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AT LONG LAST, TRIBAL I-GAMING IS ON! (WELL, SORT OF....)

by Dennis J. Whittlesey

Over the past several years, a major topic of discussion at virtually every gaming conference in the United States has centered on one statement: "The question is not whether we will have internet gaming, but when."

The "when" seems to be now.

The breakthrough occurred only a few days ago in Southern Arizona with the introduction of i-gaming at the Pascua Yaqui's Casino del Sol website. The available i-gaming includes poker, slots, blackjack and roulette, and it is offered to individuals visiting the Pascua Yaqui's brick-and-mortar casino in Tucson. While it is illegal under both state and federal law to conduct i-gaming for cash, the Pascua Yaqui casino is operating lawfully by giving "virtual cash" to its i-gaming players who then can pursue "free" internet gaming. There are no cash prizes.

Everyone involved acknowledges that the play-for-"no pay" is little more than a practice run for the day when i-gaming is lawful in Arizona. Like the speakers at national gaming conferences, they accept that the only remaining unknown as to i-gaming being offered for cash prizes is the elusive "when."

The core ingredient to the Pascua Yaqui i-gaming is the Double-Down Casino system developed and currently being offered to casinos at no cost by International Gaming Technology. The casinos can put Double Down on their web sites for non-cash play. There are no wagers, but there is money involved, both in theory and fact. Players who sign up get \$1 million in "virtual chips" at no cost and can spend it in the virtual casino. However, they can spend that freebie in no time at all, because the Pascua Yaqui have imposed a \$100 bet for a single line on a slot machine, and the lowest buy-in at a poker table is \$250. Moreover, they offer what is being called a "black tie" table, and the bets start at an eye-popping \$200,000.

While all of this is fun, these numbers make clear that even experienced players could burn through their allocated million dollars in record time. The casino expectation is that these players will think, "it's free

and fun, and we want to play some more." Once their virtual chips are gone, there is a way they can get more that requires a modest cash investment. Players can buy \$150,000 worth of new chips for \$3. Or they can buy more chips under other options, including the purchase of \$100 million virtual chips for the princely sum of \$99. And the purchases will be easy since they can be made through credit cards and PayPal.

The Pascua Yaqui are banking on the notion that those actually playing the internet games will like them, despite the fact that there are no real prizes at the end of the day. However, there definitely will be prizes at some time in the future, and Casino del Sol is hoping to develop a cadre of loyal customers who will spend real money on the tribal i-gaming in anticipation of winning real money.

So, tribal i-gaming is sort of here today. But tomorrow is coming, and that will be the day when i-gaming is for real money instead of virtual chips.

SENECA NATION V. NEW YORK: ISSUES AND RAMIFICATIONS

by Patrick Sullivan

The Seneca Nation and State of New York are currently embroiled in arbitration to resolve the Nation's claim that the State violated the negotiated Tribal-State Class III Gaming Compact by allowing non-Indian land-based gaming within its Class III gaming exclusivity zone. The Nation is withholding payments to the State and local governments pending a full resolution of the dispute, and the battle is escalating as local communities feel the effects of the withholdings.

Most recently, Mayor Paul Dyster of Niagara Falls threatened to withdraw fire protection services for the Nation's casino unless the payments resume. In fact, Tuesday's edition of *The Buffalo News* reported that the State is negotiating a short-term bridge loan with the City to make up for the shortfall, according to a State Assemblyman. Mayor Dyster has refused to confirm the negotiations.

Of probable impact on the Seneca/New York dispute is last December's Department of Justice ("DOJ") opinion that the Wire Act does not apply to non-sports betting. That opinion has set the wheels in motion for New York to regulate, license and sponsor internet gaming ("i-gaming") to rescue plunging state revenues.

The DOJ opinion expressly sanctioned New York's proposed sales of lottery tickets on the Internet, and it is generally assumed that some legislative action is sure to follow. The consensus is that legalized i-gaming is inevitable, either via state-regulated intrastate gaming platforms or interstate gaming under a federal regulatory framework. The Seneca Nation stands only to lose unless it is included.

The 10,500-square-mile Seneca exclusivity zone encompasses most of Western New York, and the tribal Compact provides that, within the zone, "no person or entity other than the Nation shall be permitted to install or operate Gaming Devices." The Compact defines Gaming

Devices as slot machines and video lottery games. In exchange for geographical exclusivity, the Nation agreed to make payments to the State amounting to 25% of the net drop from those devices. From 2002 to 2009, the Nation's payments to the State totaled \$476 million.

The Nation began withholding those payments in 2009, and the withheld payments now total over \$350 million. The standoff has cost the City of Niagara Falls alone some \$60 million. The Nation objects to gaming machines and video lottery terminals installed in taverns and restaurants, as well as machines installed at three Western New York racetracks. Governor Andrew Cuomo is pushing for a referendum to amend the state constitution to allow statewide casino gambling that may further erode the Nation's exclusivity.

The DOJ opinion adds another dimension to the Compact exclusivity dispute, and raises questions about how legalized i-gaming will fit into the Indian Gaming Regulatory Act ("IGRA") and into the already tense relationship between the Seneca Nation and New York. Unless federal legislation is enacted, the answers to these questions will determine the role of Indian tribes in i-gaming.

[Would New York's entry into i-gaming violate the exclusivity provisions of the Seneca Compact?](#)

The answer appears to be no. The Compact excludes only non-tribal "gaming devices" within the zone, defined narrowly to include slot machines and video lottery terminals, and i-gaming falls completely outside of the scope of the Compact. Competition from i-gaming in New York may affect the Nation's revenue, but any renegotiation of the payments to the State would be at the discretion of the Governor. While the Compact provides that the Nation may cease revenue sharing payments to New York if its exclusivity is violated, i-gaming probably would not *per se* trigger this provision.

[Can Indian tribes conduct i-gaming under IGRA at all?](#)

This remains an open question. In the 1990s, the Coeur d'Alene Tribe operated a short-lived "National Indian Lottery" which extended to players in 33 states and the District of Columbia the opportunity to participate through telephone orders and via a website hosted on servers located on the reservation. The Tribe entered into a compact with the State of Idaho enabling the lottery, the Secretary of the Interior approved that compact, and the National Indian Gaming Commission ("NIGC") approved the attendant management contract. So, as far back as the 1990s, an Indian tribe and a state successfully compacted to create a tribal internet lottery and even won Secretarial and NIGC approval. We will never know how long it would have lasted. The Tribe shut down the operation in response to lawsuits from states objecting to the unwanted competition with their own lotteries, and from AT&T, which provided service to the call center and had come under legal pressure from states. After extensive litigation, the lottery remained closed and the parties settled, leaving the off-reservation i-gaming question open.

Would non-Indian Class II i-gaming in New York give the Seneca Nation the right to conduct i-gaming on its own?

IGRA ties Indian tribes and states together in a number of ways, and the Nation's options will be determined by the nature of New York's foray into i-gaming. IGRA allows tribes to conduct gaming if they are located in a state that "permits such gaming for any purpose by any person, organization or entity." Assuming New York issued licenses for internet poker, which would presumably fall under Class II, the Tribe could also conduct the same games on the reservation under IGRA.

The rub, as recently noted by Professor Nelson Rose, an internationally recognized expert on gaming and i-gaming, in his testimony before Congress, is that courts would likely hold that IGRA's "Indian lands" requirement means players must be physically present on Indian lands to place bets. As Professor Rose noted, "Tribes are not prohibited from taking bets from throughout a state. But that would be a privilege granted by a state, not a right." Many gaming experts believe that the requirement of presence on Indian land substantially diminishes much of the value otherwise anticipated from i-gaming. Furthermore, if New York limited Class II i-gaming to the state lottery rather than issuing licenses to private operators, there is a question as to whether IGRA's gaming-opportunity parity rule would apply at all.

Would non-Indian Class III i-gaming in New York allow the Seneca Nation to follow suit?

IGRA does not permit Indian tribes to conduct Class III gaming merely because it is legal within the state. Tribes can only conduct such gaming if they have a Tribal-State Class III Gaming Compact. The Seneca Compact, like many others, contains a "most favored nation clause"¹ which could open a door for the Nation to follow in New York's footsteps down a path to Class III i-gaming. The Nation could use this provision to press the State for a mandatory amendment to the Compact to include any i-gaming conducted in the state. The Compact provides for arbitration if the State fails to negotiate "automatic" amendments in good faith, but the State may, of course, take the position that any relevant i-gaming falls outside of the definition of Class III. And that is another open question.

Realistically, when negotiating over i-gaming, states and tribes will weigh the costs and benefits of forcing a material breach that would terminate the compact and foreclose any Class III Indian gaming. New York may find that the lure of i-gaming is worth foregoing the Seneca payments. However, with local governments already feeling the pain of the missing payments in the ongoing dispute over land-based gaming, a renegotiation probably is likely. With this in mind, it is noteworthy that the Seneca Compact is due to expire in 2016; the Nation's renegotiation agenda almost certainly will include consideration of a tribal role for i-gaming in New York.

¹The "most favored nations clause" essentially provides that if any other tribe within the state negotiates a concession exceeding that in the existing compact, then that compact tribe has a right to the same concession. This author believes that the first Class III Gaming Compact in the country containing a "most favored nations clause" was the compact executed in 1992 between the State of Oregon and the Cow Creek Band of Umpqua Tribe of Indians. It subsequently has become universal.

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DETROIT CASINOS' AUGUST AGGREGATE REVENUES INCREASE COMPARED TO SAME MONTH LAST YEAR: MICHIGAN GAMING CONTROL BOARD RELEASES AUGUST 2012 REVENUE DATA

by Ryan M. Shannon

The Michigan Gaming Control Board ("MGCB") released the revenue and wagering tax data for August 2012 for the three Detroit, Michigan, commercial casinos. The three Detroit commercial casinos posted a collective 1.6% increase in gaming revenues compared to the same month in 2011. Aggregate gross gaming revenue for the Detroit commercial casinos also increased by approximately 4.4% in August compared to July 2012 revenue figures, reversing a trend of decline from July to August in the prior year.

MGM Grand Detroit posted slightly increased gaming revenue results for August 2012 as compared to the same month in 2011, with gaming revenue increasing by less than 0.4%. MGM Grand Detroit continued to maintain the largest market share among the three Detroit commercial casinos and had total gaming revenue in August 2012 of nearly \$49.8 million. MotorCity Casino had monthly gaming revenue of over \$38.1 million and posted less than a 0.2% increase in revenues in August 2012 compared to August 2011. Greektown had gaming revenue of nearly \$29.1 million, a 5.8% increase compared to August 2011.

The revenue data released by the MGCB also included the total wagering tax payments made by the casinos to the State of Michigan. The gaming revenue and wagering tax payments for MGM Grand Detroit, MotorCity Casino, and Greektown Casino for August 2012 were:

Casino	Gaming Revenue	State Wagering Tax Payments
MGM Grand Detroit	\$49,759,221.09	\$4,030,496.91
MotorCity Casino	\$38,102,330.20	\$3,086,288.75
Greektown Casino	\$29,065,619.31	\$2,354,315.16
Totals	\$116,927,170.60	\$9,471,100.82

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