

More Legal Challenges Ahead for Tribes in 2011

Indian Country is facing many legislative and legal challenges. A fix to the Carcieri decision has yet to gain approval by both houses of Congress. Legislation that would limit tribes' ability to host online gaming was recently proposed and legislation to re-examine and change the Indian Gaming Regulatory Act will likely be proposed. This month we asked three distinguished attorneys to discuss the legal challenges that lie ahead.

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The biggest legal challenges to Indian gaming remain (1) threats to exclusivity of Indian governmental gaming – the latest is Internet gaming; (2) threats to the primacy and legitimacy of tribal self-regulation through failing to consistently adhere to due process, impartiality and fairness; and (3) challenges to Indian sovereignty through acts of Congress.

On the first issue of exclusivity, Internet gaming presents a significant challenge. In my opinion, Internet gaming will arrive – it is not a matter of if, but when! Indian Country needs to be prepared for a whole gambit of issues including effective regulation, jurisdictional issues, dealing with intellectual property issues and classification and protecting the jurisdictional interests of Indian tribal governments. The traditional "situs" of brick-and-mortar casinos will change. We need to be ready for change.

Regarding maintaining legitimacy and primacy in tribal gaming regulation, tribal governments and their gaming commissions need to maintain vigilance to uphold the independence of tribal gaming commissions and tribal courts. This means ensuring due process for all through effective and thorough investigations and providing fair and adequate due process before tribal gaming regulatory bodies. This protects not only the tribal governments and patrons and licensees, but all of the gaming public. Tribes

should appoint and elect well-qualified and educated regulators and tribal judges and justices, fund and compensate them well so that they can dedicate adequate time to do the job without worrying about providing for their families through second or third jobs. This includes setting in place strong laws and rules regarding anti-nepotism, avoidance of conflicts of interest, and assiduous adherence to due process rights of all who are impacted by tribal governmental decisions. These considerations mean engaging in fair and impartial decision making as well as opportunities for appeal for a fresh and fair review of government decisions. Good government, be it federal, state or tribal, demands nothing less. The failure to do so places Indian governmental gaming at risk and could lead to re-writing of the Indian Gaming Regulatory Act. While IGRA is imperfect, opening the law up could lead to bad consequences for tribal sovereignty.

Third, because of the unique federal-tribal relationship, United States Congress can alter tribal sovereignty by the stroke of a pen. This historic legal and political relationship is both a sword and a shield for tribal sovereignty – it protects tribal governments from incursion by state governments and individuals, but subjects tribal sovereignty to shifting federal policy. While tribal sovereign powers pre-exist the United States Constitution – and tribes were not a party to the Constitutional Convention between states and the federal government – the modern jurisprudence remains that as domestic dependent sovereigns, Indian tribal governments' legal rights are dependent upon federal legislative policy. Tribes should be vigilant to maintain the exclusivity, legitimacy, and primacy of Indian governmental gaming. Tribes can do this by practicing good government. The best protection of tribal sovereign rights is to govern fairly, transparently and inclusively. If Indian tribal governments do not abide by the rule of law, tribal sovereignty will be under attack.

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Tribal governments have educated states regarding tribal sovereignty, tribal governmental gaming, and the risk of attacking tribes and their casinos in the courtroom. So much so that, while high profile tribal-state disputes remain and continue, a new generation of intergovernmental fight may soon outnumber them. States' younger siblings – counties, cities, and municipalities – do not yet understand tribal sovereignty. And as

local governments struggle to fund operations and please an increasingly fickle local electorate, look for more disputes like we've seen recently in the non-gaming context, at Oneida, Passamaquoddy, Cayuga, and elsewhere.

The tribal-federalist system puts tribes in the awkward position of possessing a right to government-to-government relations with the United States and the individual states, but still needing, at times, to act as local governments. The jurisdictional overlap with other local governments not surprisingly drives tax and services disputes, and can sour local relationships. Counties often fail to perceive tribes as governments. And when a tribe undertakes economic development "in" a county, casino or not, it should expect a fight. Even when a county first welcomes economic development, later versions of the same local government can see tribal ventures as potential revenue sources, which they attack accordingly.

Tribes can and will fight inappropriate local government activity in federal court. But litigation should be the last resort. Not only are federal (and state) courts unfriendly to tribal interests, but, as compared to cities and counties, tribes have far more to lose on their own behalf and on that of their sister tribes. Tribal governments should explore constructive government-to-government arrangements even at the local level, under which tribes can secure some measure of certainty by binding counties, cities, and their future leaders. The intergovernmental agreement may be commonplace with states, but it is difficult for their younger siblings to grasp. As difficult as it may seem to stoop to the local governmental level, counties and cities will not educate themselves. It is up to tribes to school local governmental actors, teach them how to behave like good neighbors, and secure the kind of jurisdictional and legal certainty necessary for sustainable economic growth.

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United States Supreme Court Justice, John Marshall, famously stated in *McCulloch v. Maryland*, that "the... power to tax... [is] the power to destroy." The current trend of "pay to play" gaming by many states, especially in these economic times, has increased tremendously and is a threat to gaming. Recently, a California tribal gaming compact was not approved by the National Indian Gaming Commission (NIGC) because the state required too much in revenue

sharing payments in exchange for the benefits the tribe would have received. As a result of the disapproved compact, neither the tribe, which was ready to begin construction on a new facility that would have provided much needed local employment, or the state, will receive anything.

As state coffers increasingly slip in the red, more often states rely increasingly on Indian gaming revenues to make up the difference. Under the Indian Gaming Regulatory Act (IGRA), states are prohibited from "taxing" tribal gaming revenues, but have increasingly circumvented IGRA by requesting exorbitant gaming device "fees," and fees for alleged gaming impacts or regulation, only to shift those fees to their general budget funds to fill state budget gaps. Tribes and tribal interests do not mind paying the legitimate cost of doing business, but want to be treated fairly. Moreover, every dollar a tribe pays to a state government that is then diverted to the general fund, is a dollar that does not support tribal infrastructure, education, government training, and member welfare, which is the reason for Indian gaming, which IGRA was created to support.

Tribes need to continuously and vociferously protect their rights on an ongoing basis. Tribal governments need to continue to build relationships with non-tribal businesses, leaders and governments. As tribes evolve in their sophistication and business savvy, they need to utilize the same methods that successful non-tribal businesses use to protect their interests. Use of public relations experts to clarify and explain sovereignty concepts and origins; lobbyists, to ensure that their voices are heard when local, state or federal government seeks to impose restrictions on sovereignty rights; and lawyers, when communication fails. Finally, tribes, irrespective of being large or small, rich or poor, need to put aside their differences, seek common ground, and join together to protect their rights. ♣