
FIFTY SHADES OF REGULATION: A SURVEY OF INTERNET GAMING ISSUES IN INDIAN COUNTRY AND A FRAMEWORK FOR FUTURE DEVELOPMENT¹

By Mike McBride²

The internet has changed the way we communicate, read, watch movies, shop, obtain services, play, make and maintain friends, date and love. It has transformed the way we wage war—drones instead of soldiers and armed aircraft and cyber attacks instead of face-to-face battles.

The Digital Age

We have difficulty understanding the internet's reach and impact. Old ways of doing things have changed. Examples abound: many newspaper and magazines have cut back, folded, or moved, in large part, online.³ Amazon.com, Inc., the online retailing juggernaut, has maneuvered in little more than one generation from selling simply paper

¹ I use the term "iGaming" throughout. Internet gaming, iGaming, interactive gaming, remote gaming, mobile gaming, online gambling and variations thereto around the world, are one in the same. E.L. JAMES, *FIFTY SHADES OF GREY* (2011)(pun intended).

² © 2013 by D. Michael McBride III. McBride is a trial and transactional lawyer and advisor recognized by his peers with top ratings in CHAMBERS USA, BEST LAWYERS IN AMERICA, SUPER LAWYERS and MARTINDALE-HUBBEL. He chairs the Indian Law & Gaming Practice Group of Crowe & Dunlevy in the Tulsa office. He chairs the International Masters of Gaming Law's Membership Committee, is an IMGL General Member and is a past Chair of the Federal Bar Association's and the Oklahoma Bar Association's Indian Law Sections. He has taught as an adjunct or visiting professor, guest lecturer or teaching assistant at law schools ranging from the Universities of Oklahoma, Wisconsin, Colorado and Tulsa. McBride frequently lectures on Indian gaming to professional and trade organizations and tribal government groups. He has published more than 50 articles. He serves on the editorial board of the GAMING LAW REVIEW AND ECONOMICS. His two decade legal career, focused on representing tribal governments and gaming interests, parallels the growth of Indian government gaming under the Indian Gaming Regulatory Act of 1988.

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³ See generally, *Death of Print Media*, THE HUFFINGTON POST, available at <http://www.huffingtonpost.com/news/death-of-print-media>, (a collection of recent online opinion articles) (last visited May 14, 2013).

books to purveying DVDs, CDs, video, MP3 downloading/streaming, software, video games, electronics, apparel, furniture, food, toys, jewelry, to even wine,⁴ to become the world's largest online retailer⁵ with over \$61 billion in sales.⁶ Apple has revolutionized the delivery and transportability of communication from unwieldy personal computers to powerful devices in the palm of our hand. The internet has fueled this commercial revolution.

Facebook has become ubiquitous with over 1.1 billion, mostly female, users around the world,⁷ including 159 million users in the United States.⁸ This out of a total global population of 7.085 billion people, of which nearly 316 million reside in the U. S.⁹ Craigslist, which began in 1995 as a non-profit organization, reported in March 2013 that it receives more than 50 billion page views per month worldwide, with 60 million users each month within the U.S. alone.¹⁰ Google has revolutionized the way we

⁴ A natural product that is dear to the writer.

⁵ Barney Jopson, *Amazon urges California referendum on online tax*, FINANCIAL TIMES, July 12, 2011, available at <http://www.ft.com/cms/s/0/61828252-ac1d-11e0-b85c-00144feabdc0.html#axzz2THBHnlw> (last visited May 14, 2013).

⁶ Amazon.com, Annual Report (Form 10-K) (Jan. 30, 2013) available at <http://pdf.secdatabase.com/1562/0001193125-13-028520.pdf> (last visited, May 14, 2013). Amazon, which produces the Amazon Kindle e-book reader and Kindle Fire tablet computer (both of which have transformed the way people read books) has challenged the traditional retail store model and led to the extinction of many traditional brick and mortar stores.

⁷ Juliette Garside & Dominic Rushe, *Facebook profits rise despite drop in US visitors to its website*, THE GUARDIAN, May 2, 2013, available at <http://www.guardian.co.uk/technology/2013/may/01/facebook-loses-10m-visitors-us> (last visited May 13, 2013).

⁸ <http://www.checkfacebook.com/> (last visited May 15, 2013) (stating that approximately 55% of Facebook users are female while only 45% are male).

⁹ <http://www.census.gov/popclock/> (last visited May 15, 2014). China is the most populous country with 1.35 billion inhabitants; India is second at 1.23 billion followed by the United States. One birth in the U.S. occurs every eight seconds and a death occurs every 12 seconds. With one international (net) migrant every 44 seconds, the U.S. sustains a net gain of one person every 15 seconds.

¹⁰ <http://www.craigslist.org/about/factsheet> (last visited May 13, 2013).

search for and quickly digest information, or even just watch music videos. YouTube, owned by Google, has more than one billion unique user visits who watch over 4 billion hours of video per month.¹¹

A recent book by Eric Schmidt (a computer scientist and Google business executive) and Jared Cohen (a foreign-policy and national security expert) provides riveting food for thought. Their book, *THE NEW DIGITAL AGE: RESHAPING THE FUTURE OF PEOPLE, NATIONS AND BUSINESS* (2013) prognosticates about the future of technology. The authors explore our interconnectedness, the rapid information delivery evolution and where we are headed not only with e-commerce but with citizenship, identity, geopolitical relationships and conflict, combat and terrorism. They note that in the first decade of the 21st century the worldwide internet user population has grown from 350 million to more than two billion.¹² The authors call the internet "the world's largest ungoverned space."¹³ As world becomes more densely populated, the more important the internet has become. Electronic connectivity has grown exponentially in tandem with population density. It is also realigning power relationships. "On the world stage," Schmidt and Cohen write, "the most significant impact of communication technologies will be the way they help reallocate the concentration of power away from the states and institutions and transfer it to individuals."¹⁴ The evolution of iGaming is no exception.

¹¹ <http://www.youtube.com/yt/press/statistics.html> (last visited May 20, 2013).

¹² ERIC SCHMIDT & JARED COHEN, *THE NEW DIGITAL AGE: RESHAPING THE FUTURE OF PEOPLE, NATIONS AND BUSINESS* 4 (Knopf) (2013).

¹³ *Id.* at 3.

¹⁴ *Id.* at 6. The authors ask provocative and then answer questions about the spread of connectivity around the world:

Can tribal gaming evolve and adapt in the burgeoning digital age? Indian country should be ready to adapt, but gaming laws need updating.

This article explores the rapid rise of e-commerce, iGaming, the brief history of Indian gaming, quickly surveys the important criminal and civil laws that impact iGaming development and highlights how geographically based laws are ill-equipped to regulate iGaming. This article provides a policy framework for future iGaming development. It discusses important policies and competing constituencies' interests and advocates for federal legislative fixes to protect the vibrancy of Indian gaming, particularly remote tribal casinos as advantaged by geography and proximity to populated urban areas.

iGaming Growth

A National Indian Gaming Association report from 2011 estimated the lawful and regulated global gaming market, including iGaming, to be in the range of \$110-125 billion annually.¹⁵ The American Gaming Association reported as follows:

based on *direct*, *indirect* and *induced* impacts, the commercial casino industry supported approximately \$125 billion in spending and nearly 820,000 jobs in the U.S. economy in 2010, which is roughly equivalent to 1 percent of the \$14.5 trillion U.S. gross domestic product.¹⁶

Who will be more powerful in the future, the citizen or the state? Will technology make terrorism easier or harder to carry out? What is the relationship between privacy and security, and how much will we have to give up to be a part of the new digital age? How will war, diplomacy and revolution change when everyone is connected, and how can we tip the balance in a beneficial way? How will war, diplomacy and revolution change when everyone is connected, and how can be tip that balance in a beneficial way? When broken societies are rebuilt, what will they be able to do with technology?

Id. at 9.

¹⁵ Joseph Eve, National Indian Gaming Association, Report at the NIGA Mid-Year Meeting on Internet Gaming & Marketing Overview at 13, Oct. 18-19, 2011 (on file with author).

¹⁶ Coleman Bazelon, Kevin Neels, Pallavi Seth, Report for American Gaming Association, *Beyond the Casino Floor: Economic Impacts of the Commercial Casino Industry* (The Brattle Group (2012)) at 1,

In the past generation, iGaming has flourished internationally.¹⁷ However, iGaming within the U.S. has grown as an unregulated, rogue black market and an unlawful form of gaming. The threat of the U.S. Dept. of Justice enforcement of the Wire Act of 1961¹⁸ drove iGaming offshore.¹⁹ Many believe that the U.S. federal government had no authority to outlaw internet gaming. Historically, only the individual states banned or regulated gaming. Congress has generally only acted when states asked for help to enforce gaming laws on an interstate basis such as with horse racing or tribal gaming following the *Cabazon* decision²⁰ or combating organized crime with the Wire Act.²¹ The Tenth Amendment to the U.S. Constitution reserves to the states or the people, all "powers not delegated to the United States by the Constitution, nor

available at http://www.americangaming.org/sites/default/files/uploads/docs/final_final_brattle_study_2-3-12.pdf) (last visited, May 17, 2013).

¹⁷ Gambling Compliance, *Market Barriers: A European Online Gambling Study, Quarterly Update*, March 2013 (on file with author) (content available for purchase at <http://www.gamblingcompliance.com>); Oversight Hearing on the U.S. Dept. of Justice Opinion on Internet Gaming: What's at Stake for Tribes (February 9, 2012), available at <http://www.indian.senate.gov/hearings/hearing.cfm?hearingID=f14e6e2889a80b6b53be6d4e41248f49> (last visited May 17, 2013); Report at the NIGA Mid-Year Meeting, *supra* note 15; David O. Stewart, American Gaming Association White Paper, *Online Gambling Five Years after UIGEA* (May 18, 2011) available at http://www.americangaming.org/sites/default/files/uploads/docs/final_online_gambling_white_paper_5-18-11.pdf (last visited May 17, 2013); Spectrum Gaming Group White Paper: *Internet Gambling Developments in International Jurisdictions: Insights for Indian Nations* (Oct. 4, 2010) (prepared for National Indian Gaming Association).

¹⁸ 18 U.S.C. § 1084 (1994).

¹⁹ See generally I. Nelson Rose, *The DOJ Gives States a Gift*, 4 UNLV GAMING L. REV. 1 (Spring 2013)(discussing the history of the Wire Act, the DOJ Wire Memo and the sudden transformation of iGaming within states). Rose is an Affiliated Member—Educator of the International Masters of Gaming Law.

²⁰ See discussion *infra* beginning at page 19.

²¹ *The DOJ Gives States a Gift*, *supra* note 19 at 2.

prohibited by it to the states". Congress has passed several other laws though to aid in curtailing interstate gambling.²² These include:

- Illegal Gambling Business Act. 18 U.S.C. § 1955. This law provides that "[n]o person engaged in the business of betting or wagering may knowingly accept" any money transfers in any way from a person participating in unlawful internet gambling.
- The Travel Act. 18 U.S.C. § 1952. This law prohibits using U.S. mail or interstate and foreign travel to engage in certain activities such as unlawful iGaming.

The iGaming debate has intensified in recent years. The social morality of gaming, like alcohol, recreational and medicinal drugs, have traditionally been questions for state and local governments to address. Should we prohibit iGaming in the U.S.? Gaming, legal or not, is a popular pastime for Americans. More than 70 million U.S. citizens engage in gaming annually, and 85% of adults admit to gaming sometime in their lives.²³ A 2010 KPMG study estimated that the market for global iGaming would grow 42% from 2008 to 2012, or from \$21.2 to \$30 billion.²⁴ H2 Gaming Capital confirmed the estimate: regulated iGaming reached almost \$30 billion worldwide in 2012.²⁵

In one night in 2006, the legal landscape shifted. Congress attached a midnight rider to a must-pass anti-terrorist bill called the Safe Ports Acts. The attachment was

²² See generally, Chris J. Thompson, Comment, *Internet Gambling: A Road to Strengthening Tribal Self-Government and Increasing Tribal Self-Sufficiency While Protecting American Consumers*, 37 AM. INDIAN L.REV. 229 (2012-2013).

²³ Michelle Minton, *Should Washington Allow Internet Gambling? Yes: Prohibitions Are Futile—As Well as Counterproductive*, WALL ST. J. at R5 (May 13, 2013) (hereinafter "Yes: Prohibitions are Futile").

²⁴ <http://www.kpmg.com/EU/en/Documents/Online-Gaming.pdf> (last visited May 15, 2013).

²⁵ Scott Martin, *Zynga turnaround may ride on lady luck: Online gambling*, USA TODAY, May 1, 2013, available at <http://www.usatoday.com/story/tech/2013/04/30/zynga-turnaround-may-ride-on-lady-luck/2125003/> (last visited May 14, 2013).

the Unlawful Internet Gambling Enforcement Act ("UIGEA").²⁶ The rider's author, Sen. Bill Frist (R.-TN), meant to totally outlaw online gaming by cutting off funding and payment of iGaming wagering. Instead, the UIGEA created a legal grey area that required the U.S. Justice Department to clarify the reach of iGaming and limit the reach of federal laws thought to prohibit the same.²⁷

UIGEA attempted to follow the money and stop it at borders. The law prohibits processing payments related to "unlawful" internet betting.²⁸ The law does not define what betting, wagering or internet gaming is prohibited—it is not a *substantive* law—it is merely a federal *enforcement* statute that relies on state law definitions or definitions found in some federal laws.²⁹ In other words, one does not violate UIGEA unless the gaming activity violates some other law such as the Wire Act or a relevant state criminal law.³⁰ It is estimated that 20,000 to 30,000 iGaming portals are actively available in the

²⁶ 31 U.S.C. § 5362(10)(B) *et. seq.* (2006).

²⁷ *The DOJ Gives States a Gift*, *supra* note 19 (discussing UIGEA's passage as the harbinger of the "DOJ's gift"); see also, I. Nelson Rose, *Indian Internet Gaming*, 17 GAMING L. REV. & ECON. 257 (MAY 2013).

²⁸ Much commentary criticizing UIGEA exists. Some examples include I. Nelson Rose, *Why You need a UIGEA Reasoned Legal Opinion*, 16 GAMING L. REV. & ECON. 483 (2012); Jack Tadman, *The UIGEA, Canada and the "New" Fantasy Sports*, 16 GAMING L. REV. & ECON. 91 (2012); Sue Schneider, *Caught in the Middle: Player Funds and Poker Indictments*, 15 GAMING L. REV. & ECON. 509 (2011); Martin D. Owens, Jr., *Don't Look Now, But the Mice Are Winning: Predictable Backfires and New Departures in the War on I-Gaming's Payment Solutions*, 14 GAMING L. REV. & ECON. 595 (2010); I. Nelson Rose, *New UIEGA Regs Put Benefits and Burdens on States*, 13 GAMING L. REV. & ECON. 1 (2009); Joseph M. Kelly, *Financial Transaction Providers Needn't Worry too Much about Complying with UIGEA Rules*, 13 GAMING L. REV. & ECON. 196 (2009); Mark B. Dubnoff, *State Bans on Internet Gambling May Be Unconstitutional*, 12 GAMING L. REV. & ECON. 207 (2008); I. Nelson Rose, *Enforcing a Stupid Law*, 12 GAMING L. REV. & ECON. 547 (2008); and I. Nelson Rose, *News From Europe: The Beginning of the End for the UIGEA?*, 11 GAMING L. REV. & ECON. 533 (2007);

²⁹ See Linda J. Shorey & Marsha A. Sajer, *The Uneasy Nexus Between Internet Gaming and Tribal Gaming*, 14 GAMING L. REV. & ECON. 239 (2010).

³⁰ *Id.*

U.S. from off-shore providers, with U.S. citizens wagering an estimated \$4 billion in 2011, despite UIGEA, according to the American Gaming Association.³¹

In 2011, the U.S. Attorney General offered states another hope. Faced with a question regarding the use of third party processors in in-state lottery-ticket sales, the Department of Justice opined that the Wire Act of 1961³² applied only to sporting events or contests.³³ In response, a handful of state jurisdictions are seeking to test iGaming expansion.³⁴ Nevada, Delaware, New Jersey and the U.S. Virgin Islands have legalized forms of iGaming.³⁵ Georgia and Illinois state lotteries offer ticket sales online with six states permitting participants to subscribe online.³⁶ State lotteries potentially present a formidable threat to tribal gaming, as the states innovate in their game offerings and

³¹ *Yes: Prohibitions are Futile*, *supra* note 22 at R5.

³² 18 U.S.C. § 1804 (1994).

³³ Virginia A. Seitz, Office of the U.S. Dep. Att'y Gen., *Whether Proposals By Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act* (Sept. 20, 2011), *available at* Op. O.L.C. WL 6848433 ("Wire Act Memo"), *also available at* <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf> (last visited, May 17, 2013); *The DOJ Gives States a Gift*, *supra* note 19.

³⁴ *See generally*, Gambling Compliance, *U.S. Internet Gambling Regulatory Tracker*, April 2013 Extract and 8 *U.S. Internet Gambling Digest* 2013 (April 19, 2013) (on file with author) (content available for purchase at <http://www.gamblingcompliance.com>); Hannah Dreier, *Online poker is back: Legal websites launches in Las Vegas* (April 30, 2013) *available at* <http://bigstory.ap.org/article/online-poker-back-legal-site-launch-vegas>; Richard N. Velotta, *Gaming: Meet the man in charge of Nevada's online gaming laws*, (April 26, 2013) *available at* <http://www.vegasinc.com/news/2013/apr/26/meet-man-charge-nevadas-online-gaming-laws/> (last visited May 17, 2013); Assoc. Press, *N.J. Gov. Christie signs Internet gambling bill into law; NJ 3rd state in US to legalize it*, WASH. POST (Feb. 26, 2013) (on file with author); Mark A. Clayton, *Nevada is Internet Ready*, 5 CANADIAN GAMING LAWYER 8-9 (June 2012), *available at* <http://www.gaminglawmasters.com/magazines/canadian/CGL%202012%20Summer.pdf> (last visited May 17, 2013). Clayton is a General Member of the International Masters of Gaming Law.

³⁵ *Indian Internet Gaming*, *supra* note 27.

³⁶ *Id.* Richard N. Velotta, *Panelists warn lawmakers about the challenges of online gambling*, LAS VEGAS SUN, Jan. 7, 2013, *available at* <http://www.lasvegassun.com/news/2013/jan/07/panelists-warn-lawmakers-about-challenges-online-g/#axzz2Tqwrcl5U> (last visited May 20, 2013).

potentially offer "instant tickets" online – a game indistinguishable from a video slot machine. All states except Hawaii and Utah have some form of legalized gaming.³⁷

H2 Gambling Capital estimates that New Jersey will generate revenue of \$410 million from internet gaming during the first year and grow to \$590 million after a few years. While this is small compared to the estimated revenue of \$10.8 billion for Las Vegas in 2012³⁸ and \$3.48 billion for Oklahoma Indian gaming in 2011,³⁹ the growth presages significant expansion for online gaming. Some have estimated the online gaming market conducted mostly overseas, and sometimes illegally, to be as large as \$30 billion dollars per year.⁴⁰

States such as California, Iowa, Mississippi and Illinois continue to consider legislation similar to that passed in New Jersey. The federal government continues to suffer from gridlock, sequestration and fiscal cliff problems that have prevented comprehensive federal approaches to gaming.

States are even attacking the legality of barring sports betting. In 1992, Congress passed the Professional and Amateur Sports Protection Act ("PASPA"), which made sports betting illegal in all states except for Nevada, Delaware, Oregon and Montana. Following a voter referendum in 2011, New Jersey challenged the federal act

³⁷ Yes: *Prohibitions are Futile*, *supra* note 22 at R5.

³⁸ Sandra Cherab, *Nevada gambling revenues up 1.5 percent in 2012*, Yahoo News, Assoc. Press Feb. 8, 2013, available at <http://news.yahoo.com/nevada-gambling-revenues-1-5-205145453.html> (last visited, May 14, 2013) (citing the Nevada Gaming Control Board report).

³⁹ Randy Ellis, *Smoke-free casino to open as Oklahoma Indian gaming revenue continues to rise*, THE OKLAHOMAN, Feb. 27, 2013, available at <http://newsok.com/smoke-free-casino-to-open-as-oklahoma-indian-gaming-revenue-continues-rise/article/3759510>, (last visited May 14, 2013) (citing economist Alan Meister, of Nathan & Associates, 2013 edition of Casino City's Indian Gaming Industry Report).

⁴⁰ Paul C. Barton, *House eyes online gaming*, RENO J. GAZETTE, Oct. 25, 2011, available at <http://www.rgj.com/article/20111025/BIZ04/111025042/Congress-eyes-online-gaming-new-tax-revenues> (last visited May 17, 2013).

by passing legislation in permitting sports betting licenses starting in 2013. Major sports leagues immediately filed suit to block New Jersey's law, but New Jersey has countered that it is unconstitutional, violating interstate commerce because certain states are favored over others.⁴¹

The International Masters of Gaming Law ("IMGL") has closely tracked the development and regulation of iGaming.⁴² Professor Joe Kelly estimates \$380 billion is wagered on sports alone in the U.S., much of it on the internet, with only about \$3 billion of lawful wagering in Nevada.⁴³ The United States, with nascent legal and regulatory development, is woefully behind other iGaming vanguard jurisdictions, particularly in the United Kingdom, Germany, Spain, France, Denmark, Finland, Alderney, Isle of Man, Malta, Australia, South Korea and some provinces of Canada.⁴⁴ Approximately 70 countries permit gaming sites to host servers within their borders.⁴⁵

⁴¹ See *Gambits*, 17:2 GAMING L. REV. & ECON. at 99 (2013).

⁴² IMGL is an invitation only, non-profit organization dedicated to the exchange of professional information concerning all aspects of gaming law. IMGL members include General Members who are private practice masters, and affiliated members who are gaming regulators, casino executives, consultants, educators, gaming vendors and gaming laboratory representatives. IMGL members are committed to participation in industry-sponsored conferences as well as the two yearly conferences sponsored by the IMGL.

The IMGL conferences focus on issues facing the gaming practitioner worldwide. The IMGL is creating a substantive body of gaming law work with our four magazines CASINO LAWYER, CANADIAN GAMING LAWYER, EUROPEAN GAMING LAWYER and LA LEY DEL JUEGO (The Law of the Game), as well as publishing CASINO LAW & LOOSELEAF SERVICE, sponsoring the UNLV GAMING LAW JOURNAL and the GAMING LAW REVIEW AND ECONOMICS publication and coordinating gaming articles for publication in various law school law review journals in conjunction with gaming law symposiums. IMGL has 304 members total including 59 General Members and 125 Affiliated Members from 34 states or territories within the United States as well as international members that include 68 General Members and 68 Affiliated members from 40 countries outside the United States. The IMGL website is available at <http://www.gaminglawmasters.com/> (last visited, May 14, 2013).

⁴³ Kelly is a business law professor at SUNY College of Buffalo, NY and is an Affiliated-Educator member of the IMGL. *Zynga turnaround may ride on lady luck*, *supra* note 25; *The DOJ Gives States a Gift*, *supra* note 19.

⁴⁴ Ed Grabianowski, *How Online Gambling Works*, available at <http://www.howstuffworks.com/online-gambling2.htm> (last visited May 15, 2013).

The Struggle to Regulate the E-Commerce & iGaming

The internet knows no boundaries and "place" has much less significance. The digital medium trumps geography. The U.S. Congress, however, has resisted regulating this medium. Legislators and regulators struggle to keep up. Early innovation on the internet was dominated by grey and black market e-merchants selling products (and services) such as pornography, fake Viagra⁴⁶ and pirated music on Napster. Civil and criminal enforcement have helped curtail nefarious practices. As internet commerce matures, legitimate commerce is overtaking frauds, scams and fringe commerce.

Internet commerce has battered traditional governmental revenue regimes. Local jurisdictions have suffered anemic sales tax revenues. Congress' inaction is borne out of the complexity of regulating the medium, competing policy and market interests and conflicts between traditional state powers and federal power. While Congress traditionally has left social policies to states to determine whether and to what extent to permit gaming, the states' police powers compete with Congress' interstate commerce powers and Congress' exclusive power to regulate commerce among the tribes.⁴⁷ Given the United States' democratic legal traditions and our union of states, Congress has found itself particularly hamstrung in attempting to craft comprehensive

⁴⁵ *Id.*

⁴⁶ Just recently Pfizer announced that it intends to sell its popular prescription drug Viagra directly to patients over the internet to curb counterfeiting. See Linda A. Johnson, *Viagra sales go online to deter fakers*, TULSA WORLD, Assoc. Press, April 7, 2013, available at http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20130507_15_e6_cutlin776916&PrintComments=1 (last visited May 15, 2013).

⁴⁷ U.S. CONST. art. I, § 3, cl. 3 ("Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

and modern policies to harness internet commerce to best promote social good, governmental funding and free enterprise.

Governments weigh social costs with benefits in crafting policy and laws. iGaming opponents cite crime, addiction, underage gambling and steep social costs as reasons to prohibit iGaming.⁴⁸ But proponents cite futility, the ability of technology and regulations to address social ills and the opportunity for much needed tax revenue.⁴⁹ Congress' head-in-the-sand approach with iGaming is not working. Ignoring the regulation of e-commerce and iGaming simply fuels the creation of black markets, operated offshore, that deprive local governments of revenue and threaten citizens with unscrupulous practices.⁵⁰

History repeats itself regarding socially sensitive public policy. Prohibition was a failed U.S. social policy that became law in 1920 and lasted just a single generation until its repeal in 1933 with the passage of the 21st Amendment to the U.S. Constitution. It drove alcohol commerce underground, fostered lucrative smuggling networks, starved local governments of tax collections, cost states and counties huge resources to combat bootlegging, promoted corruption, helped create organized crime and perpetuated a charade of "speak-easys" that citizens tolerated with winks and nods.⁵¹ Alcohol is just

⁴⁸ See, e.g., John Warren Kindt, *Should Washington Allow Internet Gambling? No: It Would Only Worsen Addiction and Crime*, WALL ST. J., May 13, 2013, at R5 (hereinafter "*No: Addiction & Crime*"); and Nicholas Bamman, *Is the Deck Stacked Against Internet Gambling? A Cost-Benefit Analysis of Proposed Regulation*, 19 J.L. & POL'Y 231 (2010)

⁴⁹ Yes: *Prohibitions are Futile*, supra note 22 at R5-R8; *The DOJ Gives States a Gift*, supra note 19 at 1-2.

⁵⁰ See generally, Joseph M. Kelly, *Sports Wagering Prohibition in the United States: An Exercise in Futility and the Best Development for Organized Crime*, 15 GAMING L. REV. & ECONOMICS 257 (2011) (discussing sports betting).

⁵¹ See generally, DANIEL OKRENT, *LAST CALL—THE RISE & FALL OF PROHIBITION* (Scribner 2010).

one example.⁵² The increasing social acceptance of marijuana is another example with recent legalization and regulation in several states including Colorado and Washington.⁵³ Governments might as well legalize, regulate and tax iGaming, as history has shown that blanket bans will not work. As commentators clairvoyantly wrote nearly a decade ago:

Clearly, the most effective way to control the effects of the idiosyncratic features of Internet gambling on development of problematic gambling behavior is to provide individuals with a scrutinized, regulated Internet gambling industry.⁵⁴

Only recently has the Congress shown a willingness to tackle taxation of internet commerce. On May 6, the Senate voted 69-27 to approve the Marketplace Fairness Act of 2013.⁵⁵ The 113th Congress considered identical versions (H.R. 684) while the same bill expired last year without enactment during the 112th Congress. The bills

⁵² Bob Faiss, presented a fascinating and insightful paper “Does the Failure of the U.S. 18th Amendment Predict the Future of Internet Gaming?” to the International Masters of Gaming Law Autumn meeting in Madrid, Spain on October 26, 2010. His presentation was part of the “iGaming in North America” panel (on file with author). He provides 12 parallels between the brief history of the 18th Amendment and U.S. history with respect to iGaming. Mr. Faiss is a General Member of the IMGL. On page 2, Mr. Faiss provides an ironic history of alcohol and gaming in America:

Both intoxicating beverages and gambling were present at the beginning of society in the U.S. All of its original 13 colonies used lotteries to raise critical funding, including that to pay for the revolution against the British. The ships that brought the first Puritans to the U.S. also brought along huge stores of intoxicating beverages.

⁵³ See generally, *Marijuana: Latest News*, CBS News, available at http://www.cbsnews.com/2741-204_162-664.html (overview and collected links to articles) (last visited May 17, 2013); see also *Legal pot luring tens of thousands to Colo., Wash. for "national stoner holiday"*, CBS News, April 15, 2013, available at http://www.cbsnews.com/8301-201_162-57579584/legal-pot-luring-tens-of-thousands-to-colo-wash-for-national-stoner-holiday/ (last visited, May 17, 2013).

⁵⁴ Adrian Parke & Mark Griffiths, *Why Internet Gambling Prohibition Will Ultimately Fail*, 8 GAMING L. REV. & ECONOMICS 295, 299 (2004).

⁵⁵ <http://thomas.loc.gov/cgi-bin/query/z?c113:S.743>: (last visited, May 15, 2013).

would allow states to require online and other out-of-state retailers to collect sale and use taxes.⁵⁶ Given current federal congressional paralysis and particularly following the DOJ's Wire Act Opinion, states have begun moving forward with laws of their own to capture, regulate and tax iGaming.⁵⁷ Web-based internet state lotteries with mega-jackpots are proliferating. Forefront states such as Nevada are moving fast to craft frameworks for iGaming interstate compacts and to enact iGaming licensing and regulations.⁵⁸ In fact, Nevada Gov. Brian Sandoval has held preliminary talks with other state governors to discuss compacting on internet poker.⁵⁹

All of these developments present serious threats to tribal government gaming, which is shackled by Reagan-era IGRA⁶⁰ territorial restrictions (that gaming occur on Indian land), game classifications and compacts. IGRA is out of balance and should be harmonized and clarified with other federal laws. If we do not do not learn and adapt by adopting rational iGaming policies, iGaming will thrive within states and internationally, but die in Indian country.⁶¹ More importantly, the IGRA gaming model may fall ill and

⁵⁶ http://www.enzi.senate.gov/public/index.cfm/news-releases?ContentRecord_id=27ed84d0-5ab2-4054-afdc-423a8bd36699 (last visited May 15, 2013); see also Ann Zimmerman, Greg Bensinger & John D. McKinnon, *Shopping Tax Free on the Web Nears End*, WALL ST. J., April 26, 2013 at B1, available at <http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-220798/> (last visited May 15, 2013).

⁵⁷ See generally, *The DOJ Gives States a Gift*, *supra* note 19.

⁵⁸ <http://www.vegasinc.com/news/2013/apr/26/meet-man-charge-nevadas-online-gaming-laws/> (last visited May 17, 2013); Mark A. Clayton, *Nevada is Internet Ready*, 5 CANADIAN GAMING LAWYER 8-9 (June 2012), available at <http://www.gaminglawmasters.com/magazines/canadian/CGL%202012%20Summer.pdf> (last visited May 17, 2013).

⁵⁹ Howard Stutz, *Sandoval: Deals with other States on Web poker possible*, LAS VEGAS REV. J., May 16, 2013, available at <http://www.reviewjournal.com/business/casinos-gaming/sandoval-deals-other-states-web-poker-possible> (last visited May 17, 2013).

⁶⁰ Indian Gaming Regulatory Act (IGRA) of 1988, 25 U.S.C. § 2701

⁶¹ Tom Foley and I spoke on a panel entitled "iGaming in Indian Country" on Friday, May 10, 2013 at the International Masters of Gaming Law Spring Meeting in Montreal, Quebec, Canada. Mr. Foley described

quickly wither away. It is time to modernize federal laws regulating gaming to protect Indian government gaming.

A Framework for Indian Country iGaming

Is iGaming a threat or opportunity to Indian gaming? It is both. Will dominant market and government interests force tribal governments into submission? Will IGRA-based gaming become irrelevant? Indian country can adapt and take advantage of the rapid developments of iGaming so long as tribal governments adhere to reasoned and cohesive policies to regulate iGaming. Antiquated civil and criminal laws must evolve in the face of rapid technologic development. Effective Indian country iGaming development must include three core principles: (1) Social Responsibility; (2) Tribal Sovereignty Protection; and (3) Free Market needs.

Social Responsibility principles requires the development of laws and a regulatory structure that will:

- ensure fair gaming, integrity and security;
- prevent corrupting influences, weed out bad actors and prior offenders;
- maintain an efficient and fair tax regime with adequate accounting;
- protect the vulnerable, including the underage, those prone to addiction and regular bettors that overspend their intentions,⁶²

learning the motto "Learn, Adapt or Die" from retired U.S. Army General Stanley A. McChrystal. See Wikipedia for background on Gen. McChrystal *available at* https://en.wikipedia.org/wiki/Stanley_A._McChrystal (last visited May 14, 2013). Mr. Foley is a gaming lawyer with the Foley Law Group in Minnesota and Virginia and is a General Member of the IMGL.

⁶² See Tiffany Conklin & Richard Schuetz, *California Gambling Control Commission—A discussion of the strategic approaches to securing legal internet wagering in the US*, EUROPEAN GAMING LAWYER 10-11, Spring 2013 (Ms. Conklin and Mr. Schuetz are Affiliated Regulator members of the IMGL); Dean Takahashi, *The big debate about the blurring of social casino games and online gambling*, Venturebeat.com, April 30, 2013, *available at* <http://venturebeat.com/2013/04/30/the-big-debate-about-the-blurring-of-social-casino-games-and-online-gambling/> (last visited May 15, 2013). Ms. Conklin and Mr. Schuetz are Affiliated – Regulator members of IMGL.

Additionally, effective Indian country iGaming development should include writing laws and enacting regulatory regimes that respect these **Tribal Sovereignty Protection**⁶³ principles:

- Indian tribal governments shall remain "not taxed" consistent with the U.S. Constitution⁶⁴ and Indian Gaming Regulatory Act of 1988 ("IGRA")⁶⁵;
- Indian tribal governments must maintain their sovereign rights to operate, tax, regulate and license iGaming without state or foreign authorities subordinating those rights;
- Tribal government sanctioned iGaming must be available to bettors in any locale where iGaming is not criminally prohibited;
- All legal regimes must respect existing rights under tribal-state gaming compacts and IGRA; and
- Federal legalization of iGaming should further the longstanding policy of self-determination, economic development and building strong tribal governments.⁶⁶

⁶³ In 2010, the governing bodies of the National Congress of American Indians and the National Indian Gaming Association have passed identical resolutions articulating portions of these principles. NCAI Resolution #ABQ-10-084, Nov. 14-19, 2010 *available at* http://www.ncai.org/attachments/Resolution_RSfueRdCasBGdbpHHuswliymKwbUifeOUqKLgVfRqrgtSqjP_sit_ABQ-10-084_rev.pdf (last visited May 20, 2013) and NIGA Resolution MY-001, Shakopee, NM 10-20-10, *available at* http://www.indiangaming.org/info/alerts/NIGA_Internet_Gaming_Resolution_2010.pdf (last visited May 20, 2013). *See also, Native American tribes demand equal footing, sovereignty if internet gaming allowed in US*, WASH. POST, Nov. 17, 2011 (on file with author).

⁶⁴ U.S. CONST. art. 1, § 2, ("Indians not taxed").

⁶⁵ 25 U.S.C. § 2701 et. seq. It is one of Congress' policies that IGRA "provide[s] a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* at 2702(1).

⁶⁶ 25 U.S.C. § 2701(5) (Congress finds that "Indian tribes have the exclusive right to regulate gaming 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.").

After satisfying these core governmental policy principles, **Free Market principles** will also require:

- Sufficient liquidity and capitalization within better poker pools to make iGaming within particular tribal jurisdictions economically viable.⁶⁷
- Coherent, efficient and fair regulatory regimes that encourage commerce.

The Dichotomy of "Indian lands" and iGaming

"Place" does matter with Indian gaming. Location is the benchmark for the legality and exclusivity of Indian gaming. Indian gaming is built on a "bricks and mortar," land-based and jurisdiction-exclusivity model. Indian gaming must occur on "Indian lands." Indian lands is defined in IGRA.⁶⁸ This is why iGaming presents significant issues for tribal governments under the current mish mash of vague federal laws. Of the 565 tribes and Alaska native groups historically forced upon small parcels of Indian land throughout the U.S., most are situated in rural areas. iGaming will bring gaming to people's homes. Will gamers still be willing to drive hours to play iGaming offerings on the reservation? If *all* aspects of betting must occur on Indian lands under IGRA, then most tribal governments will have a difficult time transitioning some or all of

⁶⁷ See *Feature: Internet & Mobile Gaming* (panel including Whit Askew, Tony Cabot, Orrin J. Eddin, Bill Lerner, Steve Rittvo and Sue Schneider) CASINO ENTERPRISE MANAGEMENT 26-32 (February 2013), available at <http://www.casinoenterprisemanagement.com/articles/february-2013/internet-mobile-gaming> (last visited May 15, 2013); Valerie Red-Horse, *Online Player Liquidity in Indian Country Discussed at Igaming North America*, CASINO ENTERPRISE MANAGEMENT 68-70 (April 2013), available at <http://www.casinoenterprisemanagement.com/articles/april-2013/online-player-liquidity-indian-country-discussed-igaming-north-america> (last visited May 15, 2013).

⁶⁸ 25 U.S.C. § 2703(4) ("The term 'Indian Lands' means (a) all lands within the limits of any Indian reservation; and (b) any lands the title to which is either held in trust by the United States for the benefit of any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."). Compare IGRA's broader definition with the narrower "Indian country" statute at 18 U.S.C. § 1151.

their gaming to iGaming in Indian country.⁶⁹ How can Indian country survive and thrive in an iGaming economy if it must endure potentially 50 shades of regulation, another 50 shades of state competition and potentially 1,050 shades of competition from international iGaming providers?⁷⁰

IGRA at 25 Years Old – And Showing Its Age

The IGRA turns a quarter-century old in 2013. IGRA is founded upon the right of Indian tribes to engage in governmental gaming on their Indian lands exclusively, without external taxation and through self-regulation. IGRA is the most successful economic development policy in United States history.⁷¹ Indian gaming has grown from approximately \$20 million in the early 1980's before the passage of IGRA to a \$27.6 billion dollar industry as of 2012.⁷² Indian gaming grew out of high stakes bingo

⁶⁹ See *Indian Internet Gaming*, *supra* note 27 (discussing problems with better location under current law and the disadvantage to tribal governments).

⁷⁰ All but two states currently have some form of legalized gaming. See *Indian Internet Gaming*, *supra* note 27. The exceptions are Hawaii and Utah. Utah may never have legalized gaming but the Hawaiian legislature has considered a number of recent proposals to legalize certain forms of gaming.

⁷¹ See D. Michael McBride III, *Why should You Care About Indian Gaming?* Indian Gaming 22-23 (December 2011), available at http://www.indiangaming.com/istore/Dec11_McBride.pdf (last visited May 14, 2013); see generally, Sidney M. Wolf, *Killing the New Buffalo: State Eleventh Amendment Defense to Enforcement of IGRA Indian Gaming Compacts*, 47 J. WASH. U. J. URB. & CONTEMP. L. 51 (1995), available at <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=1112&context=urbanlaw&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3Dt%26rct%3Dj%26q%3Digra%2520i%2520the%2520most%2520successful%2520economic%2520development%2520policy%2520in%2520united%2520states%2520history.%26source%3Dweb%26cd%3D5%26ved%3D0CEEQFjAE%26url%3Dhttp%253A%252F%252Fdigitalcommons.law.wustl.edu%252Fcg%252Fviewcontent.cgi%253Farticle%253D1112%2526context%253Durbanlaw%26ei%3Dol6SUBzJFaSJ0QH9t4G4Dg%26usg%3DAFQjCNG81hY1OIwexs37bf9xvgeVPPyKnQ#search=%22igra%20most%20successful%20economic%20development%20policy%20united%20states%20history.%22> (last visited May 14, 2013); see also Indian Gaming Regulatory Act, Hearing before the Committee on Indian Affairs, United States Senate, Oversight Hearing on the Indian Gaming Regulatory Act, Role and Funding of the National Indian Gaming Commission, July 9, 2003, Senate Hearing 108-67, available at <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg88290/html/CHRG-108shrg88290.htm> (last visited May 13, 2013).

⁷² Alan P. Meister, *Indian Gaming Looking Up*, 9 CASINO LAWYER 20-22, SPRING 2013. Meister is an Affiliated-Consultant member of the IMGL.

conducted on Indian lands and challenges by state authorities attempting to criminalize, tax and/or regulate Indian gaming on Indian lands.

The Cabazon Impetus

In the landmark decision of *Cabazon Band of Mission Indians v. California*,⁷³ the U.S. Supreme Court ruled that because California did not criminally prohibit all forms of gaming, California's interests in offering a state lottery were purely regulatory in nature. Accordingly, states cannot civilly regulate gaming on Indian lands where forms of gaming are permitted within the state.⁷⁴ This decision allowed for the immediate expansion of Indian gaming. The next year, in 1988, divergent political interests convinced Congress to compromise and pass IGRA. IGRA compromised tribal sovereignty by putting greater limits on tribes, giving states a role to play regarding Class III Las Vegas-style gaming, and restricting the location of lawful gaming. But, IGRA provided stability for a gaming industry to grow beyond most peoples' expectations.

At the time of IGRA's passage, only two states, Nevada and New Jersey, had significant gaming industries. Since then, out of 565 federally recognized Indian tribes and Alaska native groups,⁷⁵ 245 now engage in some form of gaming operations to fund their tribal governments.⁷⁶ Within Oklahoma, 33 out of 39 federally-recognized tribes

⁷³ 480 U.S. 202 (1987).

⁷⁴ *Id.* at 207-212.

⁷⁵ <http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/> (last visited May 15, 2013).

⁷⁶ <http://www.nigc.gov/LinkClick.aspx?fileticket=0J7Yk1QNqX0%3d&tabid=943> (last visited May 15, 2013).

engage in governmental gaming within Oklahoma.⁷⁷ Since that time more than 20 states have passed laws liberalizing various forms of gaming within their jurisdictions.⁷⁸ Abundant scholarship exists about the history of IGRA, its complexity and its success for Indian people.⁷⁹

Indian government gaming revenue is robust. Economist Alan Meister reports that as of 2011, Indian gaming accounted for \$27.4 billion in revenue and constituted 44% of all U.S. casino gaming revenue.⁸⁰ Out of this amount, tribal governments contributed \$1.4 billion directly to state and local governments.⁸¹ Meister estimates that tribal government brick and mortar casinos contain 341,000 gaming machines, 7,700 table games in 460 facilities in 28 states.⁸² Approximately 120 tribal casinos operated by some 33 tribal governments are within Oklahoma.⁸³ For comparison, in 1996 a total of 184 tribes operated 281 gaming facilities in 24 states and revenue totaled \$4.5 billion (year ending 1995).⁸⁴ No doubt Indian gaming has transformed many tribes into

⁷⁷ Wayne Greene, *Oklahoma second in the nation for tribal gaming*, Tulsa World, March 6, 2012, available at http://www.tulsaworld.com/article.aspx/Oklahoma_second_in_nation_for_tribal_gaming/20120306_16_a1_cutlin959277 (last visited May 15, 2013) (citing economist Alan Meister).

⁷⁸ For background on the history of Oklahoma's Indian gaming industry, see Michael McBride III, *Indian Gaming in Oklahoma*, in UNDERSTANDING GAMING LAW ISSUES 77-89 (Michaela Falls ed., 2010).

⁷⁹ See generally, KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, INDIAN GAMING LAW & POLICY (Carolina Academic Press 2006) (Dean Rand and Professor Light are Affiliated Educator Members of IMGL); G. WILLIAM RICE, TRIBAL GOVERNMENTAL GAMING LAW, CASES & MATERIALS (Carolina Academic Press 2006).

⁸⁰ Alan P. Meister, *Indian Gaming Looking Up*, 9 CASINO LAWYER 20-22, SPRING 2013.

⁸¹ *Id.*

⁸² *Id.*

⁸³ This estimate includes seven additional casinos since Alan Meister's 2012 Casino Study figures based on accredited reports of tribal regulators to this author.

⁸⁴ <http://govinfo.library.unt.edu/ngisc/research/nagaming.html> (last visited May 15, 2013).

prosperous, self-sufficient sovereigns with strong tribal governments, as Congress intended with IGRA.

Proximity of Where the Bet Occurs

Where does gaming occur? Where does the bet occur? Where is consideration exchanged? Where is the bet accepted? These questions have confounded courts and encouraged ingenuity in gaming for more than a century. Judge Hudson wrote for the North Carolina Supreme Court in *State v. Lipkin*, 169 N.C. 323 (1915):

[N]o sooner is a lottery defined, and the definition applied to a given set of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter of definition. But, in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness. It will look to the substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent. The Court will inquire, not into the name, but into the game, however skillfully disguised, in order to ascertain if it is prohibited... It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

State v. Lipkin, 169 N.C. 323, 329, 169 N.C. 265, 271, 84 S.E. 340, 343 (1915).⁸⁵

Legislators are grappling with such definitions in new laws. On February 26, New Jersey Gov. Christie signed a new iGaming law.⁸⁶ The new law makes a legislative

⁸⁵ Quoted in *Hest Tech. Inc. v. North Carolina*, 2012 WL 6218202 at *1 (N.C., December 14, 2012); available at http://www.wral.com/asset/news/state/nccapitol/2012/12/14/11880622/Hest_Ruling_121412.pdf (last visited May 17, 2013).

finding that "legalized casino gaming in New Jersey presently stands at a crossroads, facing critical regional and global challenges that jeopardize its important role in the State's economy."⁸⁷ Under this law, bettors must be within the boundaries of New Jersey to engage in lawful gaming.⁸⁸

IGRA on the other hand does not specifically address iGaming but the legislative history contemplates the maximum use of technology, technologic advances for class II gaming and the linking of gaming on Indian lands.⁸⁹ Tribal governments and their partners have struggled under IGRA's game classification and Indian lands requirements but that struggle has created great innovation for Class II gaming's obtaining displays and the development of server-based technology that has rendered stand alone slot machines obsolete. Class II gaming is very important to tribal governments as leverage for Class III gaming compacts with states; under IGRA tribes do not share revenue with states for Class II games.

Early Tribal Attempts to Expand iGaming Under IGRA

⁸⁶ P.L. 2013 Chap. 27 at 1(b) available at http://www.njleg.state.nj.us/2012/Bills/AL13/27_.pdf (last visited May 14, 2013); Alexander Berzon, *Internet Gambling Scores its Biggest Win*, WALL ST. J., Feb. 27, 2013, at 1, available at <http://online.wsj.com/article/SB10001424127887323884304578328293465612224.html> (last visited May 15, 2015); David B. Deitch, *New Jersey: taking the lead in offering internet gaming to the world*, EUROPEAN GAMING LAWYER 18-19 / INTERGAMING, Spring 2013, available at http://www.ifrahlaw.com/wp-content/uploads/2013/04/EGL_Spring2013.pdf (last visited, May 14, 2013).

⁸⁷ See, e.g., P.L. 2013 Chap. 27 at 1(b) available at http://www.njleg.state.nj.us/2012/Bills/AL13/27_.pdf (last visited May 14, 2013).

⁸⁸ *Id.*

⁸⁹ For background, see D. Michael McBride III, *Tornado Warning for Class II Gaming*, INDIAN GAMING 20 (July 2006); D. Michael McBride III, *Indian Gaming Compacts in Oklahoma: Respecting Tribal Jurisdiction and Enforcing Understanding—A Continued Rule for Class II Gaming*, INDIAN GAMING 14 (May 2010); BOB ANDERSON, FELIX COHEN, & NELL JESSUP NEWTON, FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 866-868 (LexisNexis 2012).

In 2001, the National Indian Gaming Commission's ("NIGC") General Counsel opined that

the use of the internet, even though the computer server maybe located on Indian lands, would constitute off-reservation gaming to the extent that any of the players were located off of Indian lands.⁹⁰

The United States asserted this position as *amicus curiae* in *State ex. rel. Nixon v. Coeur d'Alene Tribe* in the U.S. Court of Appeals for the Ninth Circuit.⁹¹ This is important because such off-reservation gaming is not permitted by IGRA.

In *Coeur d'Alene*, the Tribe operated a lottery pursuant to a gaming compact with Idaho. Bettors registered to play online from homes or offices off Indian country. The bettors established a gaming account, used credit cards to fund the account and could begin gaming once the accounts became funded. In addition to Idaho residents, the Tribe offered the gaming opportunity to residents in 36 other states. This caught the attention of the Attorneys General of Wisconsin and Missouri who in turn sued the lottery. The Tribe won in the federal district court, which ruled that IGRA preempted Missouri's law against iGaming. However, the Court of Appeals reversed and remanded, reasoning that Congress did not intend to preempt state regulatory and police powers over gaming conducted off of Indian lands.

⁹⁰ Letter from Kevin K. Washburn, NIGC General Counsel, to Joseph M. Speck, Nic-A-Bob Productions (March 13, 2001) (attaching Letter from Montie R. Deer, NIGC Chairman, to Ernest L. Stensgar, Chairman of Coeur d' Alene Tribe in Idaho (June 22, 1999) regarding National Indian Lottery) *available at* <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/gameopinions/Class%20III%20Games/WIN%20Sports%20Betting%20Game-Class%20III.pdf> (last visited May 14, 2013). Washburn is currently Assistant Secretary—Indian Affairs at the U.S. Dept. of Interior and was Dean of the University of New Mexico Law School. He is also an executive editor and principal author of Chapter 12 "Indian Gaming" in FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 89.

⁹¹ 164 F.3d 1102 (8th Cir. 1999).

Subsequently many courts have ruled that while IGRA comprehensively regulates Indian gaming on Indian lands, its preemptive force stops at the reservation borders.⁹² In a related later case, *AT&T Corp. v. Coeur d'Alene Tribe*,⁹³ the Court of Appeals reversed and remanded a lower court ruling that concluded AT&T was not required to provide toll free telephone service to a tribe's "National Indian Lottery." The tribe conducted the lottery solely on the reservation but sold tickets by telephone and the internet to participants in other states. The Tribe administered the player accounts on the reservation which players funded by credit card or money delivered to the reservation. Players purchased lottery tickets through deductions to the account and the Tribe credited winnings to the account. While the Tribe had an approved Class III gaming compact with Idaho that permitted the lottery activity, the transactions with non-Idaho citizens caused the legal challenges. State Attorneys General contacted AT&T and told it that the lottery activity violated state laws and that it must discontinue service to the Tribe. The Tribe's court enjoined AT&T from refusing the requested service on the reservation. AT&T sought relief in federal court.

The district court concluded that IGRA requires that a lottery player must be physically on Indian lands to purchase a ticket and that the lottery fell outside the scope of IGRA, therefore AT&T did not have to provide toll free service to the Tribe. The district court ruled that the Tribe's court lacked jurisdiction to enforce the Federal Communications Act against AT&T. Meanwhile the NIGC determined that the lottery fell within the scope of gaming permitted by IGRA. But the district court concluded that

⁹² See, e.g., *Tamiami Partners v. Miccosukee Tribe*, 63 F.3d 1030 (11th Cir. 1995).

⁹³ 295 F.3d 899 (9th Cir. 2002).

on the U.S. has jurisdiction under 18 U.S.C. § 1166 for criminal prosecutions tribes violating state gambling laws. Additionally, the state Attorneys General lacked the power under the Wire Act to require AT&T to refuse service to the Tribe because state gambling laws might be violated. The Court of Appeals affirmed the rulings but reversed and vacated the district court's determination that the lottery itself was illegal under IGRA. The Court of Appeals concluded that a state has an adequate remedy at law should it choose to challenge the NIGC's National Indian Lottery determination as falling within IGRA. Since then tribes have remained divided on iGaming policy and the potential legal expansion.⁹⁴

Internet Gaming in Oklahoma—Chickasaw Nation and the Cheyenne & Arapaho Tribes' Internet Settlement Agreement with Oklahoma?

In Oklahoma, the model tribal state gaming compact,⁹⁵ approved by referendum in 2004, has an expiration date of 2020. Thirty-three tribes have Class III compacts with Oklahoma. In 2010, the Chickasaw Nation announced its intention to begin intrastate internet poker in early January 2011 with the use of iPads from anywhere in the state.⁹⁶ The announcement brought a quick response from the Oklahoma Attorney General.⁹⁷ The State claimed that internet gaming violates the State gaming compact because of definitions for "patron" and "facility" – which are location-based. A "patron" is defined as

⁹⁴ Some tribes actually embrace iGaming while many tribes fear the consequences to their isolated, rural and highly leveraged land-based casinos.

⁹⁵ See 3A O.S. § 281 et. seq. (2005).

⁹⁶ See Memorandum from Neal Leader, Sr. Asst. Att. Gen. Office of the Att. Gen., State of Oklahoma, to Gov. Brad Henry, "Announced intention of the Chickasaw Nation to commence intrastate online poker gambling in early January, 2011" (Dec. 30, 2010) (on file with author) (hereinafter "OKAG Internet Memo").

⁹⁷ *Id.*

"any person who is on the premises of a gaming facility, for the purposes of playing covered games authorized by this Compact."⁹⁸ Further, "facility" is defined as "any building of the tribe in which the covered games authorized by this Compact are conducted by the enterprise, located on Indian lands as defined by IGRA."⁹⁹ The Attorney General concluded

In a very real sense, the proposed internet converts all of Oklahoma—wherever a computer could be located—into the Chickasaw Nation's Indian country for gaming purposes. Such gaming is not permitted under the Compact.¹⁰⁰

Moreover, the State Attorney General noted the lack of a negotiated bargain for such gaming:

The Compact was a quid-pro-quo, it authorized certain limited gaming in return for various concessions by the Nation. If the Nation now wishes to expand gaming, it must return to the negotiating table where—if the State wishes to open the doors for internet gambling—it may seek further consideration from the Nation.¹⁰¹

To date, this author is not aware that the Chickasaw Nation has followed up on its announced intention.

Perhaps taking the lead from the Chickasaw, the Cheyenne & Arapaho Tribes further tested the waters. The Tribes have operated PokerTribes.com since the summer of 2012. The site originally offered "free play" poker but permitted players to purchase additional credits, much like social games such as Farmville. Oklahoma informally challenged the games as violating the tribal state gaming compact. Recently,

⁹⁸ 3A O.S. § 281 Part 3(20) (2005).

⁹⁹ *Id.* at Part 3(14).

¹⁰⁰ OKAG Internet Memo, *supra* note 96 at p. 3.

¹⁰¹ OKAG Internet Memo, *supra* note 96 at p. 3.

on April 5, the Tribes entered into a "Settlement Agreement" with Oklahoma that purports to permit the Tribes to engage in internet gaming with players outside the United States.¹⁰² The Agreement provides that it will pay Oklahoma 20% of gross revenue from such iGaming (instead of the stair stepped average of 6% under the model compact). The Tribes suggest the Agreement does not need federal approval under IGRA. The Tribes reportedly paid \$6.8 million to Universal Entertainment Group to develop the site.¹⁰³ Since the signing the of the Settlement Agreement, the website has been down.

The Settlement Agreement raises more questions than the issues it supposedly settles: Is there consideration for this Agreement? Does the Agreement modify the Tribal State Gaming Compact? Can the Governor unilaterally alter the terms of a compact with legislative approval? Does the revenue sharing arrangement and percentage violate IGRA? Do the Tribes receive any sort of exclusivity for the revenue sharing? Does the Agreement purport to allow betting off of Indian lands? How will the Agreement be enforced? Can parties transform illegal conduct into lawful conduct outside of courts and a legislature? Many other questions persist.

Other Late Breaking Tribal iGaming Developments in California

A coalition of eight politically powerful California tribes have produced a legislative proposal to legalize intrastate internet poker within California.¹⁰⁴ California is

¹⁰² See Rosemary Stephens, *Tribes enter unchartered territory, online gaming*, 8 CHEYENNE & ARAPAHO TRIBAL TRIBUNE at 1 and 6 (April 15, 2015) available at http://www.c-a-tribes.org/Websites/michaelwood/images/April_15,_2013.pdf (last visited, April 15, 2013).

¹⁰³ *Id.*

¹⁰⁴ Dave Palermo, *California Tribes Float Draft of Third Internet Poker Bill*, GAMBLING COMPLIANCE (May 15, 2013) available at <http://www.gamblingcompliance.com/node/51536> (last visited May 17, 2013, paid subscription site); Jim Miller, *Online Gaming: Tribes work on bill to legalize Internet Poker*, THE PRESS-

a vanguard state. As many say, as California goes, so goes the Nation. Leading iGaming tribes including the Pechanga Band of Luiseno Indians and the Agua Caliente Band of Cahuilla Indians are leading the charge.¹⁰⁵ California Senator Lou Correa agreed to sponsor the bill.¹⁰⁶ Issues regarding tribal gaming exclusivity remain. On June 3 & 4, Spectrum Gaming and Pechanga.net will host an aptly-themed conference "No Tribe Left Behind" that will explore the challenges and opportunities iGaming presents to tribal gaming interests.¹⁰⁷

Conclusion

The pressure to engage in lawful online gaming has reached critical boiling point. iGaming will continue to evolve rapidly state-by-state because of federal gridlock. While the various states attempt to pass laws and venture into iGaming with less fear of federal criminalization, tribal governments still remain hampered by the uncertainty of the various out-of-date federal and state laws that were developed in a world of physical and geographically based gambling. Worse, for tribes who attempt to cross the iGaming barrier in this old world, IGRA precedent prevents their ability to reach off of Indian lands and engage in viable interstate iGaming, except for Class II linked games between reservations. Most tribes remain small, isolated and rural, cloistered from large metropolitan areas. Many tribes could be hampered also by a lack of technical infrastructure and bandwidth by virtue of this geographic isolation. Many tribal

ENTERPRISE (May 7, 2013) available at <http://www.pe.com/local-news/politics/jim-miller-headlines/20130507-online-gaming-tribes-work-on-bill-to-legalize-internet-poker.ece> (last visited May 17, 2013).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ <http://indiancountrytodaymedianetwork.com/2013/04/03/pechanganet-host-first-igaming-conference-148505>

governments may be best served by banding together to share iGaming infrastructure and marketing costs. Market consolidation will inevitably occur and favor the largest operators with the best brand identity and marketing penetration on the web.

States, on the other hand, populated with greater numbers, may innovate and expand iGaming intrastate or interstate with increased lottery offerings. As 50 "laboratories of democracy",¹⁰⁸ states will spring ahead with iGaming as federal paralysis continues to keep tribes digitally isolated under old IGRA rules. The iGaming digital divide will continue to widen as tribal governments remain constrained by IGRA, while the rules applied to states have relaxed. The federal government's trust responsibility to Native Americans mandates that Congress amend IGRA to modernize iGaming for tribes.

Many tribes understandably are hesitant to open up IGRA to amendment. Many politicians from non-gaming jurisdiction have called to amend IGRA to further restrict Indian gaming and make to make it harder to place land into trust for gaming purposes. Likewise, many non-Indian gaming interests will resist certain iGaming tribal sovereignty principles that increase its competitive advantage, such as this author's proposal (and that of NIGA and NCAI) that tribal government sanctioned iGaming "must be available to bettors in any locale where iGaming is not criminally prohibited." Implementing this principle could significantly expand IGRA across state boundary lines from where a particular tribe resides. Gaming is no longer a social issue subject to only to the police

¹⁰⁸ In a case arising out of Oklahoma, Justice Louis Brandeis popularized this term in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

powers internal to a state. Like it or not, it is an international business affecting interstate (and international) commerce and it needs to be treated as such. The barriers that are disadvantaging tribes and – worse – destroying their one dependable source of governmental revenue need to be revisited and revised. Congress should amend laws to harmonize the disparate and vague laws and to provide uniform treatment of iGaming opportunity for tribal governments.



D. Michael McBride III

michael.mcbride@crowedunlevy.com

Mr. McBride is an experienced trial, appellate and business lawyer with two decades of experience. He is a sought-after and trusted advisor with particular expertise in gaming, federal Indian law, litigation and complex transactions. He has tried more than 50 cases to conclusion in federal, tribal and state courts including numerous jury trials; as a Judge and Justice, he has adjudicated scores more and authored many published decisions. He excels in gaming regulatory matters, “bet the tribe” litigation, tribal government matters, economic development and regulatory matters. Corporations, investment funds and individuals have hired him as an expert consultant and as an expert witness in multiple federal state court cases to testify on Indian gaming matters.

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Oklahoma City
20 North Broadway
Suite 1800
Oklahoma City, OK 73102
(405) 235-7700

Tulsa
500 Kennedy Building
321 South Boston Avenue
Tulsa, OK 74103
(918) 592-9800

crowedunlevy.com