

## Spotlight on John Tahsuda Principal, Navigators Global, LLC



*John Tahsuda is a Principal of Navigators Global, LLC, where he leads Navigators' tribal affairs practice providing advocacy and counsel on a range of tribal affairs policy issues, including gaming, tax initiatives, tobacco sales, land-into-trust issues, health care, economic development, energy policy, federal recognition and self-governance.*

*Most recently, Tahsuda was Staff Director of the Senate Committee on Indian Affairs, where he was responsible for federal Indian policies affecting gaming, federal recognition, self-governance and health care. Previously, he was the General Counsel and Legislative Director of the National Indian Gaming Association.*

*Additionally, Tahsuda has served as general counsel and outside counsel to Indian tribes and tribal organizations, as well as also serving as an Adjunct Professor of Law at Cornell Law School. He is a member of the Kiowa Tribe of Oklahoma, and received a J.D. from Cornell Law School and a B.S. from Oklahoma State University.*

*This month, Indian Gaming magazine talked with John Tahsuda about the complex issues surrounding I-gaming. Here is what he had to say...*

### **From a legal standpoint, where does Internet gaming stand?**

The current legal authority is fairly clear. Under current law, both tribes and states can offer gaming over the Internet within their jurisdiction. For tribes that generally means within the borders of their reservations Pursuant to IGRA, tribes can also "link" their games, using technology, with other tribes. Prior to the DOJ opinion that became public in December 2011, it was thought that states could not offer gaming across state borders using the Internet. After that opinion, it appears that, according to the DOJ, states can link up their lottery games on the Internet similar to the format they have used to create the Powerball and Megamillions super-lotteries.

### **How can tribes best protect their interests so that they will be assured a share of this new revenue source?**

One of the most valuable assets in this new gaming format is the patron list (or players club as its usually called). For land-based casinos establishing an online presence, the players club often reflects the success of the "brand" created by the casino. Internet gaming companies pay large sums to create, obtain and even steal lists of players. For potential online tribal operators, their current players club may be the only significant asset they have. While it will be important to protect the value of that tribal asset, it is often equally important to effectively utilize that asset to expand the tribe's economic relation-

ships and thereby most effectively benefit the gaming operation.

### **Is Internet gaming already legal on tribal reservations?**

Within limitations, Internet gaming is legal on tribal reservations. Tribes must comply with federal law under the Unlawful Internet Gambling Enforcement Act and the Indian Gaming Regulatory Act, and with tribal law under the tribal gaming ordinances. The UIGEA generally preserved tribal rights under IGRA, meaning that tribes can use technologies, like the Internet, to connect their games from reservation to reservation. However, IGRA also specifies that the games must occur on "Indian lands," including the players of the games. Taken together, I think that the UIGEA and IGRA allow tribes to authorize Internet gaming within their jurisdictions, and to also link their authorized Internet gaming with other tribes within their jurisdictions.

### **Do you foresee tribes being able to offer Internet gaming off-reservation?**

I certainly believe that tribes can, will, and should offer "free-play" Internet gaming and even "social" gaming to anyone and everyone that they can draw to their sites. As for "pay-to-play" Internet gaming, I think that the road will not be easy for tribes. Of course, as I noted earlier, tribes can "link" games between reservations, and that is one legal avenue

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for Internet gaming that tribes must explore to its full potential. However, that market is necessarily limited to players located on a reservation. The ability to truly offer Internet gaming to players off-reservation will depend upon future changes to state and federal laws.

If federal law were to be changed to allow broader cross-jurisdictional Internet gaming, I believe that tribes will be allowed to participate in that scheme. If the development of Internet gaming remains on a state-by-state basis, tribes will be required to negotiate at the state level. Most states in which tribes are located have lotteries and/or limited location casinos (riverboats, old mining towns, etc.) Therefore there is already existing competition facing the tribes; competition that would probably like to exclude them. Tribes will need to work hard at the state and federal levels to try to insure a level playing field and equal access to the marketplace.

### **How does a tribe evaluate getting into Internet gaming at this point?**

Tribes must approach this business like any other. Look at the potential revenue, costs, and other ancillary considerations. Because of the potentially high development costs, I think tribes must carefully weigh the many different avenues available to get into the business. Similarly, tribes must carefully consider the different legal strategies which will impact how they structure and conduct the business. Given the fluidity of business transactions over the Internet, and how that modern reality affects traditional notions of sovereignty and governmental taxation and regulation, I strongly suggest that tribes be very open-minded about how their Internet gaming operation is legally structured. In fact, I would suggest that one effective model would be to look at modern international business transactions, and study how those transactions take into account crossing jurisdictional lines and multiple tax and regulatory regimes.

### **How will it be regulated?**

There will of course be regulation by the tribal gaming regulators. While it may occur in cyberspace, Internet gaming is still gaming. Effective regulation will require, among other considerations: (1) background checks and investigations of important staff and vendors; (2) oversight of the games before, during and after play, including insuring that the games are being played in lawful locations; and (3) investigations and prosecutions of violations of laws, regulations, rules and procedures. In many ways, regulation of Internet gaming is even easier than land-based gaming. With fewer people required to

be involved in the operation of the games, the human element is much reduced. Being totally electronic, oversight of Internet gaming is also easier as it can be programmed into the very games. Because the transaction occurs over the Internet (i.e. interstate commerce), violations that rise to the level of criminal activity often become prosecutable crimes in multiple jurisdictions, including federal prosecution.

I think all of these elements mean that Indian gaming has a regulatory leg up on many potential Internet gaming entities. We already have a long history of stringent regulation, and the tools are already in place to regulate Internet gaming, since tribes have been at the forefront of using and regulating networked electronic games utilizing multiple formats. I seriously question whether entities, like state lotteries that have never had to regulate or be regulated, are ready to engage in the type of stringent regulatory oversight needed.

### **What resources are available to help educate tribal entities on this complex issue, and what can tribes do now to get started?**

First and foremost, tribes must educate themselves. There are several good venues to get a basic understanding of the business. Conferences such as the iGaming North America conference happening in February, provide informative panel discussions, but just as importantly, a good opportunity to network and speak to people and companies that have been in the business for years now. There are also legal and business journals that now cover Internet gaming, often analyzing different countries as well as differing games and formats.

Finally, tribes must do the same type of due diligence that occurs when investing in any new business. Often a firm specializing in analytics can be helpful, but I would caution tribes to interview multiple firms to find one that understands the Internet gaming business and the tribe's current business, and how synergies can best be created among those businesses. Also, as I mentioned above, a tribe should be open-minded and creative when considering the best way to structure its business. Interviewing multiple vendors and hearing their suggestions on how to best implement the tribe's strategies is a due diligence must. Similarly, an effective legal strategy must be developed, and tribes must be creative in this venue as well. Rather than simply using the same general legal advisor, it may be helpful to supplement those views with an outside legal counsel that can look more critically at the business model and the tribe's specific circumstances. ♣

*John Tahsuda can be reached by calling (202) 315-5100 or email [john.tahsuda@navigatorsglobal.com](mailto:john.tahsuda@navigatorsglobal.com).*