



## *The Future of Internet Gaming: Challenges and Opportunities for Sovereign Tribal Governments*

by Knute Knudson

The future of Internet gaming in the U.S. is a work in progress. Conflicting forces are shaping that future. Consider - even as the Unlawful Internet Gambling Enforcement Act to bar Internet gaming takes effect in the U.S., several bills to legalize Internet gaming are pending in Congress and at state legislatures. Proponents and opponents of legalized Internet gaming are in a tug of war.

Internet gaming is a critical issue for tribal governments. Legalized Internet gaming has the potential to cut into the market share of tribal gaming operations. But legalized Internet gaming can also provide opportunities for tribes. Should Internet gaming be authorized in the U.S., the form of that authorization will determine the scope of those opportunities and threats.

Thus, now is the perfect time to review the scope of Internet gaming worldwide, the state of U.S. Internet gaming law, proposed legislation, and potential tribal impacts. There is much activity on this front right now.

### **Big Business**

Internet gaming today is very big business worldwide. It's estimated that, in 2008, \$21 billion in revenue was generated through online gaming. Consider that, in the same period, total global gambling revenues were \$121 billion. Thus today, even with a prohibition on U.S. Internet gambling, the Internet accounts for about one in six dollars of gaming revenue.

And, relative to U.S. play, it's fair to keep in mind that the American Gaming Association estimates \$5.9 billion of Internet gaming revenue came from the U.S. despite the prohibition on U.S. Internet gambling. One has to wonder what U.S. Internet play would be without domestic legal restrictions.

### **Current U.S. Law**

Internet gaming is generally deemed illegal in the U.S. under the terms of the Interstate Wire Act of 1961 (commonly known as the Wire Act) which bans the use of "a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest . . ." except from a "State or foreign country where betting on the sporting event or contest is legal into a State or foreign country in which such betting is legal."

In November of 2002 the United States Court of Appeals for the Fifth Circuit ruled that the Wire Act applies only to sports betting. However, the U.S. Department of Justice

maintains that Internet gaming remains essentially illegal in the U.S.

In 2006 Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA) as an amendment to the Safe Port Act. The UIGEA took effect June 1 of this year. The UIGEA does not prohibit Internet gaming. Rather it forbids financial transactions related to illegal Internet gaming, which is not defined.

In addition to these federal prohibitions, Internet gaming is specifically prohibited in the states of: Illinois (but for the recently approved lottery pilot for internet ticket sales), Indiana, Louisiana, Montana, Nevada, Oregon, South Dakota, Washington, and Wisconsin.

### **Pending Legislation**

In this legal climate, several bills are pending in Congress and at the state level that would allow, regulate, and tax Internet gaming.

Two key federal bills currently under consideration are:

*SB 1597*, sponsored by Senator Menendez. *SB 1597* would permit poker and games of skill. It would prohibit sports betting and games of chance. It would impose a 5% federal tax and a 5% state/tribal tax on a licensee's deposits received.

*HR 2267*, The Internet Gambling Regulation, Consumer Protection, and Enforcement Act, sponsored by Representative Frank would permit poker, games of skill, and games of chance. It would prohibit sports betting. It would impose a 2% federal tax and a 6% state/tribal tax (through other legislation - *HR 2268* and *HR 4976*) on a licensee's deposits received.

As noted, both bills would place, or permit to be placed, federal and state taxes on permitted gaming activities. Also, both *SB 1597* and *HR 2267* would allow a state or a tribe to opt out and not permit Internet gaming on those respective state or tribal lands. Under *SB 1597* and *HR 2267*, a state's decision to opt out would not bind activity on tribal land located within that state.

Pending and recent state legislation includes:

*California*: *SB 1485* is Senator Wright's bill to authorize intrastate online poker. The bill would authorize operation of three hubs which would be awarded by a competitive government procurement process with preference given to licensed gaming firms, including California tribes and card rooms.

*Florida:* HB 1411 died in committee. HB 1411 would have legalized intrastate Internet poker to be provided to the public by card room operators through a state Internet poker network.

*New Jersey:* Several bills would authorize Atlantic City Casinos to offer intrastate online casino games or sports wagers over the Internet.

Also, state lotteries in Illinois and New York are petitioning the DOJ for the ability to conduct intrastate Internet gaming transactions under current law.

### Tribal Issues

Tribe's sovereign authority to offer gambling was recognized by the courts in 1987 in the Cabazon Decision. The Indian Gaming Regulatory Act (IGRA) codified and restricted Indian gaming in 1988. Tribal sovereignty and the IGRA determine the gaming tribes may offer on Indian lands.

Tribes may offer certain types of games on Indian lands in certain conditions. A challenge for tribes will be to preserve this value of their lands should Internet gaming be legalized in the U.S.

Internet gaming may provide opportunities for tribes who wish to operate Internet gaming and integrate this channel into their existing land based operations through their player loyalty programs and thus create a "value circle" by servicing that customer not only on property, but also off property when they choose to play at home or on a mobile device.

A key element of IGRA and of tribal sovereignty is tribal government immunity from tax. As Internet gaming proposals develop the form of, and exemptions from, taxation will be key tribal issues.

### Conclusion

How, if, and when Internet gambling is authorized in the U.S. are open questions. The challenge for tribes will be one of balance.

We know there are efforts underway to authorize and tax Internet gaming in this country. We know there is already a substantial amount of Internet gaming play from the U.S. to foreign operations despite legal prohibitions. Consequently, Internet gaming is already impacting market demand for tribal casinos.

The challenge for tribes is to find and promote the right balance between Internet gaming's impact on play at tribal brick and mortar gaming operations and the opportunities that may exist in Internet gaming for sovereign tribal governments.

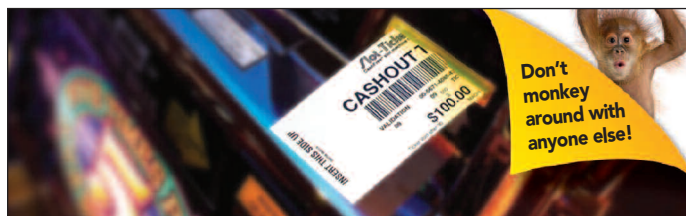
Thus, it is clearly in the best interests of tribes to stay

closely informed about developments in Internet gaming law and to stay closely involved in the process of developing Internet gaming law.

Only by aggressively monitoring Internet gaming developments and by playing a proactive role in development of domestic Internet gaming law can tribes protect their sovereignty and protect and expand the value of their tribal government gaming operations.

*Unless otherwise indicated, data on the scope of gaming that appears in this article is from testimony before the February 9, 2010 hearing of the California State Senate's Governmental Organization Committee entitled "Examining the Public Policy and Fiscal Implications Related to the Authorization of Intrastate Internet Poker in California." ♣*

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