

## TRIBAL CASINOS AND ONLINE GAMING: HURDLES IN MODIFYING STATE CHARTERS TO MEET THE DIGITAL ERA

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### I. INTRODUCTION

Tribal casinos are an important part of reservation economies. “As of 2018, tribal gaming revenues topped \$33.7 billion,” an increase from the \$26.7 billion in revenues in 2009.<sup>1</sup> Compare this number to the gaming revenue at the Las Vegas Strip, which had “revenue of \$17.8 billion dollars for rooms, food, beverages, and gaming combined, with gaming revenue accounting for \$6 billion” in 2017.<sup>2</sup> Tribal casinos are some of the main generators of gaming revenue in several states throughout the United States.<sup>3</sup> Yet, federal regulation affects these casinos’ future viability. Specifically, the restrictions from the Federal Wire Act of 1961 (Wire Act), Indian Gaming Regulation Act of 1988 (IGRA), and Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) control the way tribal casinos can adapt their games to the online sphere.

This paper addresses how these federal statutes affect tribal economies and proposes how they should function moving forward to best accommodate and maximize the growth of these economies. Part I will discuss the importance of tribal gaming to Native American economies. Next, Part II will cover how IGRA, UIGEA, and the Wire Act limit tribal casinos from entering the online gaming space. Then, Part III will cover recent challenges against state

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<sup>1</sup> James I. Schaap and Angel F. Gonzales, *The Growth of the Native American Gaming Industry: An Update*, 16 S. UNIV. COLL. BUS. E-JOURNAL 1, 11 (2022).

<sup>2</sup> *Id.* at 12.

<sup>3</sup> *See id.* at 10 (citing Alan Meister, *Casino City’s Indian Gaming Industry Report*, Nathan Associates Inc. (2017), <https://www.nathaninc.com/wp-content/uploads/2017/04/IGIRSummary2017-reducedsize.pdf>; in 2015, after experiencing a growth rate of “5.5[%], more than doubling that in 2014 . . . tribal gaming has come to generate over 44[%] of all gaming revenue in the casino gaming industry”).

governments' attempts to grant greater online gaming discretion to tribes. Afterward, Part IV will discuss the different views on the expansion of tribal gaming online. Finally, Part V proposes a solution to this conflict in the form of modifications to the text of IGRA that would exempt multi-server gaming where end users are outside a reservation. For tribal casinos to sustain their gaming revenues by increasing their online gaming offerings to the public, there must be changes not just to IGRA, but also to UIGEA and the Wire Act.

## II. THE ECONOMIC IMPORTANCE OF TRIBAL GAMING

Tribal casinos are a large part of the United States' gaming industry. Close to 45% of all gaming revenue in the United States can be attributed to tribal gaming.<sup>4</sup> In fact, "some predict tribal gaming revenue will exceed commercial gaming revenue in the next decade."<sup>5</sup> At the start of 2020, 524 tribal casinos operated in 29 states, outnumbering the 465 commercial casinos operating in 25 states.<sup>6</sup> In 2016, the American Gaming Association found that California's tribal casinos had a gross gaming revenue of \$8.41 billion, followed by the gross gaming revenue of Oklahoma's and Florida's tribal casinos, which totaled \$4.36 billion and \$2.56 billion respectively.<sup>7</sup> As a result of these large cash inflows, tribal gaming has not gone unnoticed by the federal government.

The federal government has not deemed tribal gaming as out-of-bounds for regulation. Historically, the federal government has placed its own interests over the interests of Native Americans. As Martin D. Owens, Jr. describes it, "[w]hen the Constitution was written, most Native Americans lived outside the state or federal governmental control, and therefore de facto occupied."<sup>8</sup> Hence, when "state interests outside the reservation are implicated, states may regulate the activities even of tribal members on tribal land, provided this does not interfere with self-government or otherwise injure rights derived from federal law."<sup>9</sup> Because tribal sovereignty is not necessarily complete, the federal government will intrude on tribal activities where there is a general economic or moral impact outside the reservation, such as with tribal gaming.<sup>10</sup>

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<sup>4</sup> Martin Harris, *Tribal Casinos in the US*, PLAYUSA (Dec. 2, 2021), <https://www.playusa.com/us/tribal-casinos/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Martin D. Owens, Jr., *Will Gaming Tribes Win the Race to the Internet? What's at Stake as California Indian Tribes Seek to Enter Online Gambling*, 19 GAMING L. REV. AND ECON. 133, 134 (2015).

<sup>9</sup> *Id.*

<sup>10</sup> See *Holguin v. Ysleta Del Sur Pueblo*, 954 S.W.2d 843 (Tex. Ct. App. 1997) (citing *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973)); "the basic assumptions with respect to tribal sovereignty are that (1) Indian tribes inherently

### III. HISTORY OF FEDERAL REGULATION OF TRIBAL GAMING

#### A. Before the Indian Gaming Regulatory Act

Before IGRA, gaming conducted on tribal lands did not have to follow state regulations because of tribal sovereignty. This changed in 1953 when Congress passed Public Law 280, a federal statute which provided certain states the authority to enforce state criminal law on reservations, but withheld authority to enforce civil or regulatory laws on tribal lands.<sup>11</sup> As a result, Public Law 280 did not give enough power to states to oversee tribal gaming operations. In *California v. Cabazon Band of Mission Indians*, the U.S. Supreme Court emphasized the limits of Public Law 280, explaining that tribes can conduct gaming if state law does not prohibit it.<sup>12</sup> Because of states' general inability to regulate tribal gaming, in 1988 Congress passed IGRA.

#### B. Indian Gaming Regulatory Act of 1988

In large part due to tribal gaming's potential growth and *Cabazon Band of Mission Indians*' limiting state powers to regulate tribal gaming on a criminal

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possess the authority to govern their internal affairs; (2) states cannot interfere with tribal self-government; and (3) Congress possesses plenary power to limit the sovereignty of Indian tribes.”). *See also* Nat'l Lab. Rels. Bd. v. Little River Band of Ottawa Indians Tribal Gov't., 788 F.3d. 537, 551 (6th Cir. 2015) (applying the NLRA to a tribal casino; to evaluate if a federal statutes that generally applied to all people violated tribal sovereignty, using a “presumption that generally applicable federal statutes also applies to Indian tribes, reflecting Congress’s power to modify or even extinguish tribal powers to regulate the activities of members and non-members alike, then giving “Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them” because it would “undermine a central aspect of tribal self-government”).

<sup>11</sup> *History of Indian Gaming*, MINN. INDIAN GAMING ASSOC., <https://mnindiangamingassoc.com/about-miga/history-of-indian-gaming/#1461601171603-19a1cf0c-2cb0> (last visited Nov. 6, 2022).

<sup>12</sup> *Id.* (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (clarifying that Pub. L. No. 280 expanded state jurisdiction for criminal matters on Indian lands broadly, but not so for civil matters; finding that California’s statute permitting certain organizations to operate bingo games is a civil/regulatory statute rather than a criminal statute, Pub. L. No. 280’s expansion of statute jurisdiction to Indian lands did not apply).

level, the federal government established new regulations.<sup>13</sup> One of the biggest regulations on tribal gaming was IGRA.

The IGRA created a framework for how tribal gaming may operate. The purpose of the act was to establish “clear standards or regulations for the conduct of gaming on Indian lands.”<sup>14</sup> Indeed, IGRA was not meant to hinder tribal growth, but rather promote tribal sustainability, as the general goal was to “promote tribal economic development, tribal self-sufficiency, and strong tribal government.”<sup>15</sup> Hence, IGRA provides some flexibility for tribal casinos to self-regulate. The self-regulation aspect is prevalent when the act states, “Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity.”<sup>16</sup> Nevertheless, IGRA allows both state governments and the federal government to largely control tribal gaming.

The IGRA established a system of oversight for tribal casinos by allowing states to create compacts with tribes that establish certain gaming operations.<sup>17</sup> “[T]he IGRA requires the establishment of tribal-state gaming compacts” for most gaming.<sup>18</sup> The U.S. Department of Interior then approves the contracts.<sup>19</sup> Moreover, IGRA established the NIGC, a federal agency within the U.S. Department of the Interior, “that regulates all tribal gaming in the US.”<sup>20</sup> The NIGC’s responsibilities include coordinating regulatory responsibilities with tribal regulatory agencies, reviewing and approving tribal gaming ordinances, and overseeing the conduct and regulation of Indian gaming.<sup>21</sup> However, between the state and federal government controls allowed on Indian

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<sup>13</sup> After *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Pub. L. No. 280 provided a very weak basis for tribal gaming regulation. Hence, Congress passed Indian Gaming Regulatory Act. See 25 U.S.C. § 2702 The purpose of the Indian Gaming Regulatory Act is to provide “statutory basis for the operation of gaming by Indian tribes . . . provide a statutory basis for the regulation of gaming by an Indian tribe . . . [and] the establishment of independent Federal regulatory authority for gaming on Indian lands.” *Id.*

<sup>14</sup> 25 U.S.C. § 2701(3).

<sup>15</sup> *Id.* § 2701(4).

<sup>16</sup> *Id.* § 2701(5).

<sup>17</sup> *Id.* § 2710(d)(3)(A) (“Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiation with the Indian tribe in good faith to enter into such a compact.”).

<sup>18</sup> Harris, *supra* note 4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* See also 25 U.S.C. § 2704.

<sup>21</sup> *About Us*, NAT’L INDIAN GAMING COMM’N, <https://www.nigc.gov/commission/about-us> (last visited Nov. 8, 2022).

gaming, the tribal-state compacts are the most restrictive and important pieces in a tribe's gaming operation.<sup>22</sup> IGRA categorizes different types of gaming into classes that have different requirements before a tribal casino can offer such games.

Class I gaming includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of, or in connection with, tribal ceremonies or celebrations."<sup>23</sup> Class I gaming may not be regulated by state governments, as the statute reads, "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this Act."<sup>24</sup>

Class II gaming includes "bingo" and "card games" that are either "explicitly authorized by the laws of the State" or "not explicitly prohibited and are played at any location in the State."<sup>25</sup> Unlike Class I, Class II gaming requires that the state "permit such gaming for any purpose by any person, organization, or entity" and the "governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman."<sup>26</sup> Class III gaming includes "all forms of gaming that are not class I gaming or class II gaming."<sup>27</sup>

Class III is the most restricted form of tribal gaming, as it is only lawful on tribal lands if such activities are authorized by an ordinance or resolution passed by the tribal government.<sup>28</sup> For an activity to be authorized by an ordinance or resolution: (1) there needs to be an adoption by the governing body of the Indian tribe that has jurisdiction over such lands; (2) the tribe must meet all the requirements of Class II gaming; and (3) the activities must be approved by the Chairman.<sup>29</sup> Along with the ordinance or resolution, Class III gaming also requires that the activity be allowed by the state and confirmed through a tribal-state compact.<sup>30</sup>

### C. Unlawful Internet Gambling Enforcement Act of 2006

By creating a classification system that established different requirements for tribal casinos to offer certain classes of casino games, IGRA established a basic framework to control Indian gaming.<sup>31</sup> However, since the passage of IGRA in 1988, there have been many new innovations in tribal

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<sup>22</sup> See 25 U.S.C. § 2710(d)(3)(A). A Tribal-State compact is required for class III gaming operations. *Id.*

<sup>23</sup> 25 U.S.C § 2703(6) (2011).

<sup>24</sup> *Id.* § 2710(a)(1).

<sup>25</sup> *Id.* § 2703(7)(A).

<sup>26</sup> *Id.* § 2710(b)(1).

<sup>27</sup> *Id.* § 2703(8).

<sup>28</sup> See *id.* § 2710(d)(1)(A).

<sup>29</sup> 25 U.S.C. § 2710(d)(1)(A) (2018).

<sup>30</sup> *Id.* § 2710(d)(1)(B)–(C).

<sup>31</sup> See *id.* at § 2702.

gaming. One of the biggest innovations has been the rise of online gaming.<sup>32</sup> Regardless of whether a casino operator is commercial or tribal, UIGEA controls online gaming in the United States.<sup>33</sup>

The UIGEA regulates online gambling by filtering financial transactions, making it “illegal for a ‘person engaged in the business of betting or wagering’ to knowingly accept certain financial payments from an individual who is engaged in ‘unlawful Internet gambling.’”<sup>34</sup> The Act defines what unlawful internet gambling is by considering the location of both the bettor and receiver:

[u]nlawful internet gambling occurs when an individual places or receives a “bet or wager” . . . which involves the use . . . of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.<sup>35</sup>

To comply with the Act, all parties in a gaming transaction must be in a state where online gambling is legal.<sup>36</sup> With IGRA limiting game offerings in tribal casinos and UIGEA requiring all parties to be legally authorized to play, the transition for tribal casinos to online gaming is not easy. Moreover, tribal casinos also have to be aware of a much older regulation, the Wire Act.

#### D. Federal Wire Act of 1961

The Wire Act monitors bets and wagers gambling by criminalizing particular wire communications.<sup>37</sup> The Act states

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<sup>32</sup> Audrey Weston, *How the UIGEA Impacted US Online Gambling*, GAMBLINGSITES.COM (Nov. 18, 2022), <https://www.gamblingsites.com/history/uigea/>.

<sup>33</sup> *Id.*

<sup>34</sup> *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 965 (9th Cir. 2018) (quoting 31 U.S.C. § 5363).

<sup>35</sup> *Id.* (quoting 31 U.S.C. § 5362(10)(A)).

<sup>36</sup> *See Iipay Nation of Santa Ysabel*, 898 F.3d at 965 (“[T]he UIGEA does create a system in which a ‘bet or wager’ must be legal both where it is ‘initiated’ and where it is ‘received.’ . . . If a bet merely had to be legal where it was received, a better could place an illegal bet (on a game of poker, for instance) from anywhere in the United States, so long as the bet was legal in the jurisdiction hosting the servers for a game (Las Vegas or Atlantic City, for instance, in the case of online poker). In effect, the UIGEA prevents using the internet to circumvent existing state and federal gambling laws, but it does not create any additional substantive prohibitions.”).

<sup>37</sup> Jennifer L. Carleton, *Internet Gaming on Indian Lands*, NEV. GAMING L., Sept. 2019, at 87.

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.<sup>38</sup>

In a November 2, 2018 opinion, the Department of Justice clarified the prohibitions the Wire Act had on sports betting and wagering, holding that “‘sporting event or contest’ limitation only applies to knowingly using a wire communication facility to transmit ‘information assisting in the placing of bets or wagers on any sporting event or contest,’” and not the other three prohibitions.<sup>39</sup> However, after lawsuits from the New Hampshire Lottery Commission against the Department of Justice and International Gaming Technology (IGT) against the Department of Justice, the November 2, 2018 opinion lost its effect, and the Wire Act “only applies to sports betting.”<sup>40</sup> Nevertheless, though there may be updates to the guidance on the Wire Act in the future, there is very little wiggle-room for casino operators to have interstate or foreign betting operations. The Wire Act’s restrictions on online gaming involved in interstate and foreign commerce therefore adds to what tribal casinos cannot do.

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<sup>38</sup> *Id.* at 87 (citing 18 U.S.C. § 1084(a)).

<sup>39</sup> *Id.* See also *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. \_\_\_ (2018). The Department of Justice, Office of Legal Counsel reversed its opinion in 2011 by stating that the Wire Act is not limited to the sports gambling. *Id.*

<sup>40</sup> Connor Richards, *IGT Prevails in DOJ Lawsuit; Wire Act Doesn’t Apply to Online Poker*, POKERNEWS (Sept. 20, 2022) <https://www.pokernews.com/news/2022/09/igt-prevails-in-doj-lawsuit-wire-act-doesn-t-apply-to-online-42110.htm#:~:text=In%20a%20summary%20judgement%20issued,without%20feared%20of%20federal%20prosecution>. See also *N.H. Lottery Comm’n v. Rosen*, 986 F.3d 38 (1st Cir. 2021) (granting declaratory judgment for the New Hampshire Lottery Commission stating that the Wire Act apply only to the interstate transmission of wire communications related to any sporting event or contest, and not internet transactions of state lotteries or their vendors); *Int’l Gaming Tech. v. Garland*, 2022 WL 4245579 (D. R.I. 2021) (granting summary judgment to gaming company seeking a declaratory judgment that the Department of Justice could not prosecute them for non-sports betting under the Wire Act).

#### IV. GOVERNMENT'S CONTROLLING GRIP OF TRIBAL CASINO'S ACCESS TO ONLINE GAMING

Because of IGRA, UIGEA, and the Wire Act, tribal casinos cannot participate in online gaming easily. Neither of the three regulations provide exceptions to each other. Hence, as illustrated by *California v. Iipay Nation of Santa Ysabel*, it is difficult for a tribal casino to operate an online gaming website.<sup>41</sup> Moreover, even if a tribal casino obtains a state-tribal compact with online gaming provisions, there are commercial gaming operators who would challenge those provisions.

##### A. *California v. Iipay Nation of Santa Ysabel*

The case of *California v. Iipay Nation of Santa Ysabel* discussed whether an Indian tribe was able to operate an online bingo website.<sup>42</sup> The Iipay Nation of Santa Ysabel, a federally recognized Indian tribe, tried to “revitalize its gaming revenue stream” by launching a server-based bingo game over the internet called Desert Rose Bingo (DRB).<sup>43</sup> “Iipay operated DRB through its wholly owned subsidiary, Santa Ysabel Interactive (“SYI”), on a set of servers that are located in Iipay’s now-defunct casino on tribal lands.”<sup>44</sup> To play, patrons created an account online, “select[ed] a bingo game in which to participate,” and filled out a request form.<sup>45</sup>

The problem arose with the transmission of gaming information. By sending the request form, “the patron ha[d] appointed an individual located at the casino, on Iipay’s tribal lands, as the patron’s ‘proxy.’ There is always one SYI employee located at the casino that serves as the ‘Patron’s Legally Designated Agent’ and is responsible for representing all patrons.”<sup>46</sup> The issue the Court was concerned with was whether this operation violated IGRA’s tribal-state compact and/or UIGEA.<sup>47</sup>

The case involved a bingo game, which falls under Class II gaming pursuant to IGRA.<sup>48</sup> The Iipay Nation had jurisdiction to conduct the gaming scheme because DRB took place on Indian lands and complied with certain regulatory requirements.<sup>49</sup> Therefore, the Iipay Nation’s operation of the DRB

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<sup>41</sup> See *Iipay Nation of Santa Ysabel*, 898 F.3d at 968–69 (holding that the Iipay Nation violated the UIGEA because bets or wagers were initiated in California, where betting was illegal).

<sup>42</sup> *Id.* at 962.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 963.

<sup>47</sup> *Iipay Nation of Santa Ysabel*, 898 F.3d at 963–64.

<sup>48</sup> *Id.* at 964.

<sup>49</sup> *Id.*



website complied with IGRA. However, it was not as easy for the Iipay Nation to comply with UIGEA.<sup>50</sup>

Regarding UIGEA, the Iipay Nation argued that their proxy system was pre-gaming communication.<sup>51</sup> As mentioned above, UIGEA requires that internet gambling be legal where both the bettor and receiver are located.<sup>52</sup> The Iipay Nation argued that even though players could be outside the reservation when making their bets, the players' "decision to submit a requested wager . . . is merely a pre-gaming communication with the patron's designated proxy," who was inside the reservation.<sup>53</sup> Therefore, because the proxy was the main initiator of the bet and both the proxy and casino were within the reservation, the Iipay Nation argued that the gaming scheme complied with UIGEA.

However, both the district court and Ninth Circuit rejected the tribe's communication proxy argument. First, the Ninth Circuit determined that "the act of placing a bet or wager" is gambling, "not 'off-site licensing or operation of games.'"<sup>54</sup> Second, based on the fact that "patrons initiate[d] bets or wagers within the meaning of the UIGEA while located in California, where those bets are illegal," the Ninth Circuit determined that "the bets are not legal in the jurisdiction where they are *initiated*."<sup>55</sup> As such, the Iipay Nation was not permitted to operate its online bingo website where patrons outside their reservation were playing bingo against state law. Though *Iipay Nation of Santa Ysabel* involved a state challenge against a tribal casino, recent developments in Florida have shown commercial casinos' willingness to challenge tribal casinos' operation of online gaming.

#### B. The Florida-Seminole Tribal Gaming Compact: The Current Trouble

In 2021, commercial gaming operators in Florida challenged the state after it permitted tribal casinos to conduct online sports betting before commercial casinos were allowed to enter the space themselves.<sup>56</sup> This challenge came after the Florida state government agreed to a new gaming compact with the Seminole Tribe that allowed the tribe to enter the online sports betting market.<sup>57</sup> Florida governor Ron DeSantis and tribal leaders reached the deal in

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<sup>50</sup> *Id.* at 965–68.

<sup>51</sup> *Id.* at 965.

<sup>52</sup> *Id.* at 965 (citing 31 U.S.C. § 5362(10)(A)).

<sup>53</sup> *Iipay Nation of Santa Ysabel*, 898 F.3d at 966.

<sup>54</sup> *Id.* at 967 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014)).

<sup>55</sup> *Id.* at 967 (emphasis in original).

<sup>56</sup> Dara Kam, *A Federal Judge Sides with DeSantis and Dismisses a Challenge to the Seminole Gaming Compact*, WUSF PUB. MEDIA (Oct. 19, 2021, 11:40 AM), <https://wusfnews.wusf.usf.edu/courts-law/2021-10-19/judge-sides-desantis-dismisses-challenge-to-seminole-gaming-deal>.

<sup>57</sup> *Id.*

April 2021, and the deal was ratified by lawmakers a month later.<sup>58</sup> Like the Iipay Nation's DRB website, the Seminole Tribe's sports betting website was created to "allow gamblers throughout the state to place bets online, with the bets run through computer servers on tribal property."<sup>59</sup> Unlike the Iipay Nation, the Seminole Tribe has an agreement with Florida to operate online gaming.<sup>60</sup> The compact specifically allows for bets to be "made anywhere in Florida using a mobile app or other electronic device," which "shall be deemed to be exclusively conducted by the tribe."<sup>61</sup> While this was good news for the Seminole Tribe, some commercial gaming operators found it disadvantageous.

Commercial casinos challenged Florida's gaming compact with the Seminole tribe.<sup>62</sup> West Flagler Associates Ltd., which operates two pari-mutuels, Magic City Casino and Bonita Springs Poker Room, challenged the Florida government and U.S. Department of Interior in the U.S. District Court for Tallahassee.<sup>63</sup> The claim concerned the Florida-Seminole Tribe gaming compact allowing the tribe to "operate online sports betting statewide via servers on its tribal land."<sup>64</sup> The pari-mutuels argued that the compact "violate[d] a Florida constitutional amendment barring gambling except as approved statewide by voters and violates federal laws in the Indian Gaming Regulatory Act."<sup>65</sup> Beyond this legal argument, there was an underlying motive behind the lawsuits: opening the field for sports betting in Florida for commercial casinos as well.

The pari-mutuels were not going against the Seminole Tribe without a business interest. Under the compact, the Seminole Tribe has "a monopoly over sports betting for the 30-year life of the compact."<sup>66</sup> Though the Seminole Tribe "can partner with [a] pari-mutuel," it does not have to.<sup>67</sup> Given this uncertainty, Magic City Casino and Bonita Springs Poker Room filed this lawsuit to break up the Seminole Tribe's monopoly power on sports betting. Coincidentally, the pari-mutuels also aligned their stance with the movement to create a constitutional amendment that would "establish sports betting statewide, regardless of the compact or the tribe"—a movement that has garnered the support of DraftKings

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (The Florida-Seminole Tribe compact specifically stated that "bets made anywhere in Florida 'using a mobile app or other electronic device, shall be deemed to be exclusively conducted by the tribe.'). *Id.*

<sup>61</sup> *Id.* (internal quotations omitted).

<sup>62</sup> *See* *W. Flagler Assocs. v. DeSantis*, 568 F. Supp. 3d 1277, 1280 (N.D. Fla. 2021).

<sup>63</sup> *Id.* *See also* Kam, *supra* note 56.

<sup>64</sup> Laura Cassels, *Pari-mutuels Ask Courts to Strike Sports Betting from FL Gambling Compact with Seminole Tribe*, FLORIDA PHOENIX (Sept. 27, 2021, 7:03 PM), <https://floridaphoenix.com/2021/09/27/pari-mutuels-ask-courts-to-strike-sports-betting-from-fl-gambling-compact-with-seminole-tribe/>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

and FanDuel through a \$20 million donation.<sup>68</sup> Nevertheless, the result of the lawsuits was a mixed bag for all parties involved.

On October 19, 2021, a federal judge dismissed the pari-mutuels' lawsuit against Florida Governor Ron DeSantis and the Florida Department of Business and Professional Regulation Secretary Julie Brown.<sup>69</sup> U.S. District Judge Allen Winsor dismissed the lawsuit because the pari-mutuels were unable to show how "they [would] be harmed."<sup>70</sup> Hence, the case was decided on a standing issue. Though a sigh of relief for the Seminole Tribe, it was a short-lived win.

On November 22, 2021, the U.S. District Court for the District of Columbia, in an opinion written by Judge Dabney Friedrich, sided with the pari-mutuels in their claim against the U.S. Department of Interior.<sup>71</sup> Friedrich delivered her opinion in three main parts, finding that: (1) West Flagler had Article III standing; (2) the Tribe was not an indispensable party; and (3) the compact violated IGRA by authorizing gaming off Indian lands.<sup>72</sup>

Judge Friedrich started her analysis by explaining that West Flagler had Article III standing to commence a suit because its customer survey "found that between ten and fifteen percent of those patrons would wager online and shift to a non-zero amount of their current gambling spending away from games West Flagler currently offers."<sup>73</sup> The new compact would directly affect West Flagler's customer base.<sup>74</sup> Therefore, West Flagler had Article III standing because it had "adequately established a competitive injury" with a "causal connection" . . . [to] the Secretary's approval of the gaming Compact."<sup>75</sup>

Next, the court denied the Seminole Tribe's motion to intervene and motion to dismiss. It found that even though the Tribe is a "required party" because it "has an interest in the validity of [its] compact . . . , and [its] interests would be directly affected by the relief that [West Flagler] seeks," it could not be joined because of "sovereign immunity."<sup>76</sup> The district court then moved to an analysis under Federal Rule of Civil Procedure 19(b), which provides that "if a required party 'cannot be joined,' the court must 'determine whether, in equity

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<sup>68</sup> *Id.*

<sup>69</sup> Kam, *supra* note 56.

<sup>70</sup> *Id.*

<sup>71</sup> Dara Kam, *A Federal Judge Has Overturned Florida's Online Sports Betting Compact with the Seminole Tribe*, WUSF PUBLIC MEDIA (Nov. 23, 2021, 12:27 PM), <https://wusfnews.wusf.usf.edu/courts-law/2021-11-23/a-federal-judge-has-overturned-floridas-online-sports-betting-compact-with-the-seminole-tribe>.

<sup>72</sup> *See* W. Flagler Assocs. v. Haaland, 573 F. Supp. 3d 260 (D.D.C. 2021).

<sup>73</sup> *Id.* at 268 (internal quotations omitted).

<sup>74</sup> *Id.* at 267–68.

<sup>75</sup> *Id.* at 269 (internal citations omitted).

<sup>76</sup> *Id.* at 269–70 (alteration in original) (citing Kickapoo Tribe of Indians of Kickapoo Rsrv. in *Kansas v. Babbitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995)).

and good conscience the action . . . should be dismissed.”<sup>77</sup> The court analyzed the different 19(b) factors. First, it reasoned that there would be no prejudice to the Tribe, stating “[r]esolving this case in the present posture would not prejudice the tribe . . . holding that the federal government erred in applying federal law would fully respect the Tribe’s sovereign immunity.”<sup>78</sup> Though the Tribe argued “this case implicates its sovereign immunity[,]” the court’s analysis of the 19(b) factors determined that “the Tribe’s absence is not prejudicial because the Secretary and the State of Florida have defended the Compact on its merits” and West Flagler is seeking relief only from the Secretary, which would “fully redress their injury.”<sup>79</sup> Hence, the court concluded “that ‘equity and good conscience’ permit this action to continue in the Tribe’s absence.”<sup>80</sup>

With the Seminole Tribe out of the suit, the court turned to the application of the federal regulation. First, the court detailed how the compact violated IGRA. Indeed, the court’s holding was based on a violation of IGRA, as it “centered on gamblers being able to place sports bets online across the state, with the wagers run through computer servers on tribal propert[ies].”<sup>81</sup> The decision also explained the role of the Secretary of the Interior: “[b]ecause *Amador Country* controls here, and because IRGA [sic] authorizes gaming only on Indian lands, it follows that the Secretary must reject any gaming compact that authorizes gaming at any other location.”<sup>82</sup> Like the court in *Iipay Nation of Santa Ysabel*, the court here was not convinced by the argument that the compact was legal because the servers were on tribal lands.<sup>83</sup> Rather, the court stated that:

[A]lthough the Compact deem[ed] all sports betting to occur at the location of the Tribe’s sports book(s) and supporting servers . . . this Court cannot accept that fiction. . . . because the Compact allows patrons to wager throughout Florida, including at locations that are not Indian lands, the Compact violates IGRA’s Indian lands requirement.<sup>84</sup>

Thus, the court again sided with West Flagler Associates.

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<sup>77</sup> *Id.* at 270 (quoting Fed. R. Civ. P. 19(b)).

<sup>78</sup> *W. Flagler Assocs.*, 573 F. Supp. 3d at 270 (referencing Fed. R. Civ. P. 19(b)(1)–(2)).

<sup>79</sup> *Id.* at 270–72.

<sup>80</sup> *Id.* at 272 (quoting Fed. R. Civ. P. 19(b)).

<sup>81</sup> Jim Saunders, *Judge Denies Stay in Florida Sports Betting Case*, NEWS4JAX: FLORIDA., (Nov. 25, 2021, 10:13 AM), <https://www.news4jax.com/news/florida/2021/11/25/judge-denies-stay-in-florida-sports-betting-case/>.

<sup>82</sup> *W. Flagler Assocs.*, 537 Fed. Supp. 3d at 273.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* (internal quotations omitted).

The court finished its analysis by concluding that the best way to resolve these issues was to vacate the compact. The court determined that vacating the Secretary's approval would "fully redress the *West Flagler* plaintiffs' injury."<sup>85</sup>

Following the decision, the Seminole Tribe asked "the U.S. Circuit Court of Appeals for the District of Columbia to block Friedrich's ruling from taking effect."<sup>86</sup> However, the Circuit Court "rejected the tribe's request."<sup>87</sup> As a result, the Seminole Tribe was forced to stop accepting "wagers and deposits on the Hard Rock SportsBook mobile app."<sup>88</sup> On January 25, 2022, the U.S. Department of the Interior appealed Judge Friedrich's ruling.<sup>89</sup>

A different suit was filed challenging the Florida-Seminole Tribe's compact on moral grounds. Businessmen Armando Codina, Jim Carr, and Norman Braman sued Interior Secretary Haaland in the U.S. District Court for the District of Columbia, arguing that the compact's inclusion of "new forms of Class III gaming activities . . . on and off Indian lands [was] in violation of Amendment 3's voter approval requirement."<sup>90</sup> More specifically, the claim argued that the compact violated IGRA, UIGEA, the Wire Act, and Florida's Amendment 3, which requires voter approval for agreements like the one here.<sup>91</sup> The businessmen argued that the new tribal gaming activities negatively impacted communities, and therefore was impermissible without voter approval.<sup>92</sup> These alleged negative impacts included "increasing neighborhood traffic, increasing neighborhood congestion, increasing criminal activity, reducing open spaces, and reducing their property values."<sup>93</sup> Their suit was joined with *West Flagler*'s suit, but the court found the businessmen's suit to be moot because of the remedy given to *West Flagler*.<sup>94</sup>

Like the current challenges against the expansion of tribal casinos' online operations by commercial gaming operators in California and Florida, a similar challenge is also ongoing in Washington. The recent *W. Flagler Assocs.*

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<sup>85</sup> *Id.* at 276.

<sup>86</sup> Dara Kam, *A Federal Judge Appeals the Ruling That Scrapped Sports Betting in Florida*, WUSF PUBLIC MEDIA (January 22, 2022, 7:00 AM), <https://wusfnews.wusf.usf.edu/courts-law/2022-01-22/a-federal-judge-appeals-the-ruling-that-scrapped-sports-betting-in-florida>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Laura Cassels, *South FL Businessmen, No Casinos Sue to Strike Down Gambling Expansion*, FLA. PHOENIX, (Sept. 28, 2021, 2:57 PM), <https://floridaphoenix.com/2021/09/28/south-fl-businessmen-no-casinos-sue-to-strike-down-gambling-expansion/>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 276–77 (D.D.C. 2021).

*v. Haaland* ruling puts Washington's recent expansion of its tribal-state compact to include sports betting at risk.

C. Side-effect of the Florida-Seminole Tribe Gaming Compact Challenge: Washington State

Like Florida, Washington recently entered into a tribal gaming compact that gives Washington tribes greater ability to expand online operations.<sup>95</sup> "All 29 recognized Tribes in the state of Washington have a Class III gaming compact, with 22 tribes operating 29 gaming facilities in the state."<sup>96</sup> In March 2020, Washington Governor Jay Inslee authorized sports wagering at tribal casinos.<sup>97</sup> Since then, sixteen tribes updated their gaming compacts "to include sports wagering."<sup>98</sup> However, Washington tribes have experienced some complications in utilizing these new compacts.

For example, Maverick Gaming filed a lawsuit in the U.S. District Court for the District of Columbia, "challenging Washington Tribes' exclusivity on certain types of gaming, including sports betting."<sup>99</sup> The claim further alleged that IGRA is "being used inappropriately to give Washington Tribes a monopoly."<sup>100</sup>

With commercial casino operators and private individuals determined to stop the entrance of tribal casinos into the online gaming space, it is important to further explain both sides of the argument over whether tribal casinos should have online gaming.

V. OPENING THE GATES TO ONLINE GAMING: WHY NOT?

*Iipay Nation of Santa Ysabel* limited the capabilities of tribal casinos to reach online patrons outside their tribal grounds. The current lawsuits against the Florida-Seminole Tribe compact and Washington tribal gaming compact are attempts to deny tribal control of sports betting in their respective states. Yet, more states seem adamant in allowing tribal casinos to innovate their online gaming operations. Deregulation is one way to get tribal casinos into the online realm quicker to compete against commercial gaming operators.

Specifically, there needs to be deregulation that allows tribal casinos to operate online games that cater to individuals outside their tribal lands yet does not allow tribal casinos to necessarily have a monopoly, like in Florida. The days

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<sup>95</sup> Natasha Brennan, *Washington Tribes Face Sports Betting, Gaming Challenge in New LawsUIT*, NEWS TRIB. (Jan. 13, 2022, 10:12 AM), <https://www.thenewstribune.com/news/state/washington/article257225392.html>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

of gaming prohibitions under the guise of morality are long gone since the Internet now allows open access to gaming worldwide. Alternatively, it is important to encourage patrons to choose regulated gaming. Encouraging regulated gaming includes cleaning up the definitions of what is legitimately included in tribal gaming.

Based on the Florida and Washington lawsuits, there are two main motives behind the attempts to stop tribal casinos from entering the online betting space: (1) preventing tribal casinos from receiving a “monopoly” within a state and (2) the allowance of these compacts is immoral. These two reasons represent extreme opposites, but they both work against tribal casinos’ future prospects. While preventing tribal gaming expansion to online gaming in the form of a monopoly is a legitimate concern, opposition based on moral and ethical grounds is not.

#### A. Monopoly Power

One of the main motivations behind the recent challenge to the Florida-Seminole Tribe compact was the fact that, under the compact, the Seminole Tribe would control the entire online sports betting market in Florida for thirty years.<sup>101</sup> This meets the definition of a monopoly: “exclusive ownership through legal privilege, command of supply, or concerted action.”<sup>102</sup> Under the compact, the Seminole Tribe would have this exclusive control, as no other commercial casino would be allowed to accept sports betting in Florida. If a commercial casino wanted to enter the Florida online sports betting space, it would have to partner up with the Seminole Tribe.

Monopoly power has some advantages, such as economies of scale and innovation.<sup>103</sup> Instead of multiple companies investing in expensive infrastructure to enter a high-cost industry, one company with a monopoly reduces these costs.<sup>104</sup> Under the compact, there could potentially be less money spent to launch the online sports betting industry in Florida, as only the Seminole Tribe would incur costs. Moreover, because the Seminole Tribe would be the only player in the online sports betting industry in Florida, the Tribe might invest more money in the industry than multiple firms would. However, the benefits that could potentially come from the Seminole Tribe having an online monopoly do not seem to outweigh the substantial negatives.

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<sup>101</sup> Cassels, *supra* note 64.

<sup>102</sup> *Definition of Monopoly*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/monopoly?src=search-dict-hed> (last visited November 13, 2022).

<sup>103</sup> Tejvan Pettinger, *Advantages and Disadvantages of Monopolies*, ECON. HELP (Oct. 4, 2020), <https://www.economicshelp.org/blog/265/economics/are-monopolies-always-bad/>.

<sup>104</sup> *Id.*

Instead, there would likely be many downsides to allowing the Seminole Tribe to have monopoly power in the Florida online sports betting space. One downside of monopoly power is that there is “[l]ess incentive to innovate and invest.”<sup>105</sup> In the Florida and Washington cases, there is a serious question of whether the tribes would be capable of handling new innovations in sports betting. How well would they update their online gaming websites and mobile apps? Would tribal casinos be able to provide other types of sports betting as quickly as if there were other commercial competitors in their respective states? Given this, there would be a serious concern about the value given to consumers.

Further, by granting tribal casinos monopoly power, there is concern that they may overcharge the consumer. Usually, in a monopoly, there is “[a] decline in consumer surplus.”<sup>106</sup> This means that “[c]onsumers pay higher prices and fewer customers can afford to buy.”<sup>107</sup> In the case of tribal casinos having sports betting monopolies in Florida and Washington, there is a greater concern that tribal casinos will provide consumers with less options for placing sports bets. Moreover, the tribal casinos may increase the cost of betting by producing worse spreads for consumers than if there was commercial competition in the space.

#### B. Moral/Ethical Grounds

There is no question that online gambling can be very addictive, and its impact may be worse than land-based gaming. Online gambling is much more accessible to bettors than land-based casinos. According to Dr. Sally Gainsbury, a researcher at the Centre for Gambling Education and Research at Southern Cross University, “[i]nternet gambling differs from land-based gambling primarily in terms of its constant availability, easy access and ability to bet for interrupted periods in private, facilitated by the interactive and immersive Internet environment.”<sup>108</sup> Moreover, the Internet creates a shield from reality for gamblers, which can turn dangerous. As Dr. Gainsbury details, because people do not feel as though they are spending “real” money while gambling online, “[s]urveys indicate that 19–28% of online gamblers report it is easier to spend more money online, while 15% consider this form to be more addictive than land-based gambling.”<sup>109</sup> Online gambling’s accessibility and ease-of-use may negatively impact poverty-stricken areas.

This is a very large concern in Native American communities, many of which have high poverty rates. According to Washington University’s David

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Sally M. Gainsbury, *Online Gambling Addiction: The Relationship Between Internet Gambling and Disordered Gambling*, 2 CURRENT ADDICTION REPS. 185, 186 (Apr. 11, 2015).

<sup>109</sup> *Id.*



Fall 2022]

TRIBAL CASINOS AND ONLINE GAMING

125

Patterson Silver Wolf, “[e]stimates put the problem-gambling rate among Native Americans at 2.3[%], more than double the rate among all adults.”<sup>110</sup> Some believe this high rate of problem gambling in Native American communities can be largely attributed to poverty. Indeed, “about one in four Native Americans live below the poverty line.”<sup>111</sup> Poverty often generates the desperate need to make a quick buck, and gaming can be an enticing outlet. As Patrick Pruitt, a social worker with the Indian Center in Kansas City, Missouri, put it:

[i]f they’re desperate to try to get their rent paid or get groceries or get their car payment so they can get [to] work, then they go to the casino and they’ll take their last \$50 to try to turn that into \$500, and they ended up losing like that, and at that point they’re in worse condition than they were before they went.<sup>112</sup>

However, it is questionable whether Internet gambling would actually increase problem gambling in Native American communities.

Studies have shown somewhat conflicting results concerning how internet gambling affects different socio-demographic groups. The risk factors for internet problem gambling “include being male, younger adults, and being from a culturally diverse background.”<sup>113</sup> However, Gainsbury qualifies these factors by stating that the “risk factors identified do not appear to be universal.”<sup>114</sup> Therefore, more studies may still need to be conducted to determine those who are most at risk, specifically with the possible introduction of Internet gambling in Native American communities.

Nevertheless, despite these concerns about monopoly power, morality, and ethics in society, there may still be an argument for allowing tribal casinos to completely control the online gambling realm.

## VI. THE ARGUMENT FOR THE PRESERVATION OF INDIAN CASINO MONOPOLIES

Contrary to the arguments of pro-deregulation advocates, some stress the importance of protecting Indian gaming using IGRA, UIGEA, and the Wire Act. These arguments include: (1) the economic boost tribal gaming could provide; (2) tribal gaming compacts differ from other common types of monopolies; and (3) the idea of tribal casinos being a form of reparations.

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<sup>110</sup> Michelle Tyrene Johnson, *For Native Americans, Tribal Casinos Help and Hurt*, ST. LOUIS PUB. RADIO (Feb. 4, 2019, 12:00 AM), <https://www.stpublicradio.org/projects/fix-ed-odds/for-native-americans-tribal-casinos-help-and-hurt/>.

<sup>111</sup> *Id.*

<sup>112</sup> Johnson, *supra* note 110.

<sup>113</sup> Gainsbury, *supra* note 108, at 188.

<sup>114</sup> *Id.*

### A. The Economic Boost

Washington serves as an example of how tribal gaming can be a powerful economic tool for a state. The Washington Native American economy as a whole “yielded more than \$5.3 billion in gross state product and provided 37,000 jobs, with 70% of employees being non-Tribal members.”<sup>115</sup> These statistics show that the benefits generated by Native American businesses, including tribal casinos, spread outside of just Native American lands. The internal impact for the tribes is also significant. “Gaming pays for Tribal housing, healthcare, natural resources, education, infrastructure investments and charitable donations both on and off reservations[,]” which helps Tribal governments be self-sufficient.<sup>116</sup> However, these types of economic impacts are not exclusive to tribal casinos.

Take Maverick Gaming, the commercial entity that is suing the tribal casinos, as an example. It has a union-led workforce of 2,000 employees and “intend[s] to invest \$500 million in licensed cardrooms and planned entertainment developments across the state.”<sup>117</sup> Though both tribal and commercial casinos flaunt their contributions to the economy, there is still plenty of competition allowed under the current state-tribe compact agreements in Florida and Washington. However, it is important to highlight how tribal casinos outside of Washington impact tribal communities.

### B. Tribal Casinos Are Not the Typical Monopoly

Unlike a typical monopoly, tribal casinos are in the highly competitive field of gaming, where there are already plenty of options. Moreover, the gaming industry is a leisure activity. Thus, it would be hard to argue that tribal casinos have the same negative impacts as other forms of monopolies.

Monopolies control consumer choice. One of the disadvantages of monopolies is that many of them “face inelastic demand and so can increase prices - giving consumers no alternative.”<sup>118</sup> Monopolies can significantly change the price of a good and still experience very little change in demand. If tribal casinos were granted a “true monopoly” in the Washington and Florida online sports betting markets, they would be able to control the odds of online sports games, and because they established the only legal betting market, they will still have patrons. This market control can greatly disadvantage consumers. However, tribal casinos do not have this power because of the other available alternatives to gaming.

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<sup>115</sup> Brennan, *supra* note 95.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> Pettinger, *supra* note 103.

Online gambling is not an inelastic good, and there are alternatives to it. If the odds of an online game controlled by a tribal casino were worse than the odds at a land-based commercial casino, bettors could just go to the land-based commercial casino. It comes down to what online gambling is: a form of entertainment. Online gambling is not food. Online gambling is not housing. Online gambling is not water. Online gambling can easily be replaced with other physical casino-based games. Moreover, though outside the scope of this paper, it is important to note that there are other illegal online casinos located outside the United States that lure many Americans.<sup>119</sup> Oftentimes, these casinos evade UIGEA by utilizing cryptocurrency. As all this shows, there are many alternatives to online gambling.

Because of the competitive nature of the gaming industry, it would be unwise to classify tribal casinos as traditional monopolies. Even though tribal casinos may set the online sports betting market in states like Florida and Washington, consumers still have the freedom to participate in alternative legal gambling options if tribal casinos do not like their betting odds. Gaming is an elastic service where consumers can choose a plethora of alternative games. Given that the probability of tribal casinos exercising unbridled control over online gambling is low, the U.S.'s consistently horrendous treatment of Native Americans may further justify granting tribal casinos more control over online gambling.

### C. Tribal Gaming as a Means or Reparations

Much needs to be done for Native American communities to reduce the extremely high poverty rates largely caused by past government treatment. To accomplish this, granting tribal casinos a monopoly over their respective state's online gaming industry may be a great starting point. This subsection will cover the Marshall Trilogy, the freedom of tribal casinos pre-IGRA, and the importance of giving power back to Native American tribes.

Before covering the relevant government regulations, it is important to keep in mind that there are certain general principles the U.S. Supreme Court consistently applies to Indian law cases.<sup>120</sup> As Matthew L.M. Fletcher states:

First, Congress has plenary power in the exercise of its Indian affairs duties. Second, the United States owes a duty of

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<sup>119</sup> *Illegal Sports Betting*, AMER. GAMING ASSOC. (May 31, 2022), <https://www.americangaming.org/illegal-sports-betting/>.

<sup>120</sup> Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, A.B.A. (Oct. 1, 2014), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2014\\_vol\\_40/vol--40--no--1--tribal-sovereignty/short\\_history\\_of\\_indian\\_law/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/). See also *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

protection to Indian nations and tribal members akin to a common law trust. Third, Indian nations retain inherent sovereign powers, subject to divestiture only by agreement or by Congress. Fourth, state law does not apply in Indian country absent authorization by Congress. Finally, Congress must clearly state its intention to divest tribal sovereignty.<sup>121</sup>

The greatest usurpation of Native American power came from a group of cases now referred to as the Marshall Trilogy. The Marshall Trilogy consists of *Johnson v. M'Intosh*; *Cherokee Nation v. Georgia*; and *Worcester v. Georgia*.<sup>122</sup> In *Johnson*, “[t]he Supreme Court held that Indians could not sell their property interests . . . To anyone except the national sovereign. . . . The Court confirmed national authority over Indian affairs.”<sup>123</sup> In *Cherokee Nation*, “[a] deeply split Court held that the Cherokee Nation was a domestic nation, but neither a state nor a foreign nation.”<sup>124</sup> *Worcester* confirmed states’ inability to legislate on tribal lands, stating that “state laws had no force in Indian country, barred under the Supremacy Clause by federal statutes and the Cherokee Nation’s treaties with the United States.”<sup>125</sup> These cases establish the foundation of the federal government’s power to exercise control over tribal casinos. As a result of this federal usurpation of tribal power, later Supreme Court cases upheld further governmental encroachments against Native American tribes.

One of these encroachments was Congress’s policy to split Native American land through an allotment system. Using this system, the federal government broke up “Indian reservations by allotting parcels to individual Indians and then selling surplus lands on the open market.”<sup>126</sup> This system sequestered former Native American lands for the benefit of non-Native Americans. As Fletcher describes, “[n]on-Indians quickly and efficiently acquired the most valuable allotted and surplus lands through legal and illegal means, and by 1928 two-thirds of tribal land base disappeared.”<sup>127</sup> Even when Native American tribes tried to challenge the validity of such allotments based on previous treaties between them and the federal government, the courts still upheld the congressional policy. In *Lone Wolf v. Hitchcock*, “[u]nder the terms of the treaty, two-thirds of the adult males of the tribes would have to consent before the treaty could be amended. Lone Wolf the Younger argued that the Americans fraudulently acquired the consent of the tribe and the allotment plan

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<sup>121</sup> Fletcher, *supra* note 120.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* (internal quotations omitted).

<sup>127</sup> Fletcher, *supra* note 120.

Fall 2022]

TRIBAL CASINOS AND ONLINE GAMING

129

approved by Congress should be enjoined.”<sup>128</sup> Even with this fraudulent consent, the Court ruled against Lone Wolf, holding that

Congress had the authority to proceed with the allotment plan under its plenary power over Indian affairs, that federal altering of Indian property rights over tribal objections could proceed because the tribe would receive compensation, and . . . Congress was acting in good faith in setting the terms of compensation.<sup>129</sup>

The allotment system unfairly restricted the use of Native American lands for the economic benefit of non-Native Americans, which draws parallels to the current struggles tribal casinos face when attempting to expand into online gambling.

Are the current gaming regulations not like the system of allotments? After years of economic suffering, Native American communities have benefitted from the popularity of tribal gaming. Yet, the federal government and the commercial gaming industry want to restrict tribal gaming since it undermines their purported beliefs and values, along with their economic profits. Similar to the control it exercised under the allotment system, the federal government is controlling which gaming spaces tribal casinos may enter. As exemplified by the lawsuits challenging the Florida and Washington tribal compacts, commercial gaming companies have turned to the courts to argue that they should not face “unequal” access to online gaming opportunities. The courts now get to decide whether to uphold these state compact agreements and consequently whether tribal casinos are permitted to enter online gambling. The recent court rulings show the major restrictions tribal casinos face in controlling their online games. With tribal casinos needing to expand their online operations to remain competitive in today’s gambling environment, statutory changes are needed.

## VII. STATUTORY PROGRESS: WHAT IS HAPPENING AND WHAT IS THE PATH FORWARD?

Statutory changes in either IGRA, UIGEA, or the Wire Act can help facilitate tribal casinos’ move into the online realm. The main problem that online gaming creates for tribal casinos is that it often involves servers and people that are located outside reservation grounds, which allows states and the federal government to exercise control. There have been some discussion about modifying these gaming regulations to allow tribal casinos to thrive in the future. This section will cover the proposed H.R. 4308, the Removing Federal Barriers

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<sup>128</sup> *Id.*; Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

<sup>129</sup> Fletcher, *supra* note 120.

to Offering of Mobile Wagers on Indian Lands Act, which would help modernize tribal casinos.

Introduced in 2021 by Representative Lou Correa, H.R. 4308 attempts to solve the issues caused by gaming servers being located outside tribal grounds. As seen in *Iipay Nation of Santa Ysabel* and with the Florida-Seminole Tribe compact, there is a genuine disagreement over how to define whether online gaming occurs within the confines of tribal lands. H.R. 4308 addresses this issue by explaining where bets should be considered located. Section 3 of the bill, IGRA Mobile Wagers, states, “[f]or purposes of the [IGRA] . . . only, a wager made through an interactive wagering platform shall be deemed to be made at the physical location of the server or other computer equipment used to accept the wager, unless otherwise agreed to by a State and Indian Tribe.”<sup>130</sup> The definition of “interactive wagering platform” would include entities that offer “lawful wagering over the internet, including through an internet website or mobile applications.”<sup>131</sup>

The bill also addresses any potential concerns over states’ rights that it might raise. In Section 4, Preservation of States’ Rights, the bill states,

With respect to a wager accepted through a server or other equipment located on Indian lands (as defined in section 4 of the Indian Gaming Regulatory Act (25 U.S.C. 2703)), the wager shall be considered to be exclusively occurring on Indian lands if—(1) the person placing the wager and the server or other computer equipment through which the wager is accepted are in the same State; and (2) the applicable State and Indian Tribe have entered into a Tribal-State compact under the Indian Gaming Regulatory Act.<sup>132</sup>

Section 4 would limit Section 3’s reach by requiring that both the player’s and the tribal casino’s server be in the same state. If a player from another state gambles on the tribe’s server, it would constitute a violation of IGRA. Therefore, each state would be able to control how its citizens can engage with the tribes. H.R. 4308 would expand state-tribal gaming compact jurisdiction to the online realm while instituting limits that ensure online patrons are not located outside the state.

To analyze its potential impact, H.R. 4308’s provisions can be applied to the situation in *W. Flagler Assoc.* In *W. Flagler Assoc.*, Secretary Haaland’s approval letter of the Florida-Seminole Tribe Compact did not quell the court’s concerns about the compact’s jurisdictional scope. The court recognized that the Secretary’s “letter notes that IGRA allows gaming compacts to govern the

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<sup>130</sup> Removing Federal Barriers to Offering of Mobile Wagers on Indian Lands Act, H.R. 4308, 117th Cong. § 3 (2021).

<sup>131</sup> *Id.* § 2(1).

<sup>132</sup> *Id.* § 4.

application of state and tribal laws that are relevant to class III gaming and the allocation of criminal and civil jurisdiction between states and tribes with respect to enforcing those laws.”<sup>133</sup> The letter emphasized that IGRA and state-tribal compacts should be afforded broad discretion concerning tribal gaming issues. Nonetheless, the court disagreed with the letter’s assessment, explaining that “those provisions, which concern states and tribes’ regulatory responsibilities, say nothing about whether gaming activity occurs on ‘Indian lands.’”<sup>134</sup> The court believed that states should be required to establish specific boundaries concerning online gaming. Since the court believes there is a problem with the compact’s jurisdictional scope, it may be time to redefine when gaming actually occurs on Native American lands. H.R. 4308 would help define and expand this jurisdictional scope.

Since they would address the relevant online gambling issues, H.R. 4308’s Sections 3 and 4 would help define the scope of the *W. Flagler Assoc.* compact. The compact would not face an IGRA problem since it would be clear that tribal casinos could operate online if the betting patron was in the same state as the tribe’s server. There could be some questions over whether IGRA would preempt Florida’s constitutional requirement for a referendum to expand gaming. However, because the language of H.R. 4308 states that the wager would be considered exclusively on Native American land, it likely would not trigger the referendum since IGRA defines compacts as a determination between the state governor and the tribes themselves. However, H.R. 4308 fails to directly address the issue at the center of *Iipay Nation of Santa Ysabel*: UIGEA. Any federal statute aimed at expanding tribal gaming should directly address both UIGEA and the Wire Act.

Any new legislation to expand tribal gaming to the online realm must also reform UIGEA, since it restricts tribal gaming through its control of gaming financial transactions. As previously mentioned, UIGEA makes it illegal for gaming entities to accept financial transactions where gaming is unlawful.<sup>135</sup> Therefore, both the state where a patron initiates their bet and the state where a casino receives the bet must legalize online gaming. UIGEA further constricts state powers, especially in states where gambling is only allowed in tribal territory. For new legislation to facilitate the expansion of online tribal gambling, it must be more accepting of online gambling in general.

One of the simplest ways to adjust UIGEA to allow for the expansion of online tribal gambling is to define lawful internet gambling rather than unlawful internet gambling. Instead of requiring that a wager be initiated, received, and otherwise made in a territory that allows online gambling, the law should make a wager legal if it is legal in the place the wager was initiated, received, or otherwise made. If this definition change occurred, both tribal and commercial

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<sup>133</sup> *W. Flagler Assocs. v. Haaland*, 573 F. Supp. 3d 260, 274 (D.D.C. 2021) (internal quotations omitted).

<sup>134</sup> *Id.*

<sup>135</sup> *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 965 (9th Cir. 2018).

casinos would not have to worry about violating UIGEA by offering online gambling, so long as online gambling was legal in one of the locations the wager touched. Moreover, this change would help address similar issues with the Wire Act.

As previously mentioned, the Wire Act bans wire communication of bets or wagers in an interstate setting. The Wire Act prohibits the transmission of “‘bets or wagers’ or ‘information assisting in the placing of bets or wagers on any sporting event or contest.’”<sup>136</sup> Moreover, the Act prohibits entities from transmitting “‘wire communications that entitle the recipient to ‘receive money or credit’ either ‘as a result of bets or wagers’ or ‘for information assisting in the placing of bets or wagers.’”<sup>137</sup>

By making the aforementioned changes to UIGEA—by defining lawful Internet gambling rather than unlawful Internet gambling—the Wire Act would no longer function as an effective restriction on online gambling. So long as either the place where the bet or wager is initiated, received, or otherwise made has legalized sports betting is considered lawful Internet gambling under UIGEA, then the Wire Act would have a contradictory position. Thus, it would be important for Congress to repeal 18 U.S.C. § 1084. As a result, it would be much easier for online gambling to occur throughout the United States. If one state allows online gambling, all wagers that touch that state would be legal. Though radical, this should be the way forward. Of course, states would not be too happy with this solution.

States would likely argue that changing the definition of unauthorized gaming would severely restrict their right to control gaming within their borders, especially when a state wants to completely ban gaming. This definition change would expand gaming magnitudes more than H.R. 4308 would by benefitting casinos that operate legally in at least one of the locations a wager touches. Under this legal structure, one state’s approval of online gambling would override another state’s prohibition of gambling, as long as the wager was placed online. It is doubtful that states would be comfortable telling other states what to do, especially given the overriding nature of such a change in the law. Yet, such drastic change must be pursued, especially when gambling is expanding so rapidly into the online realm.

It is time for states to recognize that the public’s sentiments about the immorality of gambling are changing. Gambling operations have reached the online realm, which makes games much easy to access. If there is no change to the definition of unauthorized gaming, tribal casinos—who currently face legal restrictions regarding online gambling—will be disadvantaged compared to other private gaming companies that freely allow such gambling. States may argue that the “or” definition of unauthorized gaming would only be available for tribal casinos, therefore causing resentment among private gaming companies due to the law favoring tribal casinos. Without making this general change to the

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<sup>136</sup> 18 U.S.C. § 1084.

<sup>137</sup> *Id.*



definition of authorized gaming, tribal casinos will struggle to expand their online gambling operations, and the public's infatuation with tribal gaming will fade. Online gambling represents the long-term future of the gaming industry, and tribal casinos must be allowed to adjust to the new environment.

Until then, H.R. 4308 could be the short-term solution to the online transition for tribal casinos. H.R. 4308's Section 3 would ensure the definition of "wager" would center on where a tribal casino's server is located. The bill's Section 4 would assuage some of the states' concerns. It would allow tribal casinos to operate online if both the player's and the casino's server were located within the same state and the tribal casino has a compact to legally operate within the state. However, it is imperative that Section 3 of H.R. 4308 also provides exemptions to UIGEA and the Wire Act in order for the legislation to be effective in protecting tribal casinos' Internet operations.

### VIII. CONCLUSION

Tribal casinos are currently facing hurdles when trying to enter the online gaming space. Federal statutes such as the Indian Gaming Regulation Act of 1988, the Unlawful Internet Gambling Enforcement Act of 2006, and the Wire Act of 1961 restrict states' ability to approve online gambling and tribal casinos' ability to cater to customers outside their reservations. Legal challenges grounded in the provisions of IGRA, UIGEA, and the Wire Act have questioned the right of tribal casinos to enter the online gambling realm. In *Iipay Nation of Santa Ysabel*, a tribal casino was not allowed to operate its online bingo casino because it violated UIGEA's requirement that gambling be permitted in the location where a wager occurs. In *W. Flagler Assocs.*, the Florida-Seminole Tribe gaming compact was held invalid because the online sports betting took place outside of Native American grounds, and the state-approved compact constituted a violation of IGRA. Washington is also facing a challenge from a commercial gaming operator to its expanded tribal gaming compact.

This paper discussed both sides of the argument surrounding tribal casinos' ability to enter the online realm. The moral argument against gambling is weak compared to the vast economic benefits of gambling to tribal communities. Though private gaming companies may argue these compacts grant tribal casinos a monopoly in certain online games, in reality, the compacts do not create traditional monopolies, as tribal casinos still face stiff competition in the high barrier-to-entry online gambling industry.

Recognizing the benefits provided by protecting tribal casinos, this paper discussed the solution of modifying the text and enforcement of IGRA, UIGEA, and the Wire Act. H.R. 4308 represents a promising solution to the issues that tribal casinos face by defining exactly where a wager should be considered located for IGRA purposes and maintaining the requirement that both the player's and the tribal casino's server be located within the same state. However, in the long-term, online wagers should be legal as long as they touch a location that allows online gaming.

Tribal gaming is controversial, but it needs to be addressed. Gaming is expanding into the online realm, and both states and Congress need to be prepared to help tribal casinos reach this new space. Otherwise, tribal gaming will become obscure compared to private gaming companies.