

Op-Ed/Editorials - When Tribes Buy Racinos

April 20, 2005

The views expressed in the Op-Ed/Editorials page are solely the views of the author(s) and do not necessarily reflect the views of the BASIS, its sponsors, or affiliated organizations.

I. Nelson Rose, Ph.D.

Professor, Whittier Law School Costa Mesa, CA

BASIS, editorial board member

Startling changes are sweeping the world of legal gambling. Gaming tribes that for decades lived in abject poverty now have a new problem: finding ways to diversify their enormous wealth.

Meanwhile, states have the opposite difficulty. The Islamist attacks of 9/11, coming at the time of the burst of the Internet stock market bubble, drove most state budgets so far into the red that there is no easy way for governors and legislatures to dig their way out. As often happens, lawmakers turn to legal gambling as a painless tax.

Naturally, at some point the two trends had to come together.

The Mohegan Sun casino in Connecticut reported revenue of \$1.1 billion for the fiscal year ending in September 2004. With that kind of money, it was easy for the Mohegans to buy Pocono Downs in Wilkes-Barre, Pennsylvania, for \$280 million. The tribe can finance the purchase out of its cash flow.

There is no market today for racetracks, especially those that have to compete against nearby casinos. New York is having trouble finding any bidders for its last track license, now that it looks like its racino law is unconstitutional.

But Pocono Downs will be one of only 14 locations in the populous state of Pennsylvania to have a share of the newly authorized 61,000 slot machines. Anyone with a calculator can figure out how much that is worth, given that even on the saturated Las Vegas Strip, 25-cent slot machines make more than \$100/day. A near-monopoly in a good location can make \$500 per slot per day, or

more.

The Mohegans also want to invest hundreds of millions in proposed tribal casinos in Wisconsin and Washington state. In November 2004, voters in Kenosha approved a non-binding referendum for an \$800 million casino-resort an hour north of Chicago that technically will be owned by the Menominee Tribe, but financed and run by the Mohegans.

In Oklahoma, two of the state's four racetracks are owned by tribes. In November 2004, that state's voters approved Class III gaming devices for these and one other track. Although "slot machines" are still illegal, these games will be fast-action linked bingo machines and video pull-tabs with video slot machine displays, as well as video poker. Oklahoma's tribe-owned, off-reservation racinos will be very close to true casinos, with non-house-banked table card games, including poker, pai gow poker and blackjack.

There have been other serious efforts by tribes to own off-reservation casinos, not subject to the Indian Gaming Regulatory Act ("IGRA"), in places such as Detroit, Michigan; West Warwick, Rhode Island; and Bridgeport, Connecticut.

What happens when a tribe becomes the financier and operator of an off-reservation casino? No one knows the answer - yet. But we can make some educated guesses.

First, it is important to note that we are not talking about the more common and controversial issue of "reservation shopping," where a tribe obtains new land, nearer a city, and has it put into trust as part of its reservation. The law here is fairly well established. If a tribe can get the necessary federal and state approvals — a difficult process — it can open a casino under the terms of the IGRA.

But what if the casino or racetrack is not part of the tribe's reservation? It might be on land never taken into trust, or even on land owned by another tribe. If the Mohegans succeed in financing and operating a casino on the Menominee Tribe's reservation in Kenosha, Wisconsin, the land won't somehow become part of the Mohegans' reservation. A tribe may own, finance or manage legal gambling on privately owned land to the same extent as anyone else.

But tribes are not sole proprietorships, partnerships nor corporations. They are not just business entities: They are not governments, even when they act like

privately-owned businesses.

The legal differences are enormous.

The United States Supreme Court has made it clear that a tribe cannot be sued for any reason, including breach of contract, unless the tribe or Congress consents. This tribal sovereign immunity extends not only to the tribe itself but also to its wholly owned business entities. And the tribe has complete immunity even if the business is off-reservation and has nothing to do with the tribe's governmental functions.

The case that made it to the Supreme Court shows how far this doctrine extends. The Kiowa tribe was involved in a business deal having nothing to do with its governmental activities. The tribe defaulted on a promissory note that was executed off-reservation.

The high Court held the tribe did not have to pay if it did not want to.

Suppliers and even state licensing bodies probably do not realize that, with tribes, they are dealing with governmental bodies that must consent to be sued.

Even if a tribe has waived its sovereign immunity, some courts have held that any dispute must first be heard in the tribe's own tribal court, unless the tribe has agreed to another forum.

Tribes have additional legal advantages not shared by their competitors. It is often said that shareholders of public companies are doubly taxed on their dividends. With gaming, they pay triple: The corporation pays gaming taxes on its gross or net gaming revenue, it then pays state and federal income taxes on its earnings, and its taxpayers then pay income taxes when those earnings are distributed as dividends.

A tribe that obtains an operator's license would have to pay the same gaming taxes. But that is where the comparison ends. Tribes are governments, so they do not pay federal or state taxes. Distributions to tribal members are not always subject to taxation. Tribal members who live on the reservation are often exempt. In any case, it is relatively easy for a tribe to pass on benefits, such as houses, cars and college scholarships, without the tribe member having to pay any taxes.

Tribes, as governments, can do things that for-profit corporations cannot. For

example, they can issue tax-free bonds, allowing them to borrow at greatly reduced rates. One tribe in California bought a bank and was then in a position to lend itself money, again at most favorable rates.

Tribes are the only sovereign governments that can contribute to federal, state and local political campaigns. Lawmakers and voters are often called upon to decide whether competing gambling should be made legal. Canada and Ontario did not like proposals for casinos in Detroit, but they could not contribute money to defeat them. Congress and the Federal Elections Commission have put no limits on the size of tribal campaign budgets, and tribes do not have to disclose their sources.

It is not even clear if tribes have to report campaign donations: Courts in California have split on whether state election laws apply to tribes.

Tribes do have one distinct disadvantage, which is more psychological than legal. The IGRA makes it clear that, when it comes to Class III gaming on their own reservation, tribes are equal to the states. And with Class II gaming, tribes do not even have to talk to states.

But when a tribe operates a track or casino outside its reservation, it is subjecting itself for the first time to the regulations and whims of state and even local governments. Will tribes willingly turn over confidential financial information?

Licensing will probably be the most difficult area. What will happen when a tribal official, used to issuing gaming licenses, is himself denied a license?

© Copyright 2004, all rights reserved worldwide Gambling and the Law® is a registered trademark of Professor I Nelson Rose, Whittier Law School, Costa Mesa, CA