

# Indian Gaming: Issues and Prospects

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## **Abstract**

*This article explains the evolution of Indian gaming from economic and social perspectives. Many of the political opportunities and threats to Indian gaming are examined, and current and future issues surrounding Indian gaming are further explored.*

## **Introduction**

From the first Florida Seminole high stakes bingo hall in the late 1970s to the recent Mashantucket Pequot's 140,000 square foot casino in Connecticut, the development of Indian gaming during the past decade has been nothing short of phenomenal. Although Indian gaming still only accounts for about 3% of U.S. gaming revenues, the rate of growth in this sector surpasses all other gaming sectors ("Trends In.." 1993). Both in 1991 and 1992, Indian gaming has grown by more than 200% (Turner 1993). This was by far the fastest growing segment in a rapidly expanding industry. As of June 1994, ninety-one tribes in 19 different states operated some form of Class III gaming (Class III Indian gaming Directory). This rapid expansion, however, has led to some increased concern by both state and federal government officials. Proposed legislation, if passed, may severely hinder the future expansion of Indian gaming. This legal limbo has left the future of Indian gaming uncertain.

The purpose of this report is to help the reader understand the evolution, current status, and future prospects of Indian gaming. First, the economic and social importance of gaming to Native Americans will be examined. Second, many of the political opportunities and threats to Indian gaming and their possible ramifications will be discussed. Third, several managerial issues currently facing the operations of Native American casinos will be analyzed. Finally, some of the future prospects of Indian gaming will be explored.

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## Why Gaming?

### Economic Concerns

To understand the true value of gaming to the tribal economies, one must first look to the economic conditions on Indian reservations. A high unemployment rate is common place in the Indian reservations due to a lack of Indian owned and Indian run businesses. This lack of Indian owned businesses was not caused by a lack of initiative by Native Americans but by their inability to access the capital needed for economic development. Indian economies relied mostly on U.S. Federal aid, but this aid only allowed for substandard living. Further, the Reagan Administration in early 1980s began to limit the Federal aid programs. Native Americans have always been a low priority or the "forgotten people" to many government officials, thus they were one of the first to be cut from the new budget. Throughout the 1980s, economic relief to Native American tribes did not even keep up with the rate of inflation (Turner 1992).

The geography and uselessness of reservation land were the biggest obstacles in attracting any type of economic investment. Reservation land consists mainly of throw away land from the old frontier days. Most tribal land is barren and isolated and cannot even support the simplest of agricultural crops. One of the few industries that they could attract was that of toxic dumping. Most tribes rejected this type of industry, however, due to their strict religious beliefs on the sanctity of land (Turner 1992).

Even if this land was rich in natural resources, it is held in trust by the U.S. government and thus cannot be used as collateral for loans. Therefore, without the capital for economic investment, the ability to start businesses was virtually impossible. And without their own businesses, any economic development would be continuously stalled.

Gaming, it was soon discovered, was one of the few industries that could be sustained on barren lands. One only needs to look at Las Vegas to see this fact. The advantage of gaming on reservations was two-fold. First, with its substantial returns on investments, many tribes were successful in attracting the hard capital necessary for starting up. In addition, gaming generated significant traffic on the reservations which is needed to support ancillary businesses, such as gas stations and convenience stores (Turner 1992). In other words, gaming attracted people as well as money.

Gaming dramatically reduced unemployment on many reservations. For example, in Minnesota, where 15 gaming operations employ over 8,000 people ("Indian gaming..." 1992), unemployment of Native Americans has virtually been eliminated. These jobs are not simply low paying menial jobs but are quite competitive with those in the surrounding communities. In fact, many non-Indians are also being employed at these gaming establishments.

Allowing Native Americans to work on the reservation also has a significant economic multiplier effect. Before the advent of gaming on reservations, up to 92 cents of every dollar earned was spent off the reservation (Turner 1992). Now, not only do these Native Americans spend more of their money on the reservation, but outsiders are also beginning to contribute to the Indian economies. This is essential for any future economic development.

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### **Social Concerns**

The above described economic problems have certainly had some dramatic social consequences on Native American tribes. Alcoholism in Indian reservations is estimated to be over six times the national average while the suicide rate is double (Oleck 1993). The average education level of Native Americans hovered around the sixth grade level (Turner 1992). In addition, disease and infant mortality occurs approximately four times the U.S. average (Kilborn 1992).

To understand the true causes of these social problems, one must go beyond the simple economic symptoms of poverty. Native Americans are proud people and by nature not very materialistic. Their sense of helplessness was not caused by the lack of material things but by the feeling of dependence on the United States. Thus, gaming is considered more than just a source of money, but as a unique opportunity to gain independence (Turner 1992).

The key to understanding the rise of Indian gaming is not economic but, in fact, the desire for sovereignty. Indian sovereignty and the desire to maintain a separate and distinct culture from that of Americans is the driving force of the gaming movement. Economic independence, many tribal leaders argue, is the only way to ensure the continuation of separate Native American nations. And as previously mentioned, gaming is one of the only ways to develop Indian economies.

Certainly not all Native American people are in full support of gaming on their reservations. Some opponents believe that gaming will only exacerbate the above social consequences. They claim that gaming attracts "an influx of noise, traffic, and decline of Indian culture (Liebermann 1990). In fact, fierce infighting among tribal members has sometimes led to violence. The most famous of these disputes occurred within the St. Regis Mohawk tribe located on the New York/Canada border. In this case, two Native Americans were killed in a shoot-out after anti-gambling groups set up roadblocks to stop customers from going into the casinos. This violence, which led to the United States federal intervention, only united many Native Americans' nationalistic desire for sovereignty.

As the economic benefits become more apparent throughout several reservations, many of the social opponents of gaming are becoming reduced. As one Native American so aptly put it, "It's not a question of taking a stand on gambling, I'm pro-eating" (Liebermann 1991a). In addition, many tribes are now using gaming revenues for developing schools, health centers, and other public works that have significantly increased the quality of life for many Native Americans.

Many Native American leaders are now comparing gambling to the ancient white buffalo that used to roam the plains. The buffalo is an intensely spiritual symbol that represents the replenishment of the American Indian people (Connor 1993a). As Indian gaming consultant Kathy Thorpe-Granowski states, "Gaming represents regeneration and taking control of our lives" (Opel 1992d). Thus, the tribes have begun to fiercely fight the political opposition that is now growing among state and federal officials.

### **Political Landscape**

Before understanding the legal status of Indian gaming and where it is headed, one must first look at a historical perspective of Indian gaming law.

Indian gaming was given its first light of day in 1977, when a Federal District Court upheld the Seminole Indians' rights to run their high stakes bingo operations. In *Seminole Tribe v Butterworth* (1979), the court determined that "the state cannot prohibit Indian bingo because it does not have regulatory power over the tribe" (Connor 1993a).

This decision was later reaffirmed by the U.S. Supreme Court in *California v Cabazon Band of Mission Indians* (1987). In this case, the Court stated that although a state may have some criminal or prohibitory jurisdiction over tribes located adjacent to their states, they can not regulate gaming that falls under civil law (Turner 1992). Therefore, if a state has legalized any form of gaming, including periodic "Las Vegas Night" charity events,

the tribes in that state could offer the same games, but without government restrictions. These two decisions left the door open for gaming to progress in many states, since only Utah and Hawaii prohibit all forms of gambling (Turner 1992).

### **Indian Gaming Regulatory Act (IGRA) of 1988**

In response to the above court decisions, Congress looked for a compromise between the tribes' sovereignty and the states' rights to regulate events located within their borders. The main purpose of the IGRA (according to the Declaration of Policy in Public Law 100-497) was: (1) to provide the statutory basis of Indian gaming; (2) to adequately shield an Indian tribe and players from organized crime and other corrupting influences; (3) to establish an independent Federal regulatory authority (National Indian Gaming Commission) for gaming on Indian land (Connor 1993a). Although a complete summary of this 200-plus page law is beyond the scope of this report, two of its major issues must be examined.

First, the IGRA sets guidelines to classify three types of Indian gaming (Turner 1992). Class I includes carnival and traditional Indian games played for prizes of minimal value. Class II includes games where players communally play against one another rather than against the house, such as bingo and poker. Class III includes any other games not included in Class I or II, such as casino games, pari-mutuel horse racing, banking card games, and slot machines.

Second, it set up the guidelines for which tribes can negotiate compacts with states for Class III gaming. Thus, a tribe wanting

casino type gaming or any other Class III gaming must negotiate with the state to do so. To ensure that the states would negotiate in "good faith," a tribe was given certain provisions that allowed them to sue the state if they believed the states negotiated in "bad faith."

Needless to say, the controversy between the tribes and states was not settled with the passage of the IGRA. Problems arose in several areas. First, the distinctions between Class II and Class III gaming was still uncertain. Many Indian casinos attempted to push the limit of the new regulations (Liebermann 1991c). Several tribes installed electronic pull tab machines claiming that they were simply "technological advancements" of Class II bingo. State officials argued, however, that they were electronic gaming devices which were prohibited.

Another area of controversy from the IGRA is the exact term of negotiating in "good faith." If a state decides it will not negotiate for slot machines of any type since these machines are not permitted under state law, does that mean they are not negotiating in good faith? Both of these questions have been brought to court.

In many cases, the courts have ruled in favor of the Native American tribes. The courts generally claim that the intent of the law, as stated in the Declaration of Policy, was to establish a statutory basis for Indian gaming. Therefore, the burden of proof is often imposed on the states, and any discrepancies in interpretation will be ruled on the tribes' favor.

There are several cases that reinforce this view. One of the most famous of these cases was the Mashantucket Pequot Tribe v Connecticut (1991). In this case, a Federal court ruled that Connecticut's refusal to negotiate with the Pequots constituted "bad faith" negotiation since Connecticut's state law allowed certain charity casino games. Thus, a Class III compact allowing these same casino type games was issued by the Secretary of the Interior, overruling the state's objections. The Mashantucket Pequot Tribe's casino is now one of the most successful Indian casinos in the country and will be discussed in more detail later in the article.

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Another landmark case reaffirming the tribes' rights to negotiate Class III gaming was *The Lac Du Flambeau Band of Lake Superior Chippewa v Wisconsin* (1991). In this case, the tribe used an unclear definition of "lottery" to mean any game that involves the elements of prize, chance, and consideration (Conner 1993a). Since the State of Wisconsin operated and regulated a lottery, the court ruled that the state must negotiate all games that include the elements of prize, chance, and consideration. There are now several tribes in Wisconsin that are operating full scale casinos.

Not all negotiations between states and tribes have been confrontational. A prime example of cooperation can be seen between the state of Minnesota and their 11 federally recognized tribes. Minnesota has successfully negotiated compacts with each of these tribes, and the results for both parties has been positive. Economic benefits can be seen not only by the tribes but by the surrounding community as well. Indian gaming is now one of the biggest employers in Minnesota and has recently become the third largest gaming destination in the U.S. behind only Las Vegas and Atlantic City (Indian gaming 1991).

### **Growing Opposition to Indian Gaming**

Unfortunately from the tribes' point of view, the Minnesota example is more the exception than the rule. The legality and constitutionality of the IGRA is currently being attacked at both the state and federal levels. This formidable threat has gained momentum and the possibility of amending the Indian gaming Regulatory Act has become real.

In 1993, forty-nine out of the fifty governors petitioned the U.S. Congress to modify the Indian gaming Regulatory Act. As one of the biggest opponents of full-scale casino gambling, Arizona Governor Fife Symington stated, "I will not, and I cannot, idle in my office while this state, without the consent of its people, is transformed into a haven for full-scale casino gambling and all the social consequences it brings" (Conner 1993b). The Governors take the position that: (1) only those games expressly authorized by state law (for commercial purposes) should be permitted; and (2) The definition of "good faith" bargaining must be clearly defined and the burden of proof should rest with the party alleging the other side is negotiating in "bad faith" ("Indian gaming Resolution..." 1993). If these modifications were enacted, it would severely hinder the ability for Indian tribes to negotiate for Class III gaming.

Other obstacles that states are using to contest the constitutionality of the IGRA are the 10th and 11th Amendment defenses. Both these amendments were enacted to protect states' rights and sovereignty. The 10th Amendment gives the States all powers not already delegated to the Federal government. The 11th Amendment prohibits any individuals from outside sovereign states to sue the States. These defenses have had conflicting results in lower state courts, but the Supreme Court has yet to decide on this issue.

In addition, The National Indian Gaming Commission tightened the definitions between Class II and Class III gaming. In a somewhat controversial decision, NIGC Chairman Anthony Hope (1992) declared most "electronic facsimile" machines as Class III devices, and thus require a tribal-state compact. After this decision, some states initiated raids of Indian gaming establishments. Arizona, California, and New York all confiscated numerous machines located on Indian reservations (Turner 1993).

Another threat towards Indian gaming was mounted in the U.S. Congress. Both Rep. Robert Torricelli (NJ) and Sen. Harry Reid (NV) introduced legislation which would also limit Indian gaming. These bills included: (1) stricter distinctions between Class II and Class III gaming; (2) tougher regulation requirements on both Class II and Class III gaming; and (3) forbidding tribes from suing the states. In addition, Rep. Torricelli's sponsored bill imposed a moratorium on future compacts unless expressly approved by the governor of the state (Conner 1993c). While these bills never did make it to the floor, both Sen. Reid and Rep. Torricelli promise to continue their opposition to widespread Indian gaming.

Naturally, the Indian tribes fervently oppose these types of restrictions and have enacted fierce lobbying and public relations campaigns. They have cynically pointed out the origins of this opposition (New Jersey and Nevada) and have facetiously called restrictions on Indian gaming as "The Donald Trump Protection Acts" ("Trends In..." 1993).

### **Will IGRA Be Reopened?**

In the 1994 Congressional session, Senators Daniel Inouye (D-Hawaii) and John McCain (R-Arizona) introduced the Indian Gaming Regulatory Act Amendments Act (S.2230) as an effort to find an acceptable middle ground between the states and the tribes. As is the case in many compromises, neither side was satisfied. Among the many tribal complaints were the "unfair" restrictions on the scope of gaming and the increased regulatory power of the National Indian gaming Commission (Connor 1994). The states, on the other hand, believe that unwanted gaming may still be forced upon them with a "fast-track" compacting process which impedes on states' rights (Becker 1994). These differences could not be overcome in the 1994 legislative session, thus any changes will have to wait until 1995.

### **Current Managerial Issues**

Even with the political future of Indian gaming still very much up in the air, numerous tribes are still progressing forward in their attempts to institute gaming on their reservations. This section of the report will delve into some specific issues that are having an impact on many Indian gaming establishments.

### **Regulation**

Since gaming is unfamiliar territory for most Native American tribes, it cannot be expected that many tribal leaders would have the expertise needed to run multi-million dollar casinos or bingo halls. Thus, it became necessary for many tribes to hire outside (white) management companies. Unfortunately, many naive tribes were unscrupulously cheated. These swindles included everything from simple overcharging to outright skimming of the profits. Organized crime was also successful in infiltrating some tribal casinos and using them as fronts for money laundering (Liebermann 1991a). How prevalent is organized crime in today's Indian gaming industry? The answer to this question depends on to whom you listen.

Many of the anti-Indian gaming forces, including the previously mentioned Sen. Reid and Rep. Torricelli, claim that organized crime is spreading throughout reservation gaming. Documented cases of money laundering and profit skimming in California and New York tribes have been used to solidify this argument (Liebermann 1991b.). Rep. Torricelli declared that Indian casinos were a "virtual invitation" to organized crime since the tribes do not have the law enforcement resources that Las Vegas and Atlantic City have ("Trends in..." 1993).

Tribal leaders, on the other hand, claim that anti-gaming forces are using the fear of organized crime as a "smokescreen" to further restrict the growth of Indian gaming ("Trends in..." 1993). While admitting to some past problems, they claim these were isolated instances which, in most cases, have been corrected. Rick Hill, Chairman of the National Indian Gaming Association, recently stated of the current status of Indian gaming, "There's no organized crime, reorganized crime, or disorganized crime on Indian reservations" (Conner 1993c). In addition, both the Justice Department and the Internal Revenue Service appear to agree. Recent reports from these organizations state that the influence of organized crime is minimal and not a real threat to Indian gaming (Connor 1994).

Tribes are now pro-actively increasing their self-monitoring activities so as to ensure the legitimacy, and the appearance of legitimacy, of their gaming establishments. Background checks are becoming more thorough and additional restrictions to who may work the casinos have been added (Guthery 1993). Many tribes want to prove that they can regulate themselves so as to deter U.S. government intervention.

### **Financing**

Naturally, many of the impoverished tribes interested in casino gaming do not have the initial money to build a gaming complex. This money, however, has to come from somewhere. In the earlier days, most U.S. banks were skeptical of these unproven endeavors. They felt these projects were too risky, and since Indian land is held in trust by the Federal government (Indian land cannot be foreclosed), no collateral was available. Therefore, innovative ways to finance these projects were needed to be found.

One of the more common ways to raise the initial start-up costs is to enter into a management contract with an outside entity. The Indian gaming Regulatory Act does,

however, have certain requirements that must be followed. First, all management contracts must first be approved by the National Indian Gaming Commission (NIGC). After some of the problems described in the previous section, these management contracts have undergone considerably more scrutiny. Other restrictions include limitations on outside profit participation and a maximum contract length of seven years. In addition, outside management firms are limited to

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a 40/60 share of the profits (Oleck 1993). These provisions were included since one of the primary purposes of the IGRA was to promote tribal economic independence.

The success of many of these tribal casinos has now attracted the attention of some of the biggest players in the gaming industry. Many Las Vegas casinos, who once fiercely fought the spread of Indian gaming, have now joined as partners with some tribes. For example, The Boyd Group now operates the successful Silver Lake Indian Casino in Mississippi. Caesars World has also recently signed an agreement with the Agua Caliente Band in Palm Springs to develop and manage an Indian card casino (Turner 1993). And Mirage Resorts is negotiating with several tribes located in the state of Washington (Turner 1993). Other management companies have been created that specifically cater to the special needs of Indian gaming.

Management contracts are certainly not cheap with substantial profits ending up with outside parties. Thus, many tribes are looking for ways to finance and manage the casinos themselves. While certainly not all have succeeded, there have been some stunning examples of success.

One of the most notable successes is the Mashantucket Pequot's Foxwoods Casino in Connecticut. After numerous attempts to borrow money from U.S. banks, this innovative tribe was successfully able to borrow \$58 million from a Malaysian hotel and casino investment group (Oleck 1993). While the interest rates were higher than normal, they did not give up an equity position in the casino. They also hired several outside managerial experts to help run the casino, paying them only a high salary, but no percentage. The success of this enterprise was beyond anyone's expectations, and a high percentage of the profits were retained within the tribe. Recent expansions of this casino now make it one of the largest and most profitable casinos in the world.

The Oneida tribe in Wisconsin and the Mdewakanton Sioux tribe in Minnesota have also financed and currently manage the casinos on their own. Leonard Prescott, a leader of the Sioux tribe, believes the key to achieving a tribe's economic self sufficiency is by learning the "necessary lessons" by yourself (Oleck 1993).

### **Marketing**

When Indian casinos first began to appear on the scene, extensive marketing campaigns were simply not a priority for many of the tribes. The uniqueness and exclusivity of these casinos often attracted more customers than they could handle. For example, the Foxwoods casino often has lines behind the tables three deep. In addition, the news media extensively covered the opening and operations of the casinos. In essence, the tribes followed the motto, "If you build it, they will come" (Opel 1992b).

As competitive pressures increased, however, the need for strategic marketing plans soon became evident. Many of the tribes could no longer depend solely on their monopolistic status. In fact, it appears that Indian gaming may have become a victim of its own success. Competition began to arise from not only the other tribes but by the increased legalization of state sanctioned gaming. Many states simply did not want to sit on the sidelines as the tribes were the only ones to benefit from gaming. For example, both Minnesota and Wisconsin (two states with numerous Indian gaming casinos) are considering the possible legalization of gambling (Turner 1992). Thus, the competition from legalized gaming may actually be a more imposing threat to Native Americans than the potential of legal restrictions in the future.

**Indian gaming does have a certain competitive advantage over other legalized casinos since they do not face as many of the legal restrictions and taxes. However, one of the most formidable and possibly fatal competitive disadvantages for some tribes is location.**

This threat of increased competition has not gone unnoticed by many tribes. Indian gaming does have a certain competitive advantage over other legalized casinos since they do not face as many of the legal restrictions and taxes. However, one of the most formidable and possibly fatal competitive disadvantages for some tribes is location. While a few reservations are located near major metropolitan areas (e.g. Pequot & Sycuan), most reservations are extremely isolated. It still remains to be seen if certain Minnesota tribes could compete with legalized casinos in Minneapolis-St. Paul or Duluth.

The Mashantucket Pequot Tribe actually went on the offensive to fight the spread of legalized gaming in Connecticut. They recently signed a contract with the state in which they agreed to pay \$100 million for the use of slot machines in their casinos (Connor 1993). This agreement is void, however, if gaming is legalized elsewhere in the state. This agreement was considered one of the main determinants in Steve Wynn's \$1 million failed lobbying effort to bring casino gambling to Hartford and Bridgeport. Thus the Pequots were successful in maintaining their monopoly.

While Indian tribes are not looking forward to this increased competition, many tribal leaders insist they can still prosper. Charles Keechi, former President of the National Indian Gaming Association (NIGA), says that Indian casinos would simply "get

down to marketing our product, just like any other business" (Connor 1993a). Aggressive direct mail and print advertising campaigns are now becoming more common among the tribes. Successful media relations is also a top priority in getting out their message (Opel 1992a). Several media and advertising consulting firms, some Indian some non Indian, have been established to help tribes in these efforts. Thus, it has become apparent that Indian gaming can no longer rest on their laurels of exclusivity.

## **Future Issues and Concerns**

### **Diversification**

Although Indian gaming continues to be an essential method of raising revenues for many tribes, they must remember that the bubble may eventually burst. As previously stated, there are numerous political and competitive threats to Indian gaming. While most believe that gaming is here to stay, its future benefits may become more limited. Tribes must not become too dependent on gaming. They must use these revenues to begin to build a self sufficient economy which includes a variety of Indian owned businesses.

Several tribes have been successful in building much needed infrastructure and diversifying their economies. One tribe, considered to be a model to be followed, is the Sycuan Tribe in California. They have been able to build schools, housing, churches, a health center, and even a fire department (Liebermann 1991c). They also have diversified their economy to include hotel, housing developments, and potentially a vineyard.

Unfortunately, not all tribes have used gaming revenues as a catalyst to develop their economic base. The influx of tremendous revenues can sometimes lead to greed among tribal members. These revenues may simply be dispersed among members of the tribe. If or when these revenues dry up, however, these tribes will be back to where they started. Gaming needs to become the means to develop long term economic development.

### **Off Reservation Indian Gaming**

A recent development in Indian gaming is the attempt by some tribes to purchase land outside of major cities for the exclusive use of establishing Class III gaming facilities. Obviously, this approach may help some of the more isolated tribes. The Siletz Tribe in Oregon is trying to purchase land in Salem so as to build a casino. In this case, the tribe wants to take advantage of an old Department of the Interior policy in which purchased land outside of a reservation can be placed in trust for the tribe (Turner 1993). In addition, the Mashantucket Pequots are trying to annex more land in Connecticut so as to expand further their already successful Foxwoods casino. Most states fervently oppose this type of action and are taking all possible steps to fight this. This action is now being fought in the courts and its outcome could dramatically impact the future development of Indian gaming.

### **The Need for Unity**

The one assumption the current authors hope the reader does not get from reading this report is that gaming affects all tribes in the same manner. It must be remembered that each tribe is a separate sovereign nation with its own specific needs and goals. As Kathy Thorpe-Granowski recently said, "You can't simply look at the generic Indian. You have to look at each individual tribal nation as its own sovereign nation" (Connor 1993a). Keeping this fact in mind, however, it must be stressed that these diverse nations must work together to confront many of the issues currently facing them.

Charles Keechi (1992) believes that the National Indian Gaming Association (NIGA) is the best way to unite. He compares the NIGA to the United Nations as a forum where numerous nations can face their problems. The NIGA has now become more active in both its lobbying and public relations activities. They have recently initiated a PR campaign called the "The Truth About Indian gaming" which stresses the positive benefits to both the tribes and surrounding communities (Connor 1993c). In fact, these campaigns

appear to be working since numerous public polls now show that the American people favor Indian gaming on reservations, more so than state sponsored gaming (Turner 1993). The NIGA now needs to stress this support in their lobbying efforts.

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