



Why Should You Care About Internet Gaming?

by D. Michael McBride III

Suddenly, what happens on the Isle of Man, the Kahnawake Mohawk reserve near Quebec, in Costa Rica or Alderney has become important to Tahlequah, Tacoma, Temecula, Tulsa and Toledo. I-gaming is here and the world has shrunk. And when it comes to Internet gaming, Indian Country should be concerned – and proactive.

Of Sovereignty, Laws and Borders

Indian gaming is built on a "brick and mortar," land-based and jurisdiction-exclusivity model. The U.S. Supreme Court ruled in *Cabazon Band of Mission Indians v. California* in 1987 that so long as the state does not criminally-prohibit gaming, Indian tribes hold a sovereign right to engage in governmental gaming without state regulation. The Indian Gaming Regulatory Act of 1988 ("IGRA") was a compromise between the absolute sovereignty of tribes engaging in gaming on their own terms, state interests, and the federal government. Each gave up something under IGRA for the compromise. Indian governmental gaming could only be conducted on Indian lands. A tribe and a state must enter into a Class III gaming compact before a tribe can conduct certain (Class III) games and before states could extract revenue from the tribe's gaming as a part of the negotiated bargain.

While IGRA contemplated technologic advances, Congress did not envision borders melting away with the advent of gaming potentially being conducted anywhere irrespective of *place*. I-gaming potentially threatens to undermine these traditional notions of jurisdictions and exclusivity. But it should not.

Now is the time for tribes to embrace the new opportunities presented by i-gaming. With appropriate laws and regulation, i-gaming can flourish in Indian Country and respect the longstanding policy of tribal governments remaining the sole beneficiaries of Indian gaming revenue. While potentially a threat to the status quo, i-gaming is an opportunity as well.

Indian gaming is the most successful economic development policy in United States history and has grown to approximately \$30 billion dollars in annual revenue in 2011. By some estimates worldwide i-gaming revenue from 2010 was a larger number – \$35 billion. The most popular form, of course is online poker. Also, much discussion has occurred about the development of intrastate i-gaming lottery systems, forms of which are offered in about five states. Some have recently estimated that *one million people a day* engage in i-gaming within the U.S. Momentum is building. We cannot ignore i-gaming.

Longtime DOJ Rhetoric Turns to Action

As the April 15, 2011 "Black Friday" indictments demonstrate, the United States Department of Justice considers all Internet gaming to be unlawful and will enforce against operators – inside or outside the United States. The DOJ clumsily has pursued selective enforcement primarily by using the Federal Wire Act, an old 1961 law targeting the use of telephones to commit crimes, and to a lesser extent, a 2006 law called the Unlawful Internet Gambling Enforcement Act, which is another enforcement statute, not a substantive gambling law. Substantive gambling laws are usually enacted by states. The DOJ has sought forfeiture of domain names and money, pursued civil money laundering penalties and asserted criminal charges of conspiracy, illegal gambling and bank and wire fraud. In April, the DOJ early on backed off of some of its extra-territorial seizure of domain names and bank accounts (from 13 countries) realizing it had overstepped its powers.

The DOJ's recent aggressive stance has muted some political enthusiasm for the passage of specific state laws authorizing i-gaming, at least without DOJ prior blessing. Nonetheless, it is only a matter of time before forms of legalized i-gaming are here. Legalization is closer than it ever has been before.

Formulation of Policy and Laws Following

Federal efforts to legalize and regulate i-gaming have stalled and few expect meaningful movement before the 2012 elections. Addressing economic woes have commanded Congress's near exclusive attention. However, the pace of federal policy discussions are increasing. Conferences around the U.S. and world that focus on i-gaming are proliferating. For example, the Digital Gaming and Lottery Policy Summit will convene December 5-6 in Washington D.C. While conservative lawmakers embrace "no new taxes" and have a reputation for opposing any forms of gaming, narrow forms of permitted i-gaming that raise significant federal revenue might be palatable. Internet poker has much attention. Tribes should find a seat at the table and demand the protection of vested interests under IGRA.

Currently the legal action in state legislatures to authorize i-gaming is centered in Iowa, New Jersey, California and Nevada. While the District of Columbia appeared to be out front with an i-gaming law last summer, it was retracted once intense media scrutiny followed. In fact, the Nevada Gaming Control Board just announced that it will begin taking applications to license companies to operate Internet gaming poker sites as soon as February 2012. While such gaming will

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be limited to Internet poker played within the state's boundaries and within a closed loop environment, the development is remarkable. Nonetheless, a state law authorizing some forms of i-gaming will likely have only a small, symbolic impact. Liquidity issues exist if the jurisdictional betting pool is too small and major gaming interests may not invest where the economic returns are inconsequential.

While consumers have embraced Internet commerce, the long-standing impasse over taxation of Internet sales has also hampered a federal solution to i-gaming regulation. The limitations of IGRA will require a comprehensive federal solution to work for all of Indian Country. The potential "Balkanization" of i-gaming by piecemeal state laws and regulations could create a haphazard framework for development as well. The passage of state i-gaming laws though set precedent, create state-tribal compacting opportunities and set the stage for more rapid national and international change.

The states, the federal government and even tribal governments are starved for new sources of revenue. These needs provide momentum for change. Tax revenues will drive the dialogue for legalization. While gaming has traditionally been a state issue, and some even question whether Congress has the power to regulate such activities, a federal solution would greatly benefit the gaming industry and help strike the balance needed to protect tribal interests. Lawful gaming is a less controversial way to raise revenue for beleaguered governments facing angry conservative constituents who vehemently oppose any new taxes.

Amorphous I-Gaming

Internet gaming however, has many unanswered questions. Where does the gaming take place? How to do you regulate it? Who regulates it? Does the gaming occur on a tribe's server? How do you tax the revenue and how do you account for the intellectual property issues?

The rise of Internet gaming has divided Indian Country, but the National Congress of the American Indians and the National Indian Gaming Association have identified six common principals to guide any dialogue for legalized i-gaming:

- As sovereign governments, Indian tribes must continue with their right to operate, regulate, tax and license Internet gaming without those rights being subordinated to non-federal authorities.
- Internet gaming conducted by tribal governments should be available to customers in any locale where Internet gaming is not criminally prohibited.

- Consistent with the United States Constitution and IGRA, tribal revenues must not be subject to tax.
- Any legal regime should respect existing rights under tribal-state compacts and IGRA.
- IGRA should not be gutted and should remain intact.
- Federal legalization of Internet gaming should continue the long standing policy of economic development for Indian country.

I-Gamer Demographics

I-gaming presents an excellent opportunity to provide additional gaming for existing gaming clients. It additionally provides growth opportunities, particularly for a new demographic. The rapidly growing segment of i-gamers are young, savvy, smart, computer literate and well educated; they grew up with video games. Their disposable incomes will grow in the future. Are these stay at home nerds? Probably not. I-gamers are social people and the amenities afforded by casinos, such as restaurants, entertainment, hotels and the like will continue to attract them and are the core of the tribal gaming brand identity. I-gaming simply provides another avenue for meeting the players' needs and desires. Tribes can expand the reach of their brand with this new medium. It provides excitement and a way to set a particular tribe's casino brand apart from others.

Testing the Waters

Now is the time to innovate and test the waters. "Play for fun" approaches provide an excellent way to test models of Internet gaming that are lawful. They provide a good test run for setting up systems, build "buzz" and attract new casino clients. Hopefully building loyalty will translate well once Internet gaming becomes legalized in one form or another. It is an opportunity to grow and cultivate gamers, develop loyalty programs and give players another opportunity to earn affinity points.

Once established, tribal casinos could easily transition "play for fun" systems to lawful revenue generation once the laws catch up with social mores. Internet gaming is here to stay and the law will catch up soon. Companies are identifying the opportunities and building teams to service the needs. Aristocrat, for example, has established an i-gaming group for "play for fun" models. Indian Country should be ready and should embrace i-gaming. ♣

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