Native American tribes should bet on online gaming

Tribal online gaming is a nascent field. The online gaming market, considered to be worth $30 billion worldwide, has yet to be fully explored. Goodwin Proctor’s E. Abim Thomas and Yvonne Elosiebo look at this potentially massive market.

While commercial entities grapple with state and federal compliance issues, federally recognized Native American tribes as sovereign nations that have agreements with state governments have a potentially massive market that they could exploit ahead of the game. Many Native American tribes currently have compacts with various states that govern the tribes’ ability to engage in gambling. Through these tribal state compacts, tribal gaming is legal if done on tribal lands. The compacts generally mandate that as long as a class of gaming is not outlawed by the federal government and is not against the state’s public policy, Native American tribes must be allowed to engage in the activity. Consequently, there are 460 Native American-run gaming facilities in 28 states. Only recently, however, have states and tribes started to consider the possibility of online gaming.

“Native American tribes should act now”

After the December 2011 Department of Justice opinion reinterpreting the Wire Act, various states started weighing the pros and cons of expanding into the online gaming market. To date, only three states have legalized online gaming: Nevada, New Jersey, and Delaware. Efforts in eight other states to legalize
online gambling, including California, have failed. While there are no tribes in New Jersey or Delaware, the approximately ten tribes in Nevada each have less than 1,200 members. Many of the tribes have individually owned small brick and mortar casinos on the outskirts of major cities and have not shown any indications that they are preparing to expand into entering that market. However, their entry is not as smooth as originally anticipated. Whether these tribes must rely on their tribal state compacts to engage in online gaming remains unclear. The compacts govern the types of games - divided into classes - that tribes can offer to their customers. Many do not mention the method, whether through brick and mortar or through the internet, by which the games must be offered. Thus, there may be a strong argument for the position that online gaming should not be subject to the contours of tribal-state compacts. For example, poker in person is no different from poker online. The elements of chance and skill do not change. Consequently, if a compact permits a tribe to engage in poker, it may successfully argue that the language necessarily encompasses all types of poker, including online poker. Indeed, in a recent letter to one tribe’s governor, the Department of the Interior stated that it “assume[d], without deciding, that the Tribes may operate internet gaming, and may include that gaming in the scope of a Compact, to the extent that internet gaming may be permitted under IGRA.” With the right arguments, tribes may be able to successfully negotiate the addition of other games that have varying levels of chance and skill in their internet gaming efforts.
Despite this potential avenue to sidestep renegotiation of compacts with states, a number of tribes have chosen to forego this end-run and instead initiate good faith negotiations with states. These tribes are taking different and creative approaches, including offering virtual play and international gaming.

For smaller tribes with only a few hundred or thousand members, the sheer technological and managerial undertaking of creating an online gambling site with a world-wide customer base may seem daunting. But this has not completely derailed all small tribes’ aspirations.

For instance, the Chippewa Indians in Wisconsin are proactively seeking out negotiations with government officials. Though they are vocal about their sovereignty and ability to deal independent of any state or federal government body, this group has chosen to engage in these discussions with states. Because the games offered by the tribe are categorized as class II games under the Indian Gaming Regulatory Act, no tribal-state compacts would need to be amended.

In California, there are a number of tribes that are looking to enter or have already entered the online gaming space, also requiring unique negotiations with state authorities. The Iipay Nation of Santa Ysabel in California recently launched real money online bingo through “proxy play in partnership with Great Luck. The Alturas Indian Rancheria Tribe in Northern California has also partnered with Great Luck to offer virtual gaming through this “proxy play” technology that could solve the location problem for US residents located in states where online gambling is still illegal. Great Luck, headed by Indians from various tribes, has a technology that would be open to gamblers anywhere in the US playing on their home computers or mobile devices. Tribes using this system are relying on VPN-like technology called Virtual Private Network Assisted Play Systems to ensure that bettors are located on reservation property virtually, effectively doing away with the physical location requirement. Once registered and approved, players can play games via “proxy play,” by which the system connects wagers to servers located on Indian lands. This will ensure that all actual gambling is taking place within sovereign Native American lands. The technology will also ensure that each player is of legal age and from a state that allows at least Class II gaming. Most states allow Class II gaming.

Shifting to the non-US market, the Cheyenne & Arapaho tribes in Oklahoma recently came to an agreement with the State of Oklahoma after negotiating with Oklahoma to close a website that offered online gaming to state residents and instead offer international gaming. The new agreement would allow the Cheyenne & Arapaho tribes to offer online gaming to non-US residents only. This is a first-of-its kind settlement in which a state governor has come to a compromise position with a Native American tribe after a commercial activity was found to be illegal. The tribes also agreed to give Oklahoma 20% of the revenues generated from all forms of online gaming. Of the $3.5 billion of revenue generated in 2011, second only to California, Oklahoma collected $134 million from Native American tribes. Though the federal government has disapproved the agreement, the negotiation itself was wildly successful and a tactic that other tribes could imitate. The basis for the federal government’s disapproval relates to the State of Oklahoma’s claim of control and access to a non-US citizen market in exchange for a percentage of the tribe’s revenues and not to a misstep on the tribe’s part.

Though it is unclear whether tribes entering the online gambling space would have to renegotiate their tribal state compacts, the effort would be well worth the watershed in revenue. Native American tribes should act now and not allow size, complexity or location to squeeze them out of a market that has the potential to double or even triple their revenue streams.

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