

SPORTS BETTING AND INDIAN GAMING: ISSUES IN INTEGRATING SPORTS BOOKS INTO TRIBAL CASINOS IN THE U.S.

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Abstract: Even before the U.S. Supreme Court issued its recent decision that permits states to legalize sports wagering, 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 more than half the states will legalize it within five years. Many will be among the 29 states that currently have casinos owned and operated by American Indian tribes in this \$32.4 billion market segment. There is no firm sense and little data pointing to how many of the 242 gaming tribes within those states will seek to open sports books, or on what basis they will make a decision. In this paper, we examine three barriers to tribes' entry into the sports betting market, and identify strategies for overcoming these barriers – an analysis also useful for states or commercial casino operators.

Keywords: Sports betting; casino wagering; casino regulation; PASPA; IGRA; Indian gaming; tribal casinos; American Indian.



I. Introduction

Full-scale legalized sports wagering at last is coming to the United States. When the U.S. Supreme Court decided in *Murphy v. National Collegiate Athletic Association*¹ that the federal Professional and Amateur Sports Protection Act² (PASPA) was unconstitutional, the Court effectively lifted the longstanding ban on legalized sports betting by authorizing states to determine individually whether to legalize it. This next wave of America's gradual acceptance of gambling as a matter of public policy is underway. Of equal significance, *Murphy* also enabled federally acknowledged American Indian tribal governments within states to exercise their own sovereign authority to bring sports betting to tribally owned and operated casinos.

Implementation of mobile and casino-based sports betting will take some time. Yet in disrupted industries, first movers have the competitive advantage. In the U.S., who will take the lead: states or tribes? In a post-PASPA world, should American Indian 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 facilities³—is complex. We posit that a tribe should carefully evaluate three major barriers to market entry:

- *Legality and regulation*, particularly the interactions of federal and state law with tribal-state compact agreements;
- *Feasibility and profitability*, including the marginal rate of return on sports books; and
- *Market and competition*, especially weighing the limited size and scope of rural markets in which many tribes are located.

We address each barrier and identify threshold strategies for how to overcome it. We believe this analysis is similarly useful for evaluating the overall potential for sports betting's success within any state and with regard to commercial casino operations throughout the U.S.

II. Background overview

A. Sports betting in the U.S.

Since its passage by the U.S. Congress in 1992, PASPA formally outlawed

1 No. 16-476, 584 U.S. __ (2018).

2 See 28 U.S.C. § 3701 *et seq.* (1992).

3 See *id.*



sports betting in most states, with the notable exception of Nevada.⁴ Yet in practice, the law has been markedly ineffective, as evidenced by the estimated \$150 billion illegal U.S. gambling market.⁵ PASPA's underlying policy goals and presumptions have become increasingly anachronistic, failing to stem the public's appetite to gamble on sports contests, especially given the advent of online and mobile technology, and as evidenced by the popularity of informal Super Bowl pools, Fantasy Sports leagues and Daily Fantasy Sports (DFS) websites, competitive video gaming and eSports skins betting, mobile social games, and the like.⁶ Too, PASPA did not contemplate the massive growth and global brand penetration of U.S. professional sports leagues like the National Basketball Association (NBA) or National Football League (NFL), or the marketing and social media reach of individual sports personalities or social media influencers. While the Supreme Court's decision was driven by the premise that Congress could not "commandeer" the states to *not* legalize gaming,⁷ PASPA on its own had become a regulatory failure.

B. Indian gaming in the U.S.

The Indian gaming industry occupies a unique position relative to the commercial and state-operated lottery or charitable gaming segments. At its foundation is the distinctive political and legal status of American Indian tribal governments and their treatment throughout U.S. history. Elsewhere we have detailed this background in depth; here, we seek to provide a quick primer to establish the basis for this specific topic and for an international audience.⁸

"Indian gaming" (the legal term of art for tribal government gaming) is the

4 *Id.* PASPA also "grandfathered" more limited sports betting in other states. See I. Nelson Rose, *States Grandfathered-in Under PASPA* (Jan. 3, 2018), available at <http://www.gamblingandthelaw.com/states-grandfathered-in-under-paspa/>.

5 See American Sports Betting Coalition, *Embracing America's Passion for Sports Betting*, available at <https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a70d888419202bd897172a0/1517344904408/Embracing+America%27s+Passion.pdf>.

6 See GQR Research, *Legalizing Sports Betting: A Winning Wager, Report to the American Gaming Association* (Apr. 17, 2017), available at https://static1.squarespace.com/static/5696d0f14bf118aff8f1d23e/t/5a70d93b419202bd8971b2fa/1517345084101/Rev_Public+AGA+National+Poll+Memo+042417+FINAL.pdf.

7 See *Murphy*, *supra* note 1.

8 See, e.g., STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* (2005); KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW AND POLICY* (2nd ed. 2014); KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW: CASES AND MATERIALS* (2nd ed. forthcoming 2019).



largest current segment of legalized gaming in the U.S., at \$32.4 billion.⁹ Tribal gaming is governed by extensive federal, state, and tribal law and regulations; it is the only type of U.S. gaming regulated at three governmental levels.¹⁰

Like its decision to open a casino under the regulatory framework of the federal Indian Gaming Regulatory Act of 1988¹¹ (IGRA), a tribe's determination whether to enter the nascent sports betting market is more than a business decision: for a sovereign government with responsibilities to its citizens, the decision carries political, legal, social, cultural, and moral implications. Because many gaming tribes continue to face disproportionately high poverty and unemployment rates and other socioeconomic challenges,¹² this calculation is critical.

While tribal gaming as a whole is the largest segment of the U.S. casino industry,¹³ national figures alone obscure the wide range of profitability by state and tribe. There are 242 sovereign tribes that currently operate nearly 500 gaming facilities.¹⁴ Location, customer base, competition, gaming array, and destination amenities all contribute to profit. On one end of what we have labeled the "spectrum of success,"¹⁵ Tribal gaming in just two states – California and Oklahoma – accounts for 40 percent of total tribal gaming revenue nationwide; the top ten states (California, Oklahoma, Florida, Washington, Arizona, Connecticut,

9 See National Indian Gaming Commission, Press Release, *2017 Indian Gaming Revenues Increase 3.9% to \$32.4 Billion* (June 26, 2018), available at <https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion>. Herein we refer interchangeably to Indian gaming, tribal gaming, and tribal government gaming.

10 IGRA's regulatory framework relies on tribal and federal authority, and for casino-style gaming, includes a role for state regulation through the tribal-state compact requirement. See 25 U.S.C. § 2710.

11 25 U.S.C. §§ 2701-21.

12 See, e.g., Shelly Hagan, "Where U.S. Unemployment Is Still Sky-High: Indian Reservations," *Bloomberg News*, Apr. 5, 2018 ("Of 27 counties with a majority American Indian or Alaska Native population, about two-thirds had unemployment rates last year above the national level . . ."), available at <https://www.bloomberg.com/news/articles/2018-04-05/where-u-s-unemployment-is-still-sky-high-indian-reservations>; U.S. Census Bureau, *American Indian Heritage Month: November 2017 Facts for Features* (reporting that over 26 percent of American Indians and Alaska Natives were in poverty in 2016, the highest percentage for any race group in the U.S.), available at <https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html>.

13 In 2015, tribal gaming accounted for about 44 percent of national casino industry revenue, while commercial casinos accounted for about 43 percent and the remaining 12 percent generated by racinos. ALAN P. MEISTER, *CASINO CITY'S INDIAN GAMING INDUSTRY REPORT*, 2017 ED. (2017) 13.

14 See National Indian Gaming Commission, *supra* note 9.

15 See LIGHT & RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY*, *supra* note 8, at 9-11.



Minnesota, Michigan, Wisconsin, and New York, by rank) account for 85 percent of national revenue. The remaining 15 percent is spread across 18 states and many tribes. Profitability also varies by facility; 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. Only 7 percent of tribal casinos earn \$250 million or more each year, and these account for 45 percent of the total. On the other end of the spectrum, 37 percent of tribal casinos earn \$10 million or less each year, accounting for just 2 percent of national revenue.¹⁶

III. Barriers to market entry

A. Legality and Regulation

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.”¹⁷ In 2001, the National Indian Gaming Commission (NIGC) opined that a state must have legalized sports betting in order for a tribe to offer it.¹⁸ For Class III gaming, IGRA requires a “compact entered into by the Indian tribes and the State.”¹⁹ The NIGC has classified sports betting as Class III gaming, which would require a compact.²⁰

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,

16 See generally *id.*; see also National Indian Gaming Commission, *FY13-FY17 Gaming Revenues By Range*, available at <https://www.nigc.gov/images/uploads/reports/Chart2017GamingRevenuesbyRange.pdf>.

17 25 U.S.C. § 2710(d)(1)(B).

18 Kevin K. Washburn, NIGC General Counsel, to Joseph M. Speck, Nic-A-Bob Productions, NIGC Game Classification on WIN Sports Betting Game, at 2 (Mar. 13, 2001), available at <https://www.nigc.gov/images/uploads/game-opinions/WIN%20Sports%20Betting%20Game-Class%20III.pdf>.

19 25 U.S.C. § 2710(d)(1)(C). The NIGC has enforcement authority, including the power to level civil fines and order closure of tribal gaming facilities. See 25 U.S.C. § 2713. The federal Johnson Act prohibits the use of unauthorized “gambling devices” in Indian country. See 15 U.S.C. § 1175.

20 25 C.F.R. § 502.4(c). In a game classification opinion from 2001, the NIGC stated that “sports betting ... is a Class III form of gaming.” Washburn, *supra* note 18. Some argue this is not yet settled law, so some forms of sports betting could fall within Class II. 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>.



or whether a new or revised compact is required.²¹ There are hundreds of gaming compacts now in effect; many are based on “model” compacts whose provisions are the same or similar for all tribes within a particular state, while others are more individualized.²² Any existing compact will require careful review to determine what amendments may be necessary for a tribe to offer sports wagering, as well as the implications of such amendments and/or 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 here by federal authorization via *Murphy*),²³ for most tribes, sports betting likely will require amending an existing compact (or a new compact, if one is not in place).

Any state-tribal compact negotiations almost certainly would include the single biggest demand a state may legally make of a gaming tribe – “revenue sharing,” or payments to a state or local government, sometimes for an identified policy purpose or for casino impact mitigation, such as education or law enforcement.²⁴ Under IGRA, however, states are not able to levy direct taxes or fees

21 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 level of risk including the possibility of litigation and civil or criminal penalties. *See, e.g.,* Babbitt, et al., *supra* note 20. Given that, most tribes likely will proceed on the assumption that sports betting is a Class III game.

22 For a (mostly up-to-date) list and links to compacts, *see* U.S. Department of the Interior, Office of Indian Gaming, “Indian Gaming Compacts,” at <https://www.bia.gov/as-ia/oig/gaming-compacts>. Many states make gaming compacts publicly available; *see, e.g.,* State of Wisconsin, Department of Administration, “Tribal Compacts and Amendments,” at <https://doa.wi.gov/Pages/AboutDOA/TribalCompactsAndAmendments.aspx>.

23 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 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 Report*, June 12, 2018), available at <https://www.legalsportsreport.com/21178/tribal-casinos-mississippi-sports-betting/>; *see also* Nicholas Garcia, “Choctaw Believed to be First Tribe Outside of Nevada to Offer Sports Betting,” *Legal Sports Report* (Sept. 3, 2018), available at <https://www.legalsportsreport.com/23406/choctaw-tribe-sports-betting/>.

24 *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, both 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 requirement. *See* 25 U.S.C. § 2710(d)(7)(A)-(B); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Sports betting undoubtedly will bring the state to

on tribal casinos, so revenue sharing is lawful only if a tribe receives a substantial benefit it otherwise would not be entitled to, such as market exclusivity.²⁵ If the payments to the state are too high with regard to anticipated net revenue, they will not withstand NIGC scrutiny.²⁶ State legalization of commercial sports betting may diminish tribal exclusivity over Class III gaming, also putting revenue sharing at risk.²⁷ Moreover, as we explain below, any state revenue-sharing demands must take into account the relatively low net return to sports books.

Although issues related to revenue sharing are likely to dominate most compact negotiations, other specifics 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 bets, for what sports, in which locations, and utilizing what technology? What changes will be required in state or tribal regulations and regulatory agencies? Overall, then, tribal-state gaming compact terms and negotiations present complicated and time-consuming barriers to the introduction of sports betting. Even successful negotiations may not result in a valid compact, as state law often requires legislative approval, which may become politically fraught,²⁸ and IGRA requires ultimate review and approval by the Secretary of the U.S. Department of Interior.²⁹

A more subtle legal and regulatory question is whether IGRA must apply at all. Tribes have the option of waiving the governmental authority recognized by IGRA to pursue instead sports betting as a licensed commercial operator (or commercial partner) under state law. Presumably, such a “tribal” sports book would be subject to state licensing, taxation, and similar requirements, but

the table, but there is no guarantee of fairness, and a state might simply walk away unless its conditions are met.

25 Light et al., *supra* note 24.

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

27 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, available at <http://www.courant.com/politics/hc-pol-no-sports-betting-20180828-story.html#>.

28 See, e.g., Max Reiss, “The Details on How Sports Gambling Died This Year in Connecticut,” *NBC Connecticut*, Aug. 30, 2018, available at <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).

29 28 U.S.C. § 2710(d)(8).

would sidestep IGRA's constraints, particularly its geographical restrictions and compacting requirements. Whether this option is available to a tribe depends on its willingness to act as a purely commercial gaming operator rather than a sovereign government, as well as on state law and regulation and other factors, such as external financing.³⁰

B. Feasibility and profitability

Ultimately, whether or not to offer sports tribal betting is a business decision. In evaluating feasibility and profitability for any entity considering their introduction, it makes sense to begin with a brief description of sports books themselves.

A typical casino sports book offers "line" bets on sports and sporting contest outcomes.³¹ High-scoring sports, such as basketball or American football, typically use point-spread lines; as subject to a spread, the favorite team must win by a certain number of points. Low-scoring sports, such as baseball or "soccer" (football), use money lines, which focus on which team wins regardless of points scored. An oddsmaker (or typically, a team of oddsmakers) sets the line. In the U.S., given Nevada's robust experience and regulatory structure, Las Vegas oddsmakers are considered trustworthy and often set the opening line. The goal in line-setting is to have a "centered game," meaning roughly equal numbers of bets on both sides of the outcome; oddsmakers may move the line in response to betting patterns in order to maintain a centered game. Given these variables and the fact that all sporting contests are external events outside of a casino's control, sports books inherently carry more risk for the casino than house-banked games with fixed odds, such as slot machines.

Effective risk management generally also requires a high wagering volume. As is the case for online poker, which is player-banked rather than house-banked, "player liquidity" – the number of people placing bets at a particular sports book

30 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* Associated Press, "New Mexico Tribe Fails on Bid to Buy Louisiana Casino," Feb. 5, 2018, *available at* <https://www.usnews.com/news/best-states/new-mexico/articles/2018-02-05/new-mexico-tribe-fails-on-bid-to-buy-louisiana-casino>.

31 This simplified description of a sports book is intended to illustrate broad points related to our central arguments in this paper and draws on sources designed for non-expert audiences, specifically Vegas.com's *Sports Betting*, at <https://www.vegas.com/gaming/gaming-tips/sports-betting/>; Keith Sargeant, "Sports Betting 101: Here's a Quick Tutorial on Placing Bets in N.J.," June 14, 2018, NJ.com, at https://www.nj.com/news/index.ssf/2018/06/sports_betting_101_here_are_the_terms_youll_need_t.html; and Ed Grabianowski, "How Sports Betting Works," *How Stuff Works*, at <https://entertainment.howstuffworks.com/sports-betting.htm>.



– matters. The smaller the market of potential and actual players, the lower the liquidity, resulting in both a lower handle and a higher risk for the casino. Many tribal casinos are located in rural areas with relatively small populations, and are less often “destination resorts” than “convenience casinos” for local patrons, so liquidity at least partially governs feasibility.

Sports bets are structured so that the casino collects a commission, or “vig,” on the bets. The vig is how the casino directly profits from the sports book. To illustrate, assume a point-spread line, with 100 bettors and a typical 11/10 vig, so that player would bet \$110 to win \$100. A centered game would look something like this: if 50 bets are placed on the favorite and 50 bets are placed on the underdog, then the total betting “handle” or bets placed 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 50 bettors each get \$210 (their original \$110 bet plus \$100 in winnings), while the 50 underdog bettors lose their original bet and get nothing. After paying out \$10,500 to the winners (50 x \$210), the casino sports book collects \$500 in net “profit” – or about a 4.5 percent return on the handle. The house return on sports betting, then, is inherently low. Profitable sports books therefore are reliant on volume, another barrier for tribes in rural areas.

The relatively low margin for sports books means that, at least leading up to the U.S. Supreme Court’s *Murphy* decision, casinos such as those on the Las Vegas Strip have offered sports books as “amenities” to bring people into the casino and incentivize nongaming spending. Nongaming amenities now generate between 45 and 75 percent of commercial casino resort revenue throughout the U.S.³² Large, destination casino resorts are in the best position to capitalize on non-gaming amenities offered at scale, including lodging, food and beverage, night- or dayclubs, concert venues, convention centers, and spas. But in smaller casinos, particularly tribal casinos in rural areas, more typical amenities might include gas stations, convenience stores, and RV parks, limiting the amenity draw and value of a sports book toward nongaming spending. Tribal casinos remain much more reliant on slots and/or other gaming devices than commercial casinos. In 2015, tribal gaming revenue was \$30.5 billion compared to just \$3.9 billion in non-gaming revenue – the highest figure to date, but less than 12 percent of the total.³³

32 Richard N. Velotta, “Las Vegas Resorts Relaying More on Non-Gaming Options, Expert Says,” *Las Vegas Review*, Apr. 26, 2018, available at <https://www.reviewjournal.com/business/tourism/las-vegas-resorts-relying-more-on-non-gaming-options-expert-says/>.

33 MEISTER, *supra* note 13, at 13.



C. Market and competition

Any good business plan includes a market analysis, including scope, competitors, and projected share. Tribes are likely to face some of the same challenges as commercial operators.

As we note above, a sports book requires sufficient player liquidity, or volume of bets placed on a particular sporting event. A gaming market's size, whether in terms of population, current customers, potential players (here, bettors), or relative accessibility (open, through mobile apps, or closed, by physical player presence requirements), all determine potential player liquidity to support a sports book.

Returning to the lessons learned from states' recent legalization and rollout of online gaming, a key reason online has faltered is because of the constraints on player liquidity imposed by intrastate market borders – a person must be located within a state to play – as opposed to illegal online and mobile gaming, which uses the same architecture to tap into a global market.³⁴

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 casino resorts.

For tribal casinos in particular, if a state authorizes commercial alongside tribal sports books, tribes may or may not have a competitive advantage. Determining factors would include the specific provisions of state authorizing legislation and compacts, as well as market accessibility.

IV. Strategies for market entry

State-by-state legalization effectively limits the size and scope of particular gaming markets – rather than accessing a national market, intra-state legalization presents only the market within state borders. Some states are cognizant of this limitation, leading to innovations to maximize player access and liquidity, including agreements among states like Nevada, New Jersey, and Delaware to pool players, or authorizing mobile betting outside of the casino.³⁵

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

34 See Michael Gentile, "A Declining New Jersey Online Poker Market Highlights the Need for Shared Liquidity," *Pokerfuse*, Sept. 18, 2018, available at <https://pokerfuse.com/news/industry/210053-declining-new-jersey-online-poker-market-highlights-need/>.

35 See Brian Pempus, "Nevada, New Jersey Kick Off Poker Player Sharing," *Card Player*, May 2, 2018, at <https://www.cardplayer.com/poker-news/22752-nevada-new-jersey-kick-off-poker-player-sharing>.



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 3 million people who reside there,³⁶ throw in the more than 42 million people who visited Las Vegas in 2017, and Nevada remains by far the largest gaming market in the U.S. Outside of Nevada, the baseline market for in-state wagering – such as California or Washington on the West Coast, or Connecticut, Massachusetts, and New York on the Eastern Seaboard – is much larger than that available to most tribal casinos located on Indian reservations.³⁷ As many tribal casinos are located in rural areas within states – such as Minnesota – or within rural states themselves – including our home state of North Dakota – tribal markets are even further constrained in terms of population, customer, and prospective player base.

Tribes should consider sharing player pools, just as New Jersey, Nevada, and Delaware have done for online gaming.³⁸ Tribes might accomplish this via proactive recommendations for state legislation and compact provisions, along with intertribal agreements.

A tribe also would want to consider contracting with an established oddsmaking outfit, providing immediate capability, capacity, and credibility. A plug-and-play product and services, like those marketed by such games manufacturers as William Hill or IGT,³⁹ will substantially reduce risk, fixed costs, learning curves, regulatory uncertainties, and overall, barriers to entry.⁴⁰

36 See Las Vegas Convention And Visitors Authority, *Year-End Summary for 2017*, available at <https://www.lvcva.com/stats-and-facts/visitor-statistics/>.

37 A relatively small number of tribal casinos are located near highly populous areas. As one example, the Mashantucket Pequot's Foxwoods Casino boasts some 12 million visitors a year, see Richard M. Velotta, "Foxwoods Property Has Biggest Casino in North America," *Las Vegas Rev.-J.*, Sept. 1, 2018, available at <https://www.reviewjournal.com/business/casinos-gaming/foxwoods-property-has-biggest-casino-in-north-america/>, but new competition due to expanded legalized gaming in the region has had a negative impact. See UNIVERSITY OF MASSACHUSETTS DARTMOUTH, CENTER FOR POLICY ANALYSIS, BRING IT ON HOME: AN OVERVIEW OF GAMING BEHAVIOR IN NEW ENGLAND (2013), available at https://www.umassd.edu/media/umassdartmouth/seppce/centerforpolicyanalysis/Bring_it_home.pdf.

38 See Jamie Hinks, "Sue Schneider Looks at Poker Liquidity," *Calvinayre.Com*, Mar. 15, 2011, available at <https://calvinayre.com/2011/03/15/poker/sue-schneider-looks-at-poker-liquidity/>.

39 See IGT, *IGT Pioneers Tribal Sports Betting with Mississippi Band of Choctaw Indians*, Press Release (Sept. 12, 2018), available at <https://www.prnewswire.com/news-releases/igt-pioneers-tribal-gaming-sports-betting-with-mississippi-band-of-choctaw-indians-300710851.html>.

40 See, e.g., David G. Schwartz, "How It Felt to Book Delaware's First Sports Bet," *Forbes*, June 7, 2018, available at <https://www.forbes.com/sites/davidschwartz/2018/06/07/how-it-felt-to-book-delawares-first-sports-bet/#26640b9d3bc6>. Depending on the nature and extent of plug-and-play commercial products and services, however, it is possible that their acquisition would constitute a management contract pursuant to IGRA, thereby requiring NIGC approval – presumably not an insurmountable

Tribes also should weigh the cost of investment in tribal regulatory agencies, including personnel, expertise, technology, and ongoing operations, including monitoring and enforcement. Outside of Nevada, the U.S. “gold standard,” few states or tribes have experience in regulating sports betting. Replicating Nevada’s model may not be feasible in the short run, or the long-term projected market may not justify the necessary investment – at least under a stand-alone model.

In addition to careful evaluation and data-based decision making on the three barriers to market entry we discuss, tribes should consider how to innovate outside of sports betting. In smaller rural markets, tribes may want to opt for lower-cost and lower-risk opportunities, such as video skills games, or expanding non-gaming amenities to include eSports, to open up younger markets. Commercial viability of such products and solutions is demonstrated by recent investments by established commercial brands or industry solution suppliers, such as MGM International and IGT, or by cutting-edge platforms for skills-based video game gambling like GameCo, or eSports wagering such as Unikrn, that are disrupting the casino gaming segment.

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. As of this writing, only two tribes operate sports books at their casinos: the Fort Mojave Indian Tribe in Nevada and the just-opened sports books at the Mississippi Band of Choctaw Indians’ casinos in Mississippi.⁴¹ The coming months should provide much useful information to other tribes through the experiences of first-to-market states, the next wave of state legislation, and accompanying tribal-state compact negotiations and initial tribal market entry.

barrier, albeit one that is untested. *See* 25 U.S.C. § 2711; 25 C.F.R. pts. 531, 533 & 535.

41 Operating under PASPA’s exception for Nevada, the Fort Mojave Indian Tribe offers a sports book at its Avi Resort and Casino in Laughlin, NV, and in September 2018, the Mississippi Band of Choctaw Indians began offering sports books at its casinos in accordance with the state’s legalization of sports betting. *See* Garcia, *supra* note 23 (reporting on the Mississippi Band of Choctaw Indians’ plans to offer a mobile sports betting app on tribal casino grounds in accordance with state law).

