

SPORTS BETTING AND INDIAN GAMING: SHOULD TRIBAL CASINOS GET IN THE GAME?

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INTRODUCTION

When the U.S. Supreme Court decided in *Murphy v. National Collegiate Athletic Association*¹ (NCAA) that the federal Professional and Amateur Sports Protection Act² (PASPA) was unconstitutional, the Court effectively lifted the widespread ban on legalized sports betting in the United States. All states—and presumably, all eligible federally acknowledged American Indian tribes—now

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¹ 138 S. Ct. 1461 (2018).

² See 28 U.S.C. §§ 3701–04 (2012), *invalidated by Murphy*, 138 S. Ct. 1461.

could exercise their sovereign authority to legalize sports wagering.³

After its passage in 1992, PASPA formally outlawed sports betting nationwide, with the notable exception of the licensed sports pools in Nevada.⁴ Yet in practice, the law was markedly ineffective, as evidenced by the estimated \$150 billion illegal U.S. gambling market.⁵ PASPA's underlying presumptions and policy goals grew increasingly anachronistic, utterly failing to slake the public's thirst to gamble on sports contests, especially with the advent of online and mobile technology, and as evidenced by the popularity of Super Bowl and March Madness office pools, online poker, Fantasy Sports leagues and Daily Fantasy Sports (DFS) sites, competitive video gaming and eSports, social games, and the like.⁶ Additionally, PASPA did not contemplate the massive growth and marketing of big-time professional sports leagues—or, ironically, that of collegiate sports and the NCAA—or social media's role in popularizing individual sports personalities and online influencers. The bottom line? Regardless of the outcome in the Supreme Court's decision, PASPA was a losing bet.

The subsequent flood of media stories after *Murphy* was decided focused on the apparent inevitability that a majority of states in the near term would legalize sports betting.⁷ Gaming operators, casinos, industry and trade affiliates, and consultants of all stripes were readying to “cash in.” As not many state legislatures

³ See A.J. Perez, *What it Means: Supreme Court Strikes Down PASPA Law that Limited Sports Betting*, USA TODAY (May 14, 2018, 3:23 PM), <https://www.usatoday.com/story/sports/2018/05/14/supreme-court-sports-betting-paspa-law-new-jersey/440710002/>.

⁴ See §§ 3701–04. PASPA also “grandfathered” more limited sports betting in the form of sports lotteries in Oregon, Delaware, and Montana. See, e.g., I. Nelson Rose, *States Grandfathered-in Under PASPA*, GAMBLING AND THE LAW (Jan. 3, 2018), <http://www.gamblingandthelaw.com/states-grandfathered-in-under-paspa/>.

⁵ See *Embracing America's Passion for Sports Betting: The Case for Overturning a Failed Law and Returning Power to the State and Tribal Sovereign Governments*, AMERICAN SPORTS BETTING COALITION, <https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a70d888419202bd897172a0/1517344904408/Embracing+America%27s+Passion.pdf> (last visited Mar. 10, 2019).

⁶ See GREENBERG QUINLAN ROSNER RESEARCH, LEGALIZING SPORTS BETTING: A WINNING WAGER, REPORT TO THE AMERICAN GAMING ASSOCIATION, (Apr. 24, 2017), https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a70d93b419202bd8971b2fa/1517345084101/Rev_Public+AGA+National+Poll+Memo+042417+FINAL.pdf.

⁷ See, e.g., Ryan Rodenberg, *How Close Is My State to Legalizing Sports Betting?*, ESPN.COM (June 28, 2018), http://www.espn.com/chalk/story/_/id/22516292/gambling-ranking-every-us-state-current-position-legalizing-sports-betting (“Movement toward legal sports betting hit a fever pitch during the first part of 2018.”); Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors Sports Betting*, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html> (stating that the Court's decision “open[ed] the door to legalizing the estimated \$150 billion in illegal wagers on professional and amateur sports that Americans make every year”); Ariane de Vogue & Maegan Vazquez, *Supreme Court Lets States Legalize Sports Gambling*, CNN (May 14, 2018, 3:45 PM), <https://www.cnn.com/2018/05/14/politics/sports-betting-ncaa-supremecourt/>

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 57

were in session, and the fall 2018 midterm election came and went, reality set in. State lawmaking and rulemaking, as well as operational development and implementation of mobile and casino-based sports wagering, will take time.

Yet in disrupted industries, first movers have the competitive advantage.⁸ And monopolies maintain it. A key question for the gaming industry, then, is how the Court's decision will impact American Indian tribes in the largest current legalized gaming market: the \$32.4 billion Indian gaming segment,⁹ in which many tribal-state compacts contemplate tribal market exclusivity in a particular state.¹⁰ Under PASPA, tribes also effectively were prohibited from offering sports betting,¹¹ now, express state legalization opens the door to tribal sports betting, as well. In a post-PASPA world, should tribes get in the game?

Answering that question—like anything that lumps together the experiences of the 242 sovereign tribes that currently operate nearly 500 gaming facilities in twenty-nine states¹²—is complex. Tribal gaming is governed by an extensive framework of federal law and regulations, as well as an array of tribal-state compacts.¹³ Like a tribe's choice to open a casino under the regulatory framework of the federal Indian Gaming Regulatory Act of 1988¹⁴ (IGRA), its determination to enter the nascent sports betting market is much more than a business decision. For a sovereign government with responsibilities to enrolled tribal citizens as well as to non-tribal community members, such a judgment carries political, legal, economic, social, cultural, and moral implications.

To make a calculated decision whether to get in the sports-betting game, we posit that a tribe should carefully evaluate three major barriers to market entry:

—*Legality and regulation*, particularly IGRA's interplay with state law, the framework of existing tribal-state compacts, and ensuring alignment with interpretations and directives from the National Indian Gaming Commission (NIGC);

—*Feasibility and profitability*, such as compact terms, fixed or sunk costs

index.html (“The Supreme Court cleared the way on Monday for states to legalize sports betting . . .”).

⁸ See First Mover, Investopedia, <https://www.investopedia.com/terms/f/first-mover.asp> (last updated Mar. 27, 2018) (definition of “first mover”).

⁹ Press Release, Nat'l Indian Gaming Comm'n, 2017 Indian Gaming Revenues Increase 3.9% to \$32.4 Billion (June 26, 2018), <https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion>.

¹⁰ See KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW AND POLICY, at 159-60 (2d ed. 2014) (discussing the “substantial exclusivity” provisions associated with revenue-sharing agreements in tribal-state gaming compacts) [hereinafter RAND & LIGHT, INDIAN GAMING LAW AND POLICY].

¹¹ See Dave Palermo, *Tribal Position On Sports Betting Will Come Into Focus At Phoenix Conference*, LEGAL SPORTS REP. (Sept. 14, 2017, 1:31 PM), <https://www.legalsportsreport.com/15573/tribal-gaming-and-sports-betting-niga-2017/>.

¹² 2017 Indian Gaming Revenues Increase 3.9% to \$32.4 Billion, *supra* note 9.

¹³ See generally RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 10, at 37-72 (providing an overview of the various federal statutes, regulations, and requirements for tribal-state gaming compacts that apply to Indian gaming).

¹⁴ See 25 U.S.C. §§ 2701–21 (2012).

and plug-and-play options for a sports book, and the marginal rate of return for sports books versus slots or similar fixed-odds games; and

—*Market and competition*, including whether other tribal and/or commercial operators offer sports betting in the same or a similar market, the advantages of partnering with commercial operators or other tribes, and how mobile betting apps and similar technology can scale.

In this essay, we address each barrier. Together, they establish the potential risk and reward for tribal sports betting. Our intent is to surface and highlight these hurdles, and to identify threshold solutions for how to surmount them.¹⁵ The considerations we raise are relevant for states, local governments, and commercial industry entities, as well. However, we believe they are more complex in the context of Indian gaming, which is subject to federal, state, and tribal regulation as well as to commercial pressures.

I. LEGALITY AND REGULATION: THE FIRST BARRIER TO MARKET ENTRY

A. *Threshold Requirements*

Generally speaking, a tribe may not offer sports betting unless it is legal under state law. Under IGRA, a tribe may operate gaming only on “Indian lands” in states that “permit[] such gaming for any purpose by any person.”¹⁶ “Such gaming” conceivably can be read broadly; for instance, in the form of all “casino-style” games. In 2001, however, the NIGC opined that a state specifically must have legalized sports betting in order for a tribe to offer it.¹⁷

¹⁵ In this essay, which accompanies the other leading-edge articles in this Symposium issue, we forgo laying out the complete backdrop for Indian gaming law and policy, including tribal sovereignty and tribes’ relationship to the U.S. Constitution, IGRA’s statutory requirements, Indian gaming regulations and case law, and the current size and scope of the tribal gaming industry, which we have described extensively elsewhere. *See, e.g.*, STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE (2005) [hereinafter LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY]; RAND & LIGHT, INDIAN GAMING LAW AND POLICY, *supra* note 10; KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW: CASES AND MATERIALS (2d ed. forthcoming 2019). We also defer to other Symposium authors to discuss in detail PASPA, the *Murphy* decision, and the more technical dimensions of legalized sports betting, particularly in the commercial sector. (We further note that some of the background specific to tribal sports betting is aptly addressed in this Symposium. *See* Francisco Olea, *The Professional and Amateur Sports Protection Act and Its Legal Implications: How Its Invalidation Will Impact Indian Gaming’s Legal and Regulatory Framework*, 9 UNLV GAMING L. J. 35 (2019)). Rather than detailing all of these other considerations, we instead leverage the fact of being embedded within this Symposium to get right to the heart of the matter: the key considerations counseling “go or no go” on tribal sports betting.

¹⁶ 25 U.S.C. § 2710(d)(1)(B).

¹⁷ *See* Letter from Kevin K. Washburn, Gen. Counsel, Nat’l Indian Gaming Comm’n, to Joseph M. Speck, Nic-A-Bob Prods., Re: WIN Sports Betting Game, at

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 59

For Class III gaming, IGRA requires a “compact entered into by the Indian tribes and the State.”¹⁸ The NIGC has classified sports betting as Class III gaming, requiring a tribal-state compact.¹⁹ Under NIGC regulations, Class III gaming includes “[a]ny sports betting and pari-mutuel wagering.”²⁰ (Nevertheless, some argue that this classification is not, as of yet, settled law, so that some forms of sports betting could fall within Class II.²¹ It is accurate, and therefore relevant, to note that this characterization has not yet been formally tested.)

At a minimum, then, a tribe’s decision to pursue sports wagering is conditioned on state law and IGRA’s requirements, presumably including those for compacts.

B. *Compacting*

Assuming state legalization of sports betting, the next step is to determine whether the existing tribal-state compact allows the tribe to open a sports book, or whether a new or revised compact is required. Alternatively, a tribe could proceed without a compact on the assumption that the tribe’s sports book (or sports-betting-type games) fall within Class II; this would require the tribe to accept some currently significant level of risk, including the possibility of litigation and civil or criminal penalties.²² Given NIGC regulations and the accompanying risk (as well as cost) of litigation, most tribes—and certainly, states—

2 (Mar. 13, 2001) [hereinafter Washburn Letter], <https://www.nigc.gov/images/uploads/game-opinions/WIN%20Sports%20Betting%20Game-Class%20III.pdf>.

Whether the NIGC will enforce this as a specific requirement after *Murphy* remains to be seen. In New Mexico, the Pueblo of Santa Ana opened a sports book at its Santa Ana Star Casino & Hotel in 2018, despite the fact that New Mexico had not passed legislation authorizing sports betting in the state. The NIGC general counsel informally commented that New Mexico fell into a “gray area,” as state law neither prohibited nor permitted sports betting, while the tribal-state compact with the Pueblo of Santa Ana authorized the tribe to operate “any or all forms of casino-style gaming.” See Steve Ruddock, *How New Mexico Sports Betting Started in a State Without a Sports Betting Law*, LEGAL SPORTS REP. (Nov. 19, 2018, 5:13 PM), <https://www.legalsportsreport.com/26007/pueblo-tribe-new-mexico-sports-betting/>.

¹⁸ 25 U.S.C. § 2710(d)(1)(C).

¹⁹ Washburn Letter, *supra* note 17.

²⁰ 25 C.F.R. § 502.4(c) (2018). In a game classification opinion from 2001, the NIGC stated that “sports betting . . . is a Class III form of gaming.” Washburn Letter, *supra* note 17.

²¹ See, e.g., Christopher E. Babbitt, Jonathan Bressler, & Claire Chung, *United States: Supreme Court to Decide Future of Sports Betting: Implications for Tribal Casinos*, MONDAQ (Feb. 21, 2018), <http://www.mondaq.com/unitedstates/x/675562/Gaming/Native+American+Law+Alert>. See also *id.* (“Montana, for example, currently authorizes sports pools and sports tab games, which are non-banked games in which players bet against and settle with each other, not a traditional sportsbook. . . . [T]he NIGC’s position [that sports betting is Class III gaming] has not been litigated, and the law on sports wagering is still developing.”).

²² See, e.g., *id.* The NIGC has enforcement authority, including the power to levy

likely will proceed on the assumption that sports betting is a Class III game.

There are hundreds of gaming compacts now in effect; many are based on “model” compacts such that the compact provisions are the same or similar for all tribes within a particular state, while others are more individualized.²³ Any existing compact will require careful review to determine what amendments may be necessary for a tribe to offer sports betting, as well as the implications of such revisions and/or offering additional Class III games at the tribe’s casino. Though some tribes have compacts that allow the tribe to add a sports book conditioned upon state legalization (triggered at the outset, that is, by federal authorization to do so—and as it turns out, via *Murphy*—followed by state sanction),²⁴ for most tribes, sports betting likely will require an amendment to an existing compact (or a new compact, if one is not in place).

C. Negotiating Revenue Sharing and Other Issues

Any compact negotiations almost certainly would include the single biggest political demand a state may legally make of a gaming tribe: revenue sharing.²⁵

civil fines and order closure of tribal gaming facilities. *See* 25 U.S.C. § 2713 (2012). The federal Johnson Act prohibits the use of unauthorized “gambling devices” in Indian country. *See* 15 U.S.C. § 1175 (2012).

²³ For a (mostly up-to-date) list and links to compacts, *see* *Indian Gaming Compacts*, U.S. DEPARTMENT OF THE INTERIOR, <https://www.bia.gov/as-ia/oig/gaming-compacts> (last visited Feb. 10, 2019). Many states make gaming compacts publicly available. *See, e.g., Tribal Compacts and Amendments*, STATE OF WIS. DEP’T OF ADMIN., <https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAndAmendments.aspx> (last visited Jan. 4, 2019).

²⁴ For example, the Mississippi Band of Choctaw Indians was able to act quickly to open sports books at its casinos due to specific language in the existing compact allowing the tribe to offer sports betting “only if such wagers are allowed on non-Tribal lands under the law of the State.” Thus, when sports wagering became legal in Mississippi by virtue of the 2017 amendments to the [state’s] Gaming Control Act, it also became an “authorized” form of gaming for the Choctaw Tribe under its long-ago negotiated compact with the state. Adam Candee, *Mississippi Sports Betting Could Go Live at Tribal Casinos Quickly*, LEGAL SPORTS REP. (June 12, 2018, 3:30 PM), <https://www.legalsportsreport.com/21178/tribal-casinos-mississippi-sports-betting/>. *See also* Nicholas Garcia, *Choctaw Believed To Be First Tribe Outside Nevada To Offer Sports Betting*, LEGAL SPORTS REP. (Sept. 3, 2018, 8:00 AM), <https://www.legalsportsreport.com/23406/Choctaw-tribe-sports-betting>. In New Mexico, the Pueblo of Santa Ana relied on compact language authorizing the tribe to operate “any or all casino-style gaming” to open a sports book at its casino after PASPA was struck down. *See* Ruddock, *How New Mexico Sports Betting Started*, *supra* note 17.

²⁵ *See generally* Steven Andrew Light, Kathryn R.L. Rand, & Alan P. Meister, *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657 (2004). Here, law and politics come into play; due to both, the negotiation or renegotiation of compact terms historically has placed the state in the driver’s seat. Although IGRA requires states and tribes to negotiate in “good faith,” the U.S. Supreme Court’s 1996 *Seminole Tribe* decision fundamentally undercut that require-

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 61

On the other hand, state legalization of commercial sports betting may diminish tribal exclusivity over Class III gaming and thus put existing revenue-sharing payments at risk.²⁶

Under IGRA, tribes (and states) need to assess revenue sharing within accepted parameters established by the Secretary of the U.S. Department of the Interior, including exclusivity and tribal economic impact analysis.²⁷ If the payments to a state are perceived as too high relative to anticipated net revenue, revenue sharing will be problematic under both Interior Department and Ninth Circuit precedent.²⁸ Moreover, as we explain below,²⁹ the extent of any state revenue sharing demands must take into account the relatively low net return to sports books, which should confine “good faith” negotiation to a limited range of outcomes.

Although issues related to revenue sharing are likely to dominate most compact negotiations, other specifics also will come into play: What *exactly* will be authorized under state law and/or a compact, for tribes and/or commercial casinos? What kinds of wagers, for what sports, in which locations, and utilizing what technology? What changes will be required in state or tribal regulations and regulatory agencies? In short, tribal-state gaming compacts are sophisticated and

ment. *See* 25 U.S.C. § 2710(d)(7)(A)–(B) (2012); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Sports betting undoubtedly will bring the state to the table, but there is no guarantee of fairness or equity in the negotiations or outcomes, and a state might simply walk away until its conditions are met. *But see* *Olea*, *supra* note 15, at 44 (“Because some tribes may have little to no interest in adding sports gambling to their already established gaming facilities, the states may have to incentivize amending the compact beyond offering sports gambling in the Indian gaming facilities.”) *Olea* observes that states like Arizona may have compacts with “poison pill” provisions that effectively render the compact, including limitations on tribal gaming and requirements for revenue sharing, null and void upon state authorization or legalization of new forms of gaming or gaming offered by non-tribal entities. *Id.* This would appear to give tribes in those states greater political leverage, at least in bringing the state to the table—although we do not believe it guarantees political advantage to the tribe once there. In *Olea*’s view, “tribes wishing to include sports gambling as an enhancement to their Indian gaming facility offerings should have *little to no trouble* in the states where there is no ‘poison pill’ provision in their gaming compacts *and* the state legalizes sports gambling.” *Id.* (emphasis added). We believe this may significantly overestimate the generosity of states under such circumstances; it is likely that a state still will introduce the need to renegotiate compact terms, at the very least creating political, if not economic, contention. *See generally* Light et al., *supra* note 25, at 677–78.

²⁶ In Connecticut, for example, the Mashantucket Pequots and the Mohegan Tribe took the position that if the state authorized non-tribal sports betting, it would violate the exclusivity supporting the tribes’ revenue-sharing payments to the state under the existing compacts. *See* Christopher Keating, *Sports Betting Off the Table This Year in Connecticut*, HARTFORD COURANT (Aug. 28, 2018, 5:00 PM), <http://www.courant.com/politics/hc-pol-no-sports-betting-20180828-story.html#>.

²⁷ *See* Light et al., *supra* note 25, at 677.

²⁸ *See* *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019 (9th Cir. 2010), *cert. denied*, 564 U.S. 1037 (2011).

²⁹ *See infra* Part II.A, Sports Book 101.

complex contracts with terms that vary significantly by state and by tribe; any negotiations should be expected to be complicated and time-consuming.³⁰

Further, even successful negotiations may not result in a valid compact. IGRA requires that the Interior Secretary review and approve gaming compacts,³¹ and state law often requires prior legislative approval.³² These multiple tiers of approval create the risk that duly negotiated compact terms may not be approved as required for a valid compact.

It should be noted, too, that while tribal gaming as a whole is the largest segment of the U.S. casino industry,³³ national figures alone obscure the wide range of profitability by state and by tribe. Tribal gaming in just two states—California and Oklahoma—accounts for 41% of total tribal gaming revenue nationwide; the top ten states (California, Oklahoma, Florida, Washington, Arizona, Connecticut, Minnesota, Michigan, Wisconsin, and New York, by rank) account for 84% of national revenue.³⁴ The remaining 16% is spread across eighteen states.³⁵ Profitability also varies by facility;³⁶ a relatively few tribal casinos are true destination casino resorts akin to the casino properties on the Las Vegas Strip. More typically, tribal casinos are relatively small, with limited amenities, and located in rural areas.³⁷ Only around 7% of tribal casinos earn \$250 million or more each year, and these account for approximately 46% of national revenue.³⁸ On the other end of the spectrum, approximately 37% of

³⁰ See Nick Sortal, *Sports Gambling? Probably Not Soon, If Your State Has Tribal Gaming*, CDC GAMING REP. (May 30, 2018, 12:01 AM), <https://www.cdcgamingreports.com/commentaries/sports-gambling-probably-not-soon-if-your-state-has-tribal-gaming/> (providing summary analysis of state law and gaming compact issues in Florida, California, Arizona, Oklahoma, and Connecticut).

³¹ 25 U.S.C. § 2710(d)(8) (2012).

³² See, e.g., Max Reiss, *The Details on How Sports Gambling Died This Year in Connecticut*, NBC CONNECTICUT (Aug. 30, 2018, 7:17 PM), <https://www.nbcconnecticut.com/news/politics/The-details-on-how-Sports-Gambling-Died-this-Year-in-Connecticut-492112721.html> (describing how a tentative deal struck between the tribes and the governor reportedly was rejected by state legislators).

³³ In 2015, tribal gaming accounted for about 45% of national casino industry revenue, while commercial casinos accounted for about 43% and the remaining 12% was generated by racinos. ALAN MEISTER, CASINO CITY'S INDIAN GAMING INDUSTRY REPORT 13 (2018).

³⁴ *Id.*

³⁵ *Id.*

³⁶ NAT'L INDIAN GAMING COMM'N, FY13-FY17 GAMING REVENUES BY RANGE, <https://www.nigc.gov/images/uploads/reports/Chart2017GamingRevenues-byRange.pdf>.

³⁷ See John L. Smith, *Small Tribal Casinos' Dilemma: Growing Gaming in Indian Country*, CDC GAMING REP. (Oct. 22, 2018, 8:00 PM), <https://www.cdcgamingreports.com/commentaries/small-tribal-casinos-dilemma-growing-gaming-in-indian-country/>.

³⁸ NAT'L INDIAN GAMING COMM'N, FY13-FY17 GAMING REVENUES BY RANGE, <https://www.nigc.gov/images/uploads/reports/Chart2017GamingRevenues-byRange.pdf>.

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 63

tribal casinos earn \$10 million or less each year, accounting for just around 2% of the total.³⁹ As a result of these differences, the negotiation of revenue sharing is a non-standardized endeavor.

D. Outside of IGRA

A more subtle, and certainly complicating, question is whether IGRA must apply at all.

IGRA governs Indian gaming, defined as gaming by “Indian tribes” on “Indian lands,” with tribal sovereignty as a defining factor of the statutory regulatory scheme.⁴⁰ However, tribes have the option of waiving their sovereign governmental authority recognized by IGRA to pursue instead sports betting as a licensed commercial operator (or commercial partner) under state law.⁴¹ Presumably, such a tribally-owned sports book would be subject to state licensing, taxation, audit, and similar requirements, but would sidestep IGRA’s constraints, particularly its geographical Indian land restrictions and Class III compacting requirements.

Whether this option is available to a tribe depends, obviously, on its willingness to act as a purely commercial gaming operator—thereby forgoing IGRA’s admittedly imperfect provisions, which nevertheless include broad protection of tribal sovereignty, valued highly by tribes and tribal citizens—as well as on state law and regulations, and other variables, such as the tribe’s ability to secure external financing.⁴²

³⁹ *Id.*

⁴⁰ See 25 U.S.C. §§ 2702, 2703(4)-(5) (2012).

⁴¹ For example, the Mohegan Tribe’s Mohegan Gaming & Entertainment operates commercial casinos in Atlantic City, Louisiana, and Pennsylvania. These casinos operate under state law and are subject to the same regulations and taxation as other commercial casinos. See Martin Derbyshire, *The Four Types of Land-Based PA Casino Licenses Explained*, PAONLINECASINO.COM (Mar. 31, 2018), <https://www.paonlinecasino.com/2266/four-casino-license-types/> (describing the categories of licenses authorized under state law and listing the Mohegan Sun at Pocono Downs as having a “Category 1” racino license).

⁴² See LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 15, at 9. Tribes as purely commercial gaming operators remain a rare, and therefore largely untested, occurrence. In a recent example, last year, the Laguna Pueblo of New Mexico made a failed attempt to purchase the Isle of Capri Casino Hotel Lake Charles in Louisiana. See *New Mexico Tribe Fails on Bid to Buy Louisiana Casino*, U.S. NEWS (Feb. 5, 2018, 1:22 PM), <https://www.usnews.com/news/best-states/new-mexico/articles/2018-02-05/new-mexico-tribe-fails-on-bid-to-buy-louisiana-casino>.

II. FEASIBILITY AND PROFITABILITY: THE SECOND BARRIER TO MARKET ENTRY

A. *Sports Book 101*

Sports books are distinct animals in the gaming world, with player wagering activity influencing the odds, and incorporating features both of games of skill and games of chance.⁴³ Adding a sports book to a casino floor involves considerations beyond those for expansion of table games or slot machines.

Thus, in evaluating the next barrier to market entry, we believe it makes sense to begin with a brief description of the sports books themselves. Our refresher account is not in any way exhaustive; we intend it to help spotlight two specific issues relevant to tribes' consideration of whether to add sports books to their casino operations: feasibility as governed by oddsmaking or line-setting expertise and ensuring bet integrity; and profitability as limited by the structure of the betting pool and its limited margin.

A typical casino sports book offers "line" bets on sports and sporting contest outcomes (baseball, basketball, boxing, football, golf, hockey, etc.).⁴⁴ High-scoring sports, such as basketball and football, typically use point-spread lines; under a point spread, the favorite team must win by a certain number of points for the bettor to win.⁴⁵ Low-scoring sports, such as baseball and soccer, use money lines, which focus on which team wins regardless of points scored.⁴⁶ An oddsmaker (or typically, a team of oddsmakers) sets the line; given Nevada's extensive experience and robust regulatory structure, Las Vegas oddsmakers are considered trustworthy and often set the state and national opening line on a particular game.⁴⁷ The oddsmaker's objective in setting the line is to manage house risk

⁴³ See VEGAS.COM, *Sports Betting*, <https://www.vegas.com/gaming/gaming-tips/sports-betting/> (last visited Mar. 7, 2018).

⁴⁴ This simplified description of a sports book is intended to illustrate broad points related to our central arguments and draws on sources designed for non-expert audiences. See SANFORD WONG & SUSAN SPECTOR, *THE COMPLETE IDIOT'S GUIDE TO GAMBLING LIKE A PRO* 159–76 (3d ed. 2003). See also *Sports Betting*, VEGAS.COM, <https://www.vegas.com/gaming/gaming-tips/sports-betting> (last visited Dec. 20, 2018); Keith Sargeant, *Sports Betting 101: Here's a Quick Tutorial on Placing Bets in N.J.*, NJ.COM (June 14, 2018, 12:11 AM), https://www.nj.com/news/index.ssf/2018/06/sports_betting_101_here_are_the_terms_youll_need_t.html; Ed Grabianowski, *How Sports Betting Works*, HOWSTUFFWORKS, <https://entertainment.howstuffworks.com/sports-betting2.htm> (last visited Mar. 10, 2019).

⁴⁵ See *Sports Betting*, *supra* note 44.

⁴⁶ See Sargeant, *supra* note 44. There are many more options for wagering on sporting contests, including "proposition" bets, such as betting on which player will score the first touchdown in a football game, and "in-game" bets, such as which team will score more points in a given quarter. These "prop bets" are highly favored in certain sports and also in other countries. Herein, we use generalizable basics about sports betting and sports books in developing our core arguments.

⁴⁷ See Rodenberg, *supra* note 7; Grabianowski, *supra* note 44.

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 65

and encourage bettor interest by having a “centered game,” meaning roughly equal numbers of bets on both sides of the sporting event’s outcome.⁴⁸ Oddsmakers may shift the line in response to betting patterns in order to incentivize and maintain a centered game.⁴⁹ Given the art of setting the line and establishing a centered game, as well as the fact that the sporting contest’s outcome and all related variables that might influence the outcome are outside of house control, sports books carry more risk for the casino than games with fixed odds, such as table games and slot machines.⁵⁰

Moreover, effective risk management generally requires a high volume of bets along with a centered game.⁵¹ As is the case for online poker, which is player banked rather than banked by the house, for sports betting, “player liquidity”—or the number of people placing bets at a particular sports book—matters.⁵² The smaller the pool of potential and actual players, the lower the player liquidity, resulting in both a lower “handle” (total dollar value of bets placed) and a higher risk for the casino.⁵³ Keeping in mind that many tribal casinos are located in rural areas with relatively small populations, and are less often “destination resorts” than “convenience casinos,” these variables at least partially govern liquidity and therefore, feasibility.⁵⁴

Sports wagers are structured so that the casino collects a commission, or “vig,” on the bets.⁵⁵ The vig is how the casino directly profits from the sports book.⁵⁶ For illustrative purposes, assume a point-spread line on the outcome of a particular sports contest, with 100 bettors and a typical 11/10 vig, such that a player would bet \$110 to win \$100. A centered game would look something like

⁴⁸ *Sportsbook Profit Margins*, SPORTSINSIGHTS.COM, <https://www.sportsinsights.com/betting-tools/sportsbook-profit-margins/> (last visited Mar. 10, 2019).

⁴⁹ Grabianowski, *supra* note 44.

⁵⁰ *See Sportsbook Profit Margins*, *supra* note 48.

⁵¹ *See* Michael Kaplan, *Wall Street Firm Uses Algorithms to Make Sports Betting Like Stock Trading*, WIRED (Nov. 1, 2010, 12:00 PM), <https://www.wired.com/2010/11/ff-midas/>.

⁵² *See* Brad R. Humphreys, *An Overview of Sports Betting Regulation in the United States* 7 (W. Va. U., Working Paper No. 17-31, 2017), <https://business.wvu.edu/files/d/964afc55-3ba5-4658-8f1e-9be9fb0bd7cc/17-31.pdf>.

⁵³ *See id.*

⁵⁴ *See* John L. Smith, *Small Tribal Casinos’ Dilemma: Growing Gaming in Indian Country*, CDC GAMING REP. (Oct. 22, 2018, 8:00 PM), <https://www.cdcgamingreports.com/commentaries/small-tribal-casinos-dilemma-growing-gaming-in-indian-country/>.

⁵⁵ *See* WONG & SPECTOR, *supra* note 44. *See also* *Vigorish*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/vigorish> (*Vigorish* is defined as “a charge taken (as by a bookie or a gambling house) on bets[.]”).

⁵⁶ *See* Chris Yuscavage, *Everything You Need to Know About How Betting Lines Work*, COMPLEX (Jan 30, 2015), <https://www.complex.com/sports/2015/01/how-betting-lines-work/how-do-sportsbooks-make-money>.

this: if fifty bets are placed on the favorite and fifty bets are placed on the underdog, then the total betting handle would be \$11,000 (based on 100 bets at \$110 each). If the favorite wins (by at least the number of points in the spread), then those fifty bettors each get \$210 (their original \$110 bet plus \$100 in winnings), while the fifty underdog bettors lose their original bet and get nothing. After paying out \$10,500 to the winners (fifty multiplied by \$210), the casino sports book collects \$500 in net “profit”—or about a 4.5% gross return on the handle.⁵⁷ The return on sports betting, then, is inherently low—and the net, even lower. Profitable sports books therefore also are reliant on volume, as well as on the nongaming spend their patrons generate, such as food and beverage.

Here, the takeaways are that oddsmaking is complex and conditioned on a number of variables both within and outside the sports book’s control, that successful oddsmaking determines betting integrity as well as profits, and that profit margins for sports books are slim.

B. Sports Books as Amenities

Given the relatively low margin for sports books, casinos such as those on the Las Vegas Strip have offered sports books as peripheral “amenities” more than casino-floor profit-drivers.⁵⁸ Gaming or nongaming amenities attract people to the casino, with the design to entice them to spend additional dollars throughout the casino-resort property.⁵⁹ With a sports book, patrons might purchase food and beverage while watching the game, or be more likely to stay and play other casino games,⁶⁰ spend a night at the casino’s hotel and go to a show, and so on.

The contributions of nongaming amenities to a Las Vegas Strip casino’s bottom line are nontrivial—and these days, decisive. While once nongaming revenue took a backseat to gaming profits, recently, the ratio has reversed. In 2017, the Strip reported gaming revenue at 42.4% of the total, with nongaming revenue (rooms, food, and beverage) accounting for 57.6%, the highest share ever reported by the Nevada Gaming Control Board.⁶¹ Today, nongaming amenities include concerts or similar entertainment, dining, lodging, nightlife (and daylife, considering the proliferation of dayclub pool parties), professional conferences

⁵⁷ This is why the major leagues’ demand of an “integrity fee” of 1% of the handle has been met with opposition from casinos—1% of the handle is 20% to 30% of the casino’s margin. See *infra* text accompanying note 66.

⁵⁸ See Anthony F. Lucas, *Examining the Link Between Poker Room Business Volume and Gaming Activity in Slot and Table Games: A Closer Look at a Key Assumption in the Full Service Theory*, 17 UNLV Gaming Research & Rev. J. 43, 44-45 (2013).

⁵⁹ *Id.* at 45.

⁶⁰ *Id.* at 48.

⁶¹ Thomas Moore, *Nevada Resort Revenue Hits Record Levels in 2017*, LAS VEGAS SUN (Jan. 12, 2018), <https://lasvegassun.com/news/2018/jan/12/nevada-resort-revenue-hits-record-levels-in-2017/>.

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 67

and meetings, retail, spas, and sporting events, now including eSports (i.e., competitive video gaming) and professional franchises, like the NHL's Vegas Golden Knights.⁶² The list of top reasons for coming to Las Vegas now finds conventions or corporate meetings, visiting family or friends, and general business trips ranking above gambling itself.⁶³ Nationwide, nongaming amenities now generate between 45% and 75% of commercial casino resort revenue.⁶⁴

Tribal casinos remain substantially more reliant on slots and other gaming devices, including Class II machines, than does the commercial industry. In 2016, tribal gaming revenue nationwide was \$31.5 billion, while nongaming revenue was \$4.2 billion—the highest figure to date, but still less than 12% of total tribal revenue.⁶⁵ While nongaming revenue at tribal casinos is growing,⁶⁶ it lags far behind that of commercial casinos.

As with gaming revenue, tribal casino nongaming revenue varies by location and operation. Large, destination casino resorts are in the best position to capitalize on nongaming amenities, although this varies with local competition. For a relatively few tribal casinos, typical amenities look more and more like those on the Strip, including upscale hotels and restaurants, luxury retail, nightclubs, brand-name concerts or shows, convention centers, custom-designed golf courses, and spas. But in many smaller casinos, particularly those in rural areas, amenities may be as straightforward as basic hotels and bars, buffet restaurants or diners, gas stations, convenience stores, and RV parks.⁶⁷ Such casinos do not boast a wide array of nongaming amenities, limiting the value of a sports book as a way to get customers in the door to spend dollars in other areas on the property. Nevertheless, in rural areas, a sports book might bring in customers to bet and watch games in a social setting with the big screen (or multiple screens), with less competition from sports bars or other venues typically found in more

⁶² Richard N. Velotta, *Las Vegas Resorts Relying More on Nongaming Options, Expert Says*, LAS VEGAS REV.-J. (Apr. 26, 2018, 7:06 PM), <https://www.reviewjournal.com/business/tourism/las-vegas-resorts-relying-more-on-non-gaming-options-expert-says/>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ MEISTER, *supra* note 33, at 30 (analyzing proprietary data from calendar year 2016).

⁶⁶ “On a nationwide basis, nongaming revenue at Indian gaming facilities grew 8.2%, from about \$3.9 billion in 2015 to an all-time high of \$4.2 billion in 2016. . . . The continued growth of nongaming revenue is indicative of the importance of nongaming amenities in the evolution of Indian gaming facilities.” MEISTER, *supra* note 33, at 30. Overall, nongaming revenue growth has been faster than gaming revenue growth in the Indian gaming sector, however. “It is notable that the growth rate for nongaming revenue was once again higher than that for gaming revenue. This has been true in 11 of the last 15 years” *Id.*

⁶⁷ See Buck Wargo, *Just Like Vegas: Regional and Tribal Casinos Want to Make Nongaming Amenities Profitable*, CDC GAMING REP. (July 22, 2018, 12:13 AM), <https://www.cdcgamingreports.com/just-like-vegas-regional-and-tribal-casinos-want-to-make-non-gaming-amenities-profitable/>.

urban areas.⁶⁸

Regardless of location, a sports book is likely to attract new patrons, particularly Millennials or the Generation Z cohort. Such “Digital Natives” live on their mobile devices, already are regular participants in fantasy sports leagues or Daily Fantasy Sports, and have proven less interested in traditional casino games of chance than in videogames, social games, and games of skill in which they control elements of the outcomes.⁶⁹

Crucially, the next generations of consumers both prefer and expect instant mobile access. As we discuss above,⁷⁰ IGRA’s requirements may be a significant constraint on a tribe’s ability to compete with the availability of mobile betting within a state’s physical borders.

C. *Additional Considerations*

Let’s now look at feasibility and profitability specifically for tribal sports books. First, feasibility: as we establish above,⁷¹ the preconditions for establishing a sports book include significant expertise to set a reliable line, build a sufficient pool of bettors, and establish and manage myriad types of sophisticated bets. A sports book also requires a substantial commitment of human resources, physical space, technology, and general operations specific to wagering.⁷² Identifying and managing these sunk, fixed, and variable costs will be critical for any tribe, especially for those in rural markets or whose gross gaming revenues are at the lesser pole of what we have labeled the “spectrum of success” for tribal gaming.⁷³ A sports book may or may not grow the tribe’s customer base, while overcoming local limitations on facility size, infrastructure, or labor pool may not be worth the investment. On the other hand, technology provides the ability to scale; for instance, if authorized under state law, a tribe’s purchase of mobile

⁶⁸ See Glenn Smithson, *Casino Success in a Rural Market*, INDIAN GAMING MAG., Nov. 2017, at 26. See generally *Small Tribal Casinos’ Dilemma: Growing Gaming in Indian Country*, *supra* note 54.

⁶⁹ Kathryn Rand & Steven A. Light, *eSports and NextGen Betting*, 16 INT’L CTR. YOUTH GAMBLING PROBS. & HIGH-RISK BEHAV., at 1 (Winter 2016). Gen Z alone now comprises 25% of the population, outnumbering Millennials and Baby Boomers, and is entering the workforce at a rapid rate. Kathryn Dill, *7 Things Employers Should Know About the Gen Z Workforce*, FORBES (Nov. 6, 2016, 3:00 PM), <https://www.forbes.com/sites/kathryndill/2015/11/06/7-things-employers-shouldknow-about-the-gen-z-workforce/#67adc1b2fad7>.

⁷⁰ See *supra* Part I, Legality and Regulation.

⁷¹ See *supra* Part II.A, Sports Book 101.

⁷² See Payton Guion, *These Are the Job Openings Sports Betting Will Bring to New Jersey*, NJ.COM (May 16, 2018, 11:51 AM), https://www.nj.com/politics/index.ssf/2018/05/sports_betting_will_bring_these_jobs_to_new_jersey.html; David Elliot, *Casinos Getting Ready for Sports Betting*, WLOX (July 16, 2018, 7:16 PM), <http://www.wlox.com/story/38656759/casinos-getting-ready-for-sports-betting/>.

⁷³ See LIGHT & RAND, INDIAN GAMING AND TRIBAL SOVEREIGNTY, *supra* note 15, at 9–11 (describing tribal gaming as a “spectrum of success”).

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 69

gaming app architecture could facilitate player liquidity via customer acquisition and pooling at low marginal cost, and could be a true game changer for many tribes.⁷⁴

As for profitability, as we describe above,⁷⁵ the rate of return for a sports book is low, due to reliance on the total pool of player funds and the need to set odds that generate a centered game. Sports betting also carries inherent risk for the sports book, as the line is contingent on external factors that are not always predictable, and the house cannot directly set and maintain firm odds for payout on the handle.⁷⁶

To surmount these barriers to market entry, a tribe would want to consider contracting with an established oddsmaking outfit, providing immediate capability, capacity, and credibility. A “plug-and-play” technology solution and suite of sports book services, like those marketed by such prominent bookmakers or games manufacturers as William Hill or IGT,⁷⁷ would substantially reduce risk, fixed costs, learning curves, regulatory uncertainties, and overall, barriers to entry.⁷⁸ Depending on the nature and extent of plug-and-play products and services, however, it is possible that acquisition of such commercial products and services could be construed as constituting a “management contract” pursuant to IGRA, thereby requiring NIGC review and approval—presumably not an insurmountable barrier, albeit one that is untested in this context.⁷⁹

Profitability projections for tribal sports books must take into account the likelihood of increased revenue-sharing payments to the state. When opening up settled compacts to the politics of negotiation, state officials are almost certain to demand increased revenue sharing to allow a tribe to expand into sports wagering. With its relatively low margin, sports betting profits may not offset the risks inherent in renegotiating compact terms.

An additional variable impacting profitability is the so-called “integrity fee”

⁷⁴ See Garcia, *supra* note 24.

⁷⁵ See *supra* Part II.A, Sports Book 101.

⁷⁶ Olea, *supra* note 15, at 46, makes a similar point.

⁷⁷ See IGT, *IGT Pioneers Tribal Gaming Sports Betting with Mississippi Band of Choctaw Indians*, CISION PR NEWSWIRE (Sept. 12, 2018, 6:45 AM), <https://www.prnewswire.com/news-releases/igt-pioneers-tribal-gaming-sports-betting-with-mississippi-band-of-choctaw-indians-300710851.html>; Michelle Schenk, *IGT is “Your Best Bet” at G2E*, IGT (Oct. 4, 2018), <https://www.igt.com/products-and-services/lottery/lottery-blog/2018/october/igt-is-your-best-bet-at-g2e-2018>.

⁷⁸ See David G. Schwartz, *How It Felt to Book Delaware’s First Sports Bet*, FORBES (June 7, 2018, 8:55 AM), <https://www.forbes.com/sites/davidschwartz/2018/06/07/how-it-felt-to-book-delawares-first-sports-bet/#26640b9d3bc6>. See also Olea, *supra* note 15, at 43 (“Tribes that have little to no experience in running sports books or related sports gambling operations within their facilities may seek to hire additional experienced personnel, perhaps under management contract, to get their operation to a functional level.”).

⁷⁹ See 25 U.S.C. §§ 2710(d)(9) (2012) (authorizing management contracts for Class III gaming subject to approval). See also *id.* § 2711(a)(1) (2017) (authorizing management contracts for Class II gaming subject to approval).

proposed by major sports leagues, including the NBA and MLB.⁸⁰ The leagues have demanded as much as one percent of the total handle, positing it as a fee to help secure the integrity of the sports or of the product.⁸¹ States have responded with arguments that this label at best is disingenuous; rather, the leagues are simply seeking to charge an unnecessary rights fee, royalty, or tax, and that state gaming regulation is sufficient to ensure integrity of the games.⁸² As an additional cost borne by any sports book, such a fee will precipitously reduce profitability at the margin and, for tribal sports books in particular, may be negotiated between the state and the leagues and simply passed on to the tribe.

As an overarching consideration, the realities of the growing sports betting market may or may not live up to the hype—whether at first, or at all. Contributing to the uncertainty, predictive data often are based on national, rather than state, local, or (certainly, most rarely) tribal markets. New Jersey’s recent introduction of online gaming is instructive; then-Governor Chris Christie admitted the state had “overplayed its hand” in its initial projections and budgeting around online gaming revenue (with actuals of just \$34 million in 2014, its first year, as opposed to the state’s projected \$200 million influx).⁸³ Another lesson: once hailed as the savior for New Jersey’s budgetary woes, online poker has been the big loser in that state, contributing less than 10% of total revenue in 2018 and down about 11% year-over-year.⁸⁴ However, being first-to-market may bring a greater advantage in sports betting than it did for online gaming: New Jersey legalized sports betting in June 2018, and as of early fall, the online sports betting handle from the three commercial providers that had been in the market for just a few weeks (DraftKings, playMGM, and SugarHouse) accounted for over one-third of the state’s total sports betting revenue.⁸⁵

Tribes also should consider the cost of aligning the capacity of their own

⁸⁰ See generally Darren Heitner, *NBA and MLB Face Challenge in Persuading States to Award a Sports Betting Integrity or Rights Fee*, FORBES (May 18, 2018, 7:00 AM), <https://www.forbes.com/sites/darrenheitner/2018/05/18/the-nbas-and-mlbs-challenge-in-convincing-states-to-award-a-sports-betting-integrity-or-rights-fee/>.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Ryan Hutchins, *Christie Overplayed Hand on NJ Online Gaming*, NJ.COM (Feb. 26, 2014), https://www.nj.com/politics/2014/02/christie_made_bad_bet_on_online_gambling_revenue.html.

⁸⁴ Steven Stradbroke, *New Jersey Online Gaming Has Solid, If Not Record-Setting August*, CALVINAYRE.COM (Sept. 12, 2018), <https://calvinayre.com/2018/09/12/business/new-jersey-online-gambling-revenue-august/> (noting that by August 2018, the market solidified, posting solid year-over-year gains amid multiple record-setting months, up 16.5% overall to \$190.2 million, with \$175.4 million of that from casino products). See Steven Stradbroke, *New Jersey Online Poker Revenue Sinks to a New Low*, CALVINAYRE.COM (Oct. 12, 2018), <https://calvinayre.com/2018/10/12/business/new-jersey-online-poker-sinks-record-low/>.

⁸⁵ Chris Grove, *New Jersey Sports Betting Revenue Soars with Introduction of Online Bets*, FORBES (Sept. 13, 2018, 10:24 AM), <https://www.forbes.com/sites/chrisgrove/2018/09/13/nj-sportsbetting-revenue-mobile-boost/#38e1ad0a5f19>.

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 71

regulatory commissions or agencies with the specific regulatory requirements for sports books, including personnel, expertise, technology and analytics, and ongoing operations, such as monitoring, compliance, and enforcement. Outside of Nevada—the “gold standard” given its relatively long history with legalized sports betting and the state’s robust Gaming Commission and Gaming Control Board—few states or tribes have experience in regulating sports betting. Replicating the Nevada model may not be feasible given available tribal government funds or competing tribal community priorities, either in the short or the long run, or the projected market may not justify the necessary investment.

Taking into account revenue-sharing payments, regulatory costs, facility and operational investments, the possibility of a league “integrity fee,” and relatively small markets, many if not most tribal casinos may not realize sufficient net revenue to justify a sports book—at least under a stand-alone model. An inter-tribal sports book may offer a more practicable alternative to a greater number of tribes.⁸⁶

III. MARKET AND COMPETITION: THE THIRD BARRIER TO ENTRY

A. *Market Constraints*

Any good business plan includes a market analysis, including scope, competitors, and projected share. Here, too, tribes are likely to face some of the same challenges as commercial operators, along with additional challenges particular to tribal sports books.

As noted above,⁸⁷ a sports book requires sufficient player liquidity, or volume of bets placed on a particular sporting event. Similar to liquidity in poker, this involves having a large enough pool of players to play against, and in the sports betting context, to achieve a centered game and a sufficient prize pool. For sports books—and ultimately, the total casino operations themselves—this also means having sufficient liquidity and handle both to absorb losses due to the inherent uncertainties of sports betting (without the fixed odds of, say, slot machines), and to net sufficient win for the house. The gaming market’s size, whether in terms of population, current customers, potential players (here, bettors), or relative openness to player access through mobile apps or as constrained by physical player presence requirements, all determine potential player liquidity

⁸⁶ See Gordon R. Friedman, *New Oregon Casino Plan: Tribal Leaders Announce Proposed 2021 Opening in Salem*, THE OREGONIAN (last updated May 2, 2017), https://www.oregonlive.com/politics/index.ssf/2017/05/tribal_leaders_announce_new_ca.html (describing an intertribal partnership in Oregon and the increased chances for Secretary of the Interior and Governor approval when multiple tribes unite) (last visited Mar. 10, 2019).

⁸⁷ See *supra* Part II.A, Sports Book 101.

to support a sports book.⁸⁸

Returning for a moment to the lessons learned from states' recent legalization and rollout of online gaming, a key reason online gaming revenue has faltered is because of the negative impacts on player liquidity of intrastate market borders—a person must be located within a state to play—as opposed to illegal online and mobile gaming that uses the same architecture but taps into a global market.⁸⁹

B. Market Competition

If legal sports betting spreads as predicted, tribes, as well as commercial operators, will need to weigh market competition. As customers have more choices on where to place their bets, sports books that are less conveniently located, provide fewer amenities, or offer a narrower array of bets and games will lose out in a competitive market. With state-by-state legalization, markets near state borders will be particularly competitive, as is the case now for many destination casino resorts.⁹⁰

For tribal casinos in particular, if a state authorizes commercial sports books alongside tribal sports books, tribes may or may not have an advantage over commercial operators, or may simply be on equal footing. Factors would include the specific provisions of state authorizing legislation and compacts, as well as market accessibility.

C. Innovative Approaches

As demonstrated by online gaming, state-by-state legalization effectively limits the size and scope of particular gaming markets—rather than accessing a national market, intrastate legalization accesses only the market within the state's borders. Some states are cognizant of this limitation, leading to innovations to maximize player access and liquidity. For example, in 2014, Nevada and Delaware entered into the Multi-State Internet Gaming Agreement to pool online poker players in an effort to increase player liquidity and thus state revenue; New Jersey players joined the pool under the agreement in 2018.⁹¹

⁸⁸ See *id.*

⁸⁹ See Michael Gentile, *A Declining New Jersey Online Poker Market Highlights the Need for Shared Liquidity*, POKERFUSE (Sept. 18, 2018, 10:44 PM), <https://pokerfuse.com/news/industry/210053-declining-new-jersey-online-poker-market-highlights-need/>.

⁹⁰ See John Wolfson, *America's Casino-Saturation Problem*, THE NEW YORKER (Nov. 18, 2014), <https://www.newyorker.com/business/currency/americas-casino-saturation-problem> (describing competition among casinos near state borders along the East Coast).

⁹¹ See Interview with Allison Keyes, *Delaware, Nevada Sign First Multistate Internet Gaming Deal*, NPR (Feb. 28, 2014, 5:00 AM), <https://www.npr.org/2014/02/>

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 73

Another innovation, intended to maximize intrastate markets, comes in the form of mobile player apps. In Nevada, for example, state law allows casinos to offer a mobile sports betting app so that players can place bets from anywhere in the state—they do not need to be physically present at the casino’s sports book to place a bet. Even though Nevada’s market in theory is limited to the nearly three million people who reside there, throw in the more than forty-two million people who visited Las Vegas in 2017,⁹² and Nevada remains the largest gaming market in the U.S. by far.⁹³ Outside of Nevada, the baseline market for in-state wagering—such as in California or Washington on the West Coast, or Connecticut, Massachusetts, and New York on the East Coast—is much larger than that available to most tribal casinos located on Indian reservations.⁹⁴ As many tribal casinos are located in rural areas within states or within rural states themselves, tribal markets often are even further constrained in terms of population, customer, and prospective player base. For example, tribal casinos in rural northern Minnesota have access to very different and much more limited markets than does the Mystic Lake Casino Hotel located near the Twin Cities of Minneapolis-St. Paul.⁹⁵

28/283773407/delaware-nevada-sign-first-multi-state-internet-gaming-deal; Brian Pempus, *Traffic on World Series of Poker’s Online Site Could Triple Under Nevada, New Jersey Deal, Expert Says*, CARD PLAYER (Apr. 18, 2018), <https://www.card-player.com/poker-news/22719-traffic-on-world-series-of-poker-s-online-site-could-soon-triple-under-nevada-new-jersey-deal-expert-says>.

⁹² LAS VEGAS CONVENTION & VISITORS AUTH., YEAR-END SUMMARY FOR 2017 (2017) <https://www.lvcva.com/stats-and-facts/visitor-statistics/> (follow the hyperlink then click on “Year-End Summary for 2017” link).

⁹³ See AM. GAMING ASS’N, STATE OF THE STATES 2018: THE AGA SURVEY OF THE COMMERCIAL CASINO INDUSTRY 17 (2018), https://www.americangaming.org/sites/default/files/AGA%202018%20State%20of%20the%20States%20Report_FINAL.pdf (ranking the Las Vegas Strip as the top single-jurisdiction casino market in the U.S. with \$6.4 billion in revenue in 2017; Atlantic City was second with \$2.4 billion).

⁹⁴ See Richard N. Velotta, *Foxwoods Property Has Biggest Casino in North America*, LAS VEGAS REV.-J., (Sept. 1, 2018, 4:15 PM), <https://www.reviewjournal.com/business/casinos-gaming/foxwoods-property-has-biggest-casino-in-north-america/> (noting that a relatively small number of tribal casinos are located near highly populous areas; as one example, the Mashantucket Pequots’ Foxwoods Casino boasts some 12 million visitors a year). *But see* CTR. FOR POLICY ANALYSIS, UNIV. OF MASS. DARTMOUTH, BRING IT ON HOME: AN OVERVIEW OF GAMING BEHAVIOR IN NEW ENGLAND iii, v, 29 (2013), https://www.umassd.edu/media/umassdartmouth/seppce/center-for-policy-analysis/Bring_it_home.pdf (also noting that new competition has had a negative impact due to expanded legalized gaming in the region).

⁹⁵ See, e.g., Timothy Williams, *\$1 Million Each Year for All as Long as Tribe’s Luck Holds*, N.Y. TIMES (Aug. 9, 2012), <https://www.nytimes.com/2012/08/09/us/more-casinos-and-internet-gambling-threaten-shakopee-tribe.html> (reporting on the Shakopee Mdewakanton Tribe’s annual per capita payments of \$1 million from revenue from its casino near Minneapolis); Sharon Schmickle, *Has Casino Money Improved Lives on Minnesota’s Indian Reservations?*, MINNPOST (Dec. 10, 2012), <https://www.minnpost.com/politics-policy/2012/12/has-casino-money-improved->

If a tribal sports betting market is limited by statute, compact, or regulation to players on a particular reservation or within a tribe's casino, opening and operating a sports book will be riskier even than operating house-banked gaming machines in locales with low player liquidity.⁹⁶ Tribes should consider sharing player pools just as New Jersey, Nevada, and Delaware have done for online gaming.⁹⁷

CONCLUSION

Even before the Supreme Court decided *Murphy*, the biggest brand names in gaming worldwide were positioning themselves to capitalize on the fan base for America's most recognizable sports leagues. Sports wagering already is up and running in five states; analysts predict that it will be legal in as many as thirty-two states within five years, including up to fourteen within the next two years.⁹⁸ Many of these states are among the twenty-eight states that currently have tribal casinos.⁹⁹

As of this writing, there is no firm sense and little data pointing to how many

lives-minnesota-s-indian-reservations/ (describing the contrast between the financial success of the Shakopee Mdewakanton and tribes in northern Minnesota, including the Red Lake Band of Chippewa Indians and the Leech Lake Band of Ojibwe, with more than 40% of community members living in poverty).

⁹⁶ See generally Jamie Hinks, *Sue Schneider Looks at Poker Liquidity*, CALVINAYRE.COM (Mar. 15, 2011), <https://calvinayre.com/2011/03/15/poker/sue-schneider-looks-at-poker-liquidity/>.

⁹⁷ Tribes might accomplish this with recommended state legislation and compact provisions, along with intertribal agreements, similar to intertribal partnerships to open new casinos. In Oregon, for example, tribes have started exploring the possibility of an intertribal casino. See Friedman, *supra* note 86 (noting that the Confederated Tribes of Siletz Indians has "consulted with Oregon's other tribes, hoping to attract them to join the casino venture as partners"). See also *id.* (describing an intertribal partnership to open a casino near Salem, Oregon); Kenneth R. Gosselin, *East Windsor Casino Takes Shape in New Renderings*, HARTFORD COURANT (June 13, 2018, 8:30 PM), <https://www.courant.com/real-estate/property-line/hc-east-windsor-casino-renderings-20180613-story.html> (illustrating a recent partnership: "New renderings show MMCT Venture LLC—the joint venture formed by the Mashantucket Pequot and Mohegan tribes to develop the \$300 million venue [in East Windsor, CT]—plans a one-story casino with an attached five-story parking garage nestled into a former movie theater site off I-91.").

⁹⁸ See Cork Gaines & Shayanne Gal, *Here Are the States Where Sports Betting is Expected to Be Legal Within 5 Years*, BUSINESS INSIDER (May 19, 2018, 8:13 PM), <https://www.businessinsider.com/states-legalize-sports-betting-gambling-2018-5> (citing proprietary January 2018 study by boutique research firm Eilers & Krejcik Gaming).

⁹⁹ See Wayne Parry, *18 States May Introduce Sports Betting Bills in 2018: Industry Report*, CHI. SUN-TIMES (Jan. 9, 2018, 12:25 PM), <https://chicago.sun-times.com/business/sports-betting-legalized-illinois-eilers-krejcik-gaming-report/>. See also *Frequently Asked Questions: In Which States Does Indian Gaming Occur?*, NAT'L INDIAN GAMING COMM'N, <https://www.nigc.gov/commission/faqs> (listing states in which tribes currently conduct gaming, although note that this list may or may not be fully up-to-date).

Spring 2019] *SPORTS BETTING AND INDIAN GAMING* 75

of the 242 gaming tribes within those states will seek to open sports books. Currently, only three tribes operate sports books at their casinos: the Fort Mojave Indian Tribe in Nevada, and the recently-opened sports books at the Mississippi Band of Choctaw Indians' casinos in Mississippi and the Pueblo of Santa Ana's Santa Ana Star Casino in New Mexico.¹⁰⁰ Time is of the essence; being first to market in a state or even an entire region is a current possibility for many tribes, but not for long.

In addition to careful evaluation and data-based decision making concerning the three barriers to market entry we discuss herein, tribes also should consider innovative approaches, such as the possibility of acting as a purely commercial operator in order to take full advantage of state legalization, or partnering with other tribes to create a shared liquidity pool across the United States. Particularly in smaller markets and rural areas, tribes may want to opt for lower-cost and lower-risk opportunities, such as skill-based video slot machines or similar video game gambling machines, or expanding nongaming amenities to include eSports, to open up younger markets. The commercial viability of such products and solutions are demonstrated by recent investments by established commercial brands or industry solution suppliers that set market terms, such as MGM International and IGT, or cutting-edge platforms for arcade-style skills-based video game gambling like GameCo,¹⁰¹ or eSports wagering such as Unikrn,¹⁰² that are disrupting the traditional casino gaming segment.

Given the high profile of sports betting and relative speed with which legislation is being introduced, the coming year should provide much useful data to tribes in the form of the experiences of first-to-market states and tribes, the next waves of state legislation, and the inevitable accompanying tribal-state compact negotiations.

After all of this analysis, the answer to the question we posed at the outset—in a post-PASPA world, should tribes get in the game?—varies significantly by tribe. In other words, the answer is, “It depends.” Far from a cop-out answer, however, this assessment acknowledges the value to public officials and others of engaging in informed analysis, rather than making decisions based solely on the hype surrounding this tectonic shift on the public policy of sports wagering. For some tribes, waiting on the sidelines may be the right decision; for others, the time to get in the game is now.

¹⁰⁰ Garcia, *supra* note 24; Geoff Grammer, *Sports Wagering to Hit New Mexico Next Week at Santa Ana*, ALBUQUERQUE J. (Oct. 9, 2018, 9:26 PM), <https://www.Abqjournal.com/1231258/sports-wagering-in-new-mexico-to-start-next-week-at-santaana.html>.

¹⁰¹ See GAMECO, <https://gameco.com/> (last visited Mar. 10, 2019).

¹⁰² See UNIKRN, <https://unikrn.com/about> (last visited Mar. 10, 2019).