly increases potential fines from the previous penalty of \$5,000 per violation to as much as a quarter of a million dollars and significant jail time for a felony violation.

The proposed amendments create exceptions for the transporting of a “gambling device” to Indian Country for Class III gaming and for gambling devices that have been certified according to regulations prescribed by the NIGC. The proposed legislation also grants a limited “grandfather clause” of eighteen months after the date of enactment for gambling devices used as technologic aids that were in actual operation as of the date of the enactment. To qualify for the exemption, either the NIGC (by written opinion prior to enactment) or a Federal Circuit Court of Appeals must have concluded that the subject device is Class II.

The amendments also prohibit the alteration of technologic aids after certification. Significantly, the amendments require that the NIGC adopt or amend regulations pursuant to the IGRA to govern the use of gambling devices as Class II technologic aids and that such regulations make clear distinctions between Class II technologic aids and Class III gaming. The NIGC’s approach is totally contrary to the text of the IGRA, which promotes technologic advancement of Class II games-not arbitrary, bureaucratic restrictions.

SB 2078 Cyclone

The Senate Indian Affairs Committee introduced SB 2078 in November 2005 and has marked up the bill with amendments. While the proposal is not such a vicious affront to

How You Can Take Action

Tribal leaders should attend the NIGC consultations in July and August, voice their concerns, and submit written comments before August 23, 2006 or the close of the 90-day comment period. Contact your federal representatives and senators. Let them know how Indian gaming has benefited your Tribe or Nation and that tribal regulation and IGRA serve the goals of promoting economic development for tribes and protecting the integrity of the Indian gaming industry. Tell them to oppose efforts to amend the Johnson Act.

The NIGC, DOJ and Senates proposed laws and published rules can be accessed on the web at:

- <http://edocket.access.gpo.gov/2006/06-4798.htm>
- <http://edocket.access.gpo.gov/2006/E6-7873.htm>
- <http://www.nigc.gov/>
- <http://www.usdoj.gov/otj/johnson.htm>
- <http://indian.senate.gov/public/>

The NIGC summer consultations are scheduled as follows:

- July 12-13, Washington, DC.
- July 17-18, Bloomington, Minnesota
- July 19-20, Denver, Colorado
- July 24-25, Tacoma, Washington
- July 26-27, Ontario, California
- August 8-9, Oklahoma City, Oklahoma

See also the National Indian Gaming Association:
<http://indiangaming.org>

Class II gaming as the matters mentioned above, it does provide significant new powers to the NIGC to review and approve contracts, to set time frames for that review, and to impose new restrictions on the process for placing land into trust for gaming purposes. SB 2078 has considerably more support than support for the proposed Johnson Act amendments, but the bill could open the door to dangerous future IGRA amendments that could negatively impact Indian gaming. Tribes should prepare and react to the coming tornadoes. Stay tuned for additional warnings. ♣

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