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Tribal Gaming Facing Dual Expansion Threat

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The potential spread of commercial casinos and Internet wagering is threatening the American Indian share of the U.S. gambling market, hastening the need for indigenous governments to diversify economies away from gambling, industry experts say.

“Absolutely. No tribe is sitting still if an opportunity to diversify their economy comes their way,” said Kristi Jackson, CEO of Tribal Financial Advisors Inc.

“We’re seeing [economic diversification] all over the place, whether it’s alternative energy, commercial gaming off the reservation or some other business entirely. There is absolutely a push in that direction. It’s universal.”

“It has always been a priority of tribes to diversify their economies,” said Jamie Fullmer, former chairman of the Yavapai Apache Nation and chairman of Blue Stone Strategy Group.

Several states have discussed or are considering legislation to legalize commercial casinos and racetrack slots, or “racinos,” notably New York, Florida, Illinois and Kentucky, potentially eroding the relative exclusivity tribes enjoy with government casinos in 28 states.

Proposed congressional legislation for federal oversight of Internet poker does not include provisions for tribes demanding tax exempt status and a role in regulating online gambling.

Meanwhile, a recent Department of Justice (DoJ) opinion that online gambling with the exception of sports betting does not violate the Wire Act may enable state lotteries to provide Internet wagering, yet another potential threat to casino tribes.

“The situation is so fluid I don’t think anyone really knows where the major threat is coming from,” said attorney Glenn Feldman, a specialist in Indian law.

“Federal legislation that ignores or cut tribes out completely is as much of a threat as state lotteries. Which is worse, I can’t tell you.”

“Many tribes, especially those with established land-based gaming operations, are worried that they might not be included in this coming proliferation of state-operated and -licensed Internet gambling,” Whittier Law School Professor I. Nelson Rose told a recent hearing on online gambling held by the Senate Committee on Indian Affairs.

“And they have every reason to worry.”

The \$26.5bn tribal casino industry nearly equals the \$28bn commercial casino segment of the legal U.S. gambling market. Combined, commercial casinos and racinos in 12 states annually win \$34.6bn,

according to the American Gaming Association.

“As the growth of racetrack casinos has taken off, the line between racetrack and commercial casinos has blurred,” AGA President Frank Fahrenkopf said in introducing an industry report last year.

Pari-mutuel gambling, lotteries, card clubs and other forms of legal wagering bring the overall U.S. gambling industry to more than \$90bn a year.

The tribal share of the market grew dramatically after passage of the Indian Gaming Regulatory Act (IGRA) of 1988. But the growth stabilized with maturation of the largely rural industry and political and legal difficulties tribes face acquiring new lands off existing reservations.

Of the 28 states with tribal casinos, 12 also have commercial casinos and racetrack slots. Of the 16 tribal government gambling states with no commercial casinos or “racinos,” three (California, Washington and Montana) have significant card club industries.

Because tribes use casino revenue to provide government services to their citizens, there is a growing concern the spread of commercial gambling and Internet wagering will impede economic progress on Indian reservations.

“Gaming has been the single most effective form of economic development for Indian country,” said Hawaii Senator Daniel Akaka, chairman of the Senate Committee on Indian Affairs.

“Tribal concerns and priorities must be considered, and tribal voices must be heard when court, administrative or legislative decisions are made on gaming because of its significant role in the [tribal] economy.”

In an effort to grow gaming economies, the Mohegan Tribe of Connecticut, Chickasaw Nation of Oklahoma, Seminole Tribe of Florida and other Indian governments are investing in off-reservation commercial casinos and racetracks. Unlike reservation casinos subject to IGRA, these operations pay local taxes on their gross gaming revenues and are regulated by state regulatory authorities.

With the potential for state-wide online lotteries, advisers suggest tribes, in an effort to compete, need to pursue intrastate online poker as a commercial business venture, not as a government enterprise with the tax exempt and self-regulatory status afforded to land-based Indian casinos under IGRA.

The California Online Poker Association, a coalition of tribes and card clubs, is pursuing such an approach.

“Given the current state of the law, with the exemption from the Unlawful Internet Gambling Enforcement Act allowing for intrastate operations, if tribes are going to avail themselves of that model it will be in a commercial sense,” Feldman said.

“It’s not their system to operate and regulate. It’s a state system in which they can be a participant.”

Should Congress enact a federal regulatory scheme for online poker, tribes are expected to press for an IGRA model with tax exemptions and a regulatory role for tribal gaming authorities and the National Indian Gaming Commission (NIGC), which oversees tribal casinos.

“I’ve got clients all over the board on this issue,” Feldman said. “I’m not recommending anything. I’m saying give the tribes as much flexibility as you can because there are any number of models a tribe may choose to adopt.”

The DoJ list poker as a Class II, bingo-style game not subject to tribal-state compacts regulating Indian casinos. But expansion of commercial gambling and other forms of Internet wagering could jeopardize agreements requiring tribes to share revenues in exchange for exclusivity.

“When there is some revenue share being paid to the state, the tribes have to get some benefit in return,” Jackson said. “If the benefit is exclusivity and that gets threatened, there may be an opportunity to not pay that revenue share, going forward.”