

## More Legal Challenges Ahead for Tribes in 2011

Indian Country is facing many legislative and legal challenges. A fix to the Carciere 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.