The Professional and Amateur Sports Protection Act and its Legal Implications: How Its Invalidation Will Impact Indian Gaming's Legal and Regulatory Framework.

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ABSTRACT: The Professional and Amateur Sports Protection Act ("PASPA") was a Federal statute enacted in 1992 that effectively outlawed sports gambling in the United States, with the exception of the states of Nevada, Montana, Delaware, and Oregon.[1] In 2011, the State of New Jersey amended its state constitution and enacted a law that would authorize "certain regulated sports wagering at New Jersey casinos and racetracks" while also implementing "a comprehensive regulatory scheme for licensing casinos and sporting events."[2] Five (5) professional sports leagues brought suit against New Jersey under PASPA, and New Jersey challenged PASPA's constitutionality based on the anti-commandeering doctrine.[3] Over the next few years, the district court, the Third Circuit Court of Appeals, and an En Banc panel in the Third Circuit Court of Appeals all ruled in favor of the leagues; but in June of 2017, the Supreme Court of the United States granted certiorari, and heard the case the following December.[4] On May 14, 2018, in an opinion delivered by Justice Alito, the Supreme Court of the United States held that PASPA was unconstitutional.[5] Consequently, the federal, state, and tribal legal framework for gambling has been drastically altered. State laws, state-tribal gaming compacts,

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[1] *See* 28 U.S.C. § 3701 *et seq.* (1992).

[2] *Christie v. National Collegiate Athletic Association*, Oyez, https://www.oyez.org/cases/2017/16-476 (last visited Apr 26, 2018).

[3] *Id.*

[4] *Id.*

[5] *See Murphy v. NCAA*, 584 U.S. _(2018).

and tribal gaming ordinances will now require redrafting and/or amendments if either government seeks to capitalize on this change. Regulations and inter-governmental agreements will require renegotiation, and implications beyond a simple strike down of a federal statute will begin to take form. This paper seeks to analyze the impact of PASPA's strike down on tribal gaming (used interchangeably with "Indian gaming" throughout this paper) as it pertains to the legal, regulatory, and intergovernmental relations context.

I. Introduction

a. The Indian Gaming Regulatory Act of 1988

i. 25 U.S.C. Chapter 29 – Indian gaming regulation

The Indian Gaming Regulatory Act of 1988 ("IGRA") was drafted by Congress as a response to findings that numerous Indian tribes were engaging in gaming activities on Indian lands as a way of generating tribal government revenue.[6] Federal law prior to IGRA did not provide clear standards or regulations for the conduct of those gaming activities,[7] and the policy behind IGRA was to provide a statutory basis for the regulation of gaming by an Indian tribe.[8] Prior to the Act, the Supreme Court of the United States had recognized that as sovereign nations, Indian tribes had the sole jurisdiction to regulate Indian gaming on Indian lands.[9] IGRA, in turn, set up a complex regulatory framework for Indian gaming, giving roles to tribes, states, and the federal government. Gaming types were defined and categorized into three different classes: Class I, Class II, and Class III gaming.[10] These roles were codified and granted tribal

[6] 25 U.S.C. § 2701(1).
[7] *Id.* § 2701(3).
[8] 25 U.S.C. § 2702(2).
[9] *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987).
[10] 25 U.S.C. § 2703 specifically defines: **(1)** Class I gaming as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations;" **(2)** Class II gaming as "(i) the game of chance commonly known as bingo (whether or not

jurisdiction and self-regulation of Class I and II gaming on Indian lands,[11] but limited Class III gaming to co-regulation with the state government through a tribal-state gaming compact to govern the conduct of Class III gaming activities.[12] Though tribes had been conducting gaming operations for years, at the time of IGRA's enactment, Indian gaming across the nation was relatively in its infancy, offering little to nothing in the realm of sports gambling.

b. The Professional and Amateur Sports Protection Act

i. **28 U.S.C. § 3702 – Unlawful sports gambling**[13]

In 1991, the Senate Judiciary Subcommittee on Patents, Copyrights and Trademarks held public hearings on a bill intended to outlaw sports gambling, Senate Bill 474.[14] After the hearings, "Congress found that 's]ports gambling [was] a national problem.'"[15] Concluding that "[t]he harms it inflicts are felt beyond the borders of those States that sanction it."[16] The Senate

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electronic, computer, or other technologic aids are used in connection therewith)— (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations, (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and (ii) card games that— (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games[;]" and **(3)** Class III gaming as "all forms of gaming that are not class I gaming or class II gaming."

[11] 25 U.S.C. § 2710(1)-(2). Also, some Class II Gaming activities are co-regulated by the NIGC through guidelines codified in the Code of Federal Regulations.

[12] 25 U.S.C. § 2710(d)(3)(A).

[13] 28 U.S.C. § 3702 (1992) indicates that : "It shall be unlawful for—(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games."

[14] *See* https://www.congress.gov/bill/102nd-congress/senate-bill/474 (last visited April 26, 2018).

[15] R. Rodefer, Jeffrey. (2002). Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466. Gaming Law Review. 6. 393-415. 10.1089/109218802760363987. Citing U.S. Code & Cong. News, 102nd Cong. 1st Sess., 3554.

[16] *Id.*

Judiciary Committee at the time was persuaded by and agreed with the testimony of David Stern, Commissioner for the National Basketball Association, who testified that "[t]he interstate ramifications of sports betting are a compelling reason for federal legislation."[17] Following those hearings and findings, Congress enacted the Professional and Amateur Sports Protection Act (PASPA) in 1992, effectively prohibiting sports gambling in the United States with the exception of sports lotteries and gambling already being regulated by state governments in Oregon, Delaware, Montana, and Nevada.[18] PASPA also explicitly prohibited sports gambling on any Indian lands described in "section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4))"[19] where Indian Gaming was currently taking place.

II. Federal-State-Tribal Legal Framework in Indian Gaming Pre-PASPA Strike Down

a. Federal Framework

After the passage of IGRA in 1988, gaming was categorized into three types of gaming "classes" or types for purposes of regulation. These were effectively defined in IGRA as Class I, Class II, and Class III gaming.[20] Class I gaming was to be under the complete jurisdiction of the tribe as it pertains to regulation and authority, while Class II was to be regulated by the tribe with oversight from the Federal government through the National Indian Gaming Commission (NIGC) and its issuance of Codified Federal Regulations.[21] Class III gaming on the other hand, was to be co-regulated by the tribe and the state the tribe had its gaming operation in, specifically under the terms agreed to in a tribal-state gaming compact that required approval from the

[17] *Id.*
[18] *See* 28 U.S.C. § 3704.
[19] *See* 28 U.S.C. § 3704(b).
[20] *See* 25 U.S.C. §§ 2703(6),(7)(A), and (8).
[21] 25 C.F.R. § 543.

United States Secretary of the Interior,[22] and approval of a Tribal Gaming Ordinance by the Chairman of the NIGC.[23] Tribes that wish to, "may enter into a management contract for the operation and management of its gaming activity subject to the approval of the NIGC Chair[,]"[24] after the Chair finds the contract in compliance with the intent of IGRA.[25]

A key provision of IGRA as it relates to Indian Gaming and its role in intergovernmental relations is that "[a]n Indian tribe may engage in, or license and regulate, class II [and III] gaming on lands within such tribe's jurisdiction, [only] if— such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)[.]"[26] Thus, including those within the few states that were exempted from the PASPA statute, all tribes operating Indian gaming facilities throughout the country were unable to offer sports gambling in their operations after 1992. Interestingly, tribes up to that point were likely busy dealing with the growing pains of getting an Indian gaming operation off the ground, and none focused on sports gambling enough to set a paradigm of what an Indian gaming facility offering sports betting would look like prior to 1992. Ultimately, no tribes noticeably took advantage of the opportunity in the 4 years between IGRA's 1988 and PASPA's 1992 enactment.

b. State Framework

As noted above, Tribes wishing to engage in Tribal/Indian gaming must first ensure that the type of gaming they wish to pursue is legal in their state.[27] If they choose to engage in Class I

[22] 25 U.S.C. § 2710(d)(3)(B).
[23] 25 U.S.C. § 2710(d)(2)(A).
[24] Nat'l Indian Gmg. Comm'n https://www.nigc.gov/finance/management-contracts (last visited April 28, 2018).
[25] 25 C.F.R. §§ 531, 533, and 535.
[26] 25 U.S.C. § 2710(b)(1)(A) and 25 U.S.C. § 2710(d)(1)(A)(ii).
[27] *Id.*

or Class II gaming, the state has nothing to do with the regulation or oversight of such gaming activities,[28] however, if they choose to engage in Class III "Vegas" type of gaming, then they must "request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact."[29] Logically, different states and different tribes negotiate based on their individual capabilities, and as such, many tribal-state compacts differ across the nation.

c. Tribal Framework

As already noted, tribes eligible to operate a gaming facility must decide what type of gaming they choose to engage in, and submit their gaming ordinance to the NIGC for approval.[30] If they choose to engage in Class III gaming, then they must obtain a compact with their state, and submit it to the Secretary of the Interior for approval.[31] This creates a sort of "triple layer" of regulation, as Class I gaming is regulated by the tribe, Class II by the tribe and NIGC, and Class III by the tribe and state.

i. Poison Pill Provision in Arizona Tribal-State Gaming Compacts

In Arizona, the tribal-state compact contains a "poison pill" provision that indicates that "[i]f, on or after May 1, 2002, State law changes or is interpreted in a final judgment of a court of competent jurisdiction or in a final order of a State administrative agency to permit either a Person or entity other than an Indian tribe to operate Gaming Devices; any form of Class III Gaming (including Video Lottery Terminals) that is not authorized under this Compact, other

[28] 25 U.S.C. § 2710(b)(1).
[29] 25 U.S.C. § 2710(d)(3)(A).
[30] 25 U.S.C. § 2710(d)(2)(A).
[31] 25 U.S.C. § 2710(d)(3)(B).

than gambling that is lawful on May 1, 2002"[32] then "[t]he Tribe shall be authorized under this Compact to operate Class III Gaming Devices without limitations on the number of Gaming Devices, the number of Gaming Facilities, or the Maximum Gaming Devices Per Gaming Facility, and without the need to amend this Compact[.]"[33] In addition, the poison pill eliminates parts of the tribal-state gaming compact that require the tribes to share revenue with the state, and thus "[i]n addition to Sections 3(h)(1)(A) and (B), the Tribe's obligation under Section 12 to make contributions to the State shall be immediately reduced."[34] Essentially, all of this means that states such as Arizona with current tribal-state gaming compacts will need to renegotiate the compact provisions if they choose to legalize sports betting in their states now that PASPA's been struck down by the Supreme Court of the United States.

III. Legal Framework in Indian Gaming Post-PASPA Strike Down

a. Murphy v. NCAA

In December of 2017, The Supreme Court of The United States heard arguments from petitioner Murphy et al., and respondent NCAA et al. on appeal from the United States Court of Appeals for the Third Circuit. Previously in 2012, The NCAA and three major professional sports leagues had brought an action in Federal court against New Jersey's Governor and other state officials claiming they violated PASPA by approving an amendment of New Jersey's State Constitution that effectively legalized sports gambling.[35] New Jersey countered that PASPA violated the United States Constitution's "anticommandeering" principle, but both the District

[32] ARIZ. TRIBAL–STATE COMPACT § 3(h)(1)(2003), https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf.
[33] *Id.* at (A).
[34] ARIZ. TRIBAL–STATE COMPACT § 3(h)(1)(A)–(C) (2003), https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf
[35] *See Murphy v. NCAA*, 584 U.S. _ at 1 (2018).

Court and the Third Circuit disagreed and ruled in favor of the NCAA.[36] At that time, the Supreme Court of the United States denied review. In 2014, New Jersey's Legislature enacted a law that repealed state-law provisions preventing sports betting schemes, and the NCAA filed a new action in federal court. Again, both the District and Court of Appeals for the Third Circuit held that the state law violated PASPA.[37] This time, however, the Supreme Court of the United States granted certiorari, and ruled on the case on May 14, 2018.

The Supreme Court held that PASPA violated the anticommandeering principle of the Constitution because it "unequivocally dictate[d] what a state legislature may and may not do[;] "[38] and that it was essentially a form of Congress issuing direct orders to state legislatures.[39] The Court also cited Tenth Amendment principles that confirm "all legislative power not conferred on Congress by the Constitution is reserved for the States," and specifically noted the absence of Congressional power to "issue direct orders to the governments of States" based on anti-commandeering principles previously held in in *New York v. United States* and *Printz v. United States*.[40] The Court concluded its opinion by stating that the policy choices required to legalize sports gambling "were not [theirs] to make" and that though "Congress can regulate sports gambling directly[…] if it elects not to do so, each State is free to act on its own."[41]

b. Federal Regulation Post-PASPA

Now that the Supreme Court of the United States has ruled that PASPA is unconstitutional, Congress may draft a statute that regulates sports gambling, or let the individual

[36] *Id.*
[37] *See NCAA, ET AL V. GOVERNOR OF NEW JERSEY, ET AL*, 730 F.3d 208 (2013).
[38] *See Murphy*, at 3.
[39] *Id.*
[40] *Id.; also, see New York v. United States*, 505 U. S. 144 (1992), and *Printz v. United States*, 521 U. S. 898 (1997).
[41] *See Murphy,* at 31.

states willing to enact sports gambling draft their own state statutes. The gaming regulator for the federal government, the NIGC, may wait on Congress to draft a statute, or approve the tribal gaming ordinances that are amended to include sports gambling in tribal gaming facilities in accordance with newly negotiated tribal-state compacts (approved by the Secretary of the Interior) in states that legalized sports gambling. Because sports gambling will likely be defined as Class III gaming, the NIGC will have a minimal role in its regulation outside of approving the tribal gaming ordinance, or ensuring compliance with IGRA and its accompanying regulations.

Many tribes choose to have Management companies operate their facilities instead of doing it themselves; these agreements between private Management companies and the tribes are referred to as "Management contracts" by the NIGC, and will also continue to require NIGC Chair approval in accordance with 25 C.F.R. §§ 531, 533, and 535. Tribes that have little to no experience in running sports books or related sports gambling operations within their facilities may seek to hire additional experienced personnel, perhaps under Management contract, to get their operation to a functional level. Regardless of the different approaches taken by the tribes, if Congress chooses to regulate sports gambling, or the Secretary of the Interior receives the first amended/revised tribal-state gaming compacts including sports gambling, the NIGC will likely also draft or update a few regulations to provide tribes with guidance in the application of their new venture, even if just succinct enough to allow for such application.

c. State Regulation Post-PASPA

Many states will enact laws legalizing sports gambling, free from any federal interference; as is, some 20 states have already introduced laws or bills to legalize sports

gambling in anticipation of the ruling.[42] Because many of the states have tribal-state gaming compacts, they must be cognizant of the renegotiations with tribal governments the invalidation of PASPA may impose on them. As noted in the Arizona example above, some tribal-state gaming compacts contain provisions that would prevent states from enacting such legislation without it affecting their gaming compacts with tribes. Depending on the state, the states and tribes may choose to amend parts of their current compact to include sports gambling in their Indian gaming facilities, or negotiate a way to allow the state to legalize sports gambling without the negative implications it dawns on its tribal-state gaming compact. However, things may not turn out as simple as that.

Provisions beyond the legalization of sports gambling in the state will most certainly be a topic of contention in the new tribal-state compact negotiations. Because some tribes may have little to no interest in adding sports gambling to their already established gaming facilities, the states may have to incentivize amending the compact beyond offering sports gambling in the Indian gaming facilities. As tribal-state gaming compacts are all individual state-tribal negotiations, other provisions, most notably tribal revenue sharing, will be ardently negotiated and contested. Tribes with no interest in sports gambling in their facilities will have a negotiation advantage if there is any sort of "poison pill" provisions in their current tribal-state gaming compact, whereas those tribes wishing to include sports gambling as an enhancement to their Indian gaming facility offerings should have little to no trouble in the states where there is no "poison pill" provision in their gaming compacts *and* the state legalizes sports gambling.

[42] Daniel Wallach, *Why A Narrow Ruling For New Jersey Could Still Allow Sports Betting By Private Operators*, Forbes (Apr. 23, 2018), https://www.forbes.com/sites/danielwallach/2018/04/23/statutory-victory-for-new-jersey-in-sports-betting-case-would-not-trigger-private-party-prohibition/#8d2b62b1d81d.

In addition, there's always the potential issue of tribes banding together to form a coalition against states legalizing sports gambling, particularly in states where most tribes are against the legalization of sports gambling, either because the profit margin is not worth giving up real estate in the facility for, or the investment is too great for the tribe to bear the addition of such (sports gambling) areas in their casinos. State legislatures will have to fight against these coalitions, and ultimately decide on an appropriate state statute to address the concerns and interests of both parties for the welfare of the state and its tribal citizens; especially those tribal entities with which they have gaming compacts.

d. Tribal Regulation Post-PASPA

As noted in the state regulation post-PASPA section above, tribal regulation of Indian gaming after PASPA's invalidation will vary depending on each state's tribal-state gaming compact. Tribes operating gaming facilities within states that choose to legalize sports gambling will have to first decide if sports gambling would be beneficial to include in their Indian gaming facilities. Secondly, they will need to look to their tribal-state gaming compacts, and figure out if there is a "poison pill" provision that gives them a negotiation advantage. Thirdly, after successful negotiation with the state to amend their current compact to include sports gambling, they will need to redraft and amend their tribal gaming ordinance, resubmit it to the NIGC, and amend and resubmit the tribal-state gaming compact to the Secretary of the Interior for approval.[43] If all goes well and both the NIGC and the Secretary approve the amended ordinance and tribal-state compact, tribes would be at liberty to regulate sports gambling as a class III activity concurrently with the state.[44]

[43] 25 U.S.C. § 2710(d)(2)(A) and 25 U.S.C. § 2710(d)(3)(B).
[44] 25 U.S.C. § 2710(d)(5).

IV. Indian Gaming Disinterest in Sports Gambling

a. Sports Gambling Not a Big Enough Market for Some Tribes

Many tribes may not be interested in adding sports gambling to their current gaming facility operations because of the complex regulatory issues and ultimately low profit margins. Veteran Nevada sportsbook operator Art Manteris estimates sports gambling profit generating "only a four-to six-percent margin" and being "labor-intensive" in addition to requiring "major capital investment."[45] For example, Pechanga Band of Luiseño Indians Chairman Mark Macarro in California stated that "Indian country is being oversold" potential sports gambling profits and cites the need for "new studies…analytics… and something quantifiable" to make an accurate projection of such profits.[46] Current estimates gauge a sports book generating about "5 percent on the dollar" in comparison to a bank of slot machines in the same space making 8-10% profit with lower overhead costs to operate.[47] The uncertainty about huge profit margins linked to sports gambling is echoed in former member of the National Indian Gaming Commission and consultant Norm DesRosiers, who states that "[i]f you're going to rely on people coming into the casino wagering in a sportsbook, you're not going to generate much."[48] Similarly, vice chair of the Poarch Creek Indians Robbie McGhee said some tribal casinos are "not meccas for gaming" and thus would provide little incentive to provide investment capital and seek out the necessary skilled workforce to operate sports gambling.[49]

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[45] Dave Palermo, *Why Sports Betting May Not Make Business Sense For Many Tribal Casinos*, Legal Sports Report (Oct. 9, 2017), https://www.legalsportsreport.com/15937/business-sense-for-tribes-and-sports-betting/.
[46] *Id.*
[47] Nick Sortal, *Some Indian casinos cautious about sports wagering*, CDC Gaming Reports (Jan. 30. 2018), https://www.cdcgamingreports.com/commentaries/some-indian-casinos-cautious-about-sports-wagering/.
[48] *Id.*
[49] *Id.*

b. Some Tribes Would Rather Not Renegotiate Tribal-State Gaming Compacts to Include Sports Gambling

Though a few tribes in Arizona and Connecticut have expressed interest in sports gambling and support legislative efforts to legalize it, many tribes in other states are impartial about it.[50] Tribes in Minnesota, Michigan, and Washington have shown little interest in embracing sports gambling, in particular because of the favorable nature of their current tribal-state gaming compact.[51] As many as 12 tribes in Michigan, 25 tribes in Washington, and 11 tribes in Minnesota began the negotiation process of their tribal-state gaming compacts despite the previous uncertainty of sports gambling without "an appetite for expanded gambling" or "any effort by tribes to engage in sports wagering at a state level."[52] As mentioned previously, tribes in this scenario would likely not want to renegotiate the current tribal-state gaming compacts, and would seek to create new gaming compacts with different revenue sharing percentages should the state push to legalize sports gambling. This turns on a position of leverage and negotiation advantage for either party, depending on their circumstances. For the 58 tribes mentioned here, a new compact with more favorable terms seems likely in light of PASPA's invalidation, *if* the state chooses to move in that direction.

c. Tribal-State Compacting Issues

With the prospect of new state legislation for sports gambling and the potential for new tribal-state compact negotiations, old compacting issues previously before the 10th and 5th Circuit

[50] Dave Palermo, *Tribes Scramble To Figure Out How Sports Betting Can Fit Into Indian Gambling Under Federal Law*, Legal Sports Report (Aug. 3, 2017), https://www.legalsportsreport.com/14890/tribes-sports-betting-and-federal-law/.
[51] *Id.*
[52] *Id.*

Court of Appeals and the Supreme Court of the United States are unavoidably raised again. The seminal case of disagreement between state government and tribal compact negotiations is *Seminole Tribe of Florida v. Florida*[53]. This 1996 Supreme Court of the United States case began with the state of Florida "refus[ing] to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact," thereby violating the "requirement of good faith negotiation" contained in § 2710(d)(3) [of IGRA].[54]" Although IGRA implies authority to initiate a cause of action against a state government for failing to negotiate a tribal-state compact in good faith,[55] the United States Supreme Court ruled in favor of Florida and affirmed the dismissal of the Seminole tribe's lawsuit, holding that the "Eleventh Amendment prevent[s] Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause[,]"[56] ultimately granting the states sovereign immunity from lawsuits brought by Indian tribes.[57] *Seminole* can be viewed as a monumental case that effectively undercut tribes' abilities to force state governments to negotiate gaming compacts in good faith, and placed the states in a position of power; for absent of a waiver of the state's sovereign immunity, there is no longer a remedy for states that refused to negotiate/renegotiate their respective gaming compacts.

In 1999, as a response to *Seminole* and states' ability to assert sovereign immunity, regulations governing Class III gaming procedures were codified by the Commissioner of Indian Affairs.[58] These regulations granting the Secretary of the Interior the ability to issue Class III gaming procedures ("Secretarial procedures") in the absence of a tribal-state compact would

[53] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).
[54] *Id.*, at 52.
[55] 25 U.S.C. § 2710(d)(7)(A)-(B).
[56] *Seminole*, 517 U.S. 44, at 53 (1996).
[57] *Id.*
[58] 64 FR 17543, Apr. 123, 1999.

eventually be challenged by states as well. The Secretarial procedures require a tribe to submit a Class III gaming proposal to the Secretary, who then gives the state 60 days to accept or submit an alternative proposal.[59] If the state refuses to negotiate or submit its proposal to a mediator for the tribe and state, then Class III gaming will be implemented according to the Secretary-issued procedures[60]

In 1995, representatives of the Kickapoo Traditional Tribe of Texas met with the Governor of the State of Texas's staff to discuss the possibility of negotiating a compact to conduct Class III gaming in Texas.[61] When the State of Texas refused to negotiate, the Kickapoo tribe attempted to file a suit against them for failing to negotiate in good faith.[62] Ultimately, Texas's motion to dismiss the Kickapoo Tribe's suit was granted on April 2, 1996.[63] As recourse, in 2003, the Kickapoo submitted its Class III gaming application to the Department of the Interior in accordance with the Secretarial Procedures regulation.[64]

Four months later in March of 2004, the State of Texas filed a lawsuit against the Kickapoo Tribe and the United States Department of Interior in U.S. District Court for the Western District of Texas. Though the lawsuit was dismissed, the State of Texas filed an appeal with the United States Court of Appeals for the 5th Circuit, asserting their stance that the Secretary of the Interior had no authority under IGRA to promulgate Class III procedures absent of a gaming compact.[65] The 5th Circuit Court held that "[t]he secretarial procedures violate[d] the unambiguous language of IGRA and congressional intent by bypassing the neutral judicial

[59] 25 C.F.R. § 291.7.
[60] *Id.* § 291.11.
[61] *Texas v. United States*, 362 F. Supp. 2d 765 (W.D. Tex., 2004).
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Texas v. United States*, 497 F.3d 491, at 495 (5th Cir. 2007).

process that centrally protects the state's role in authorizing tribal Class III gaming[;]"[66] and subsequently reversed the District Court's decision. US Supreme Court certiorari to hear this case in the Supreme Court has been denied, and Kickapoo is forced to operate its gaming facilities without Class III machines because the state government refused to negotiate a compact. Florida and Texas are not the only states that have had significant disputes in terms of Indian gaming regulation between the state and its tribes.

Recently, in July of 2017, the Pueblo of Pojoaque in New Mexico lost a similar compacting dispute with the State of New Mexico in the 10th Circuit Court of Appeals,[67] thus inherently reaffirming the ability for states to refuse to negotiate a tribal-state compact with tribes for the operation of class III gaming facilities with little to no relief available for tribes. These legal precedents set an awkward tone for potential ongoing tribal-state compact negotiation disputes, as both tribal and state governments with current Indian gaming operations will need to come to the table to discuss the inclusion of sports gambling in a post PASPA world if either entity elects to make it a part of their gambling operations.

d. Private Cardrooms in States and PASPA Invalidation

Another issue worthy of mention that has perhaps not received as much attention as it deserves is the potential for disputes to arise between tribes and cardrooms in states that currently have tribal-state gaming compacts with various tribes. California is a prime example of where an attempt to legalize sports gambling can result in a topic of contention and political

[66] *Id.* at 511.
[67] *See Pueblo of Pojoaque v. New Mexico,* No. 16-2228 (10th Cir. 2017).

pushback from tribal governments due to its $1 billion dollar card room industry.[68] There has been an ongoing six year dispute in California in which several California tribes are threatening to file a lawsuit alleging the "card room industry is operating banked table games in violation of state law and a constitutional guarantee that tribes alone can offer casino-style gambling."[69] This is of particular importance and within context of the sports betting situation because the coalition of tribes has been growing and has now indicated that "they will use their political clout to fight any potential statewide legislation or ballot referendum that would enable California's approximately 75 card rooms to offer sports betting."[70]

California Assembly Government Organization Committee and Chairman Adam Gray has already sponsored legislation calling for a voter referendum to legalize sports betting in California in anticipation of PASPA's invalidation in the US Supreme Court.[71] This means that even though California was already preparing for PASPA to be held unconstitutional, it will now need to decide how it will treat the legalization of sports gambling, with very special attention given to the topic of contention regarding the ability of card rooms to continue operating with what the coalition refers to as "out of conformity with state law" and under less strict licensing and regulatory provisions than those required of Indian gaming.[72] Revenue sharing with the State of California from Indian gaming operations has continued to rise, and a recent report by the California State Auditor places the contributions to the state from tribal gaming revenues at

[68] Dave Palermo, *Sports Betting Progress In California Faces Possible Roadblock Over Card Room Games*, Legal Sports Report (Dec. 11, 2017). https://www.legalsportsreport.com/16900/california-sports-betting-and-card-rooms/.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

almost $8 billion.[73] These contributions are used to help fund state services such as law enforcement, fire services, emergency medical services, waste disposal, behavioral health, planning and adjacent land uses, public health, roads, recreation and youth programs, and child care programs, among other things. [74] These are certainly things that the state of California and its state legislature should and will likely consider in both its drafting of a law legalizing sports gambling, and the addressing and settling of the cardrooms and tribal gaming governments dispute. As with many other states, the issue of legalizing sports gambling in California will turn largely on negotiation leverage relative to the interests of the State of California and its Indian gaming tribes.

e. Some Tribal Casinos Not Profitable Enough to Invest in Sports Gambling

There are currently approximately 480 tribal gaming operations in 28 states, and of those, less than 100 will likely create a dedicated sports book now that PASPA's been invalidated.[75] That's largely because adding an additional gambling enterprise with a low profit margin doesn't make much sense. According to National Indian Gaming Commission Chairman Jonodev Chaudhuri, most of the tribal gaming facilities in the country are relatively small and barely make payroll, amounting to what he calls "basically job programs, located in rural communities" that still manage to provide essential revenue for the well-being of tribes.[76]

Recently, "[a]n Associated Press computer analysis of federal unemployment, poverty and public assistance records indicates the majority of American Indians have benefited little

[73] California State Auditor, Report Number: 2016-036 Indian Gaming Special Distribution Fund (Mar. 2017), https://www.auditor.ca.gov/pdfs/reports/2016-036.pdf.
[74] *Id.*
[75] Sortal, *Some Indian casinos cautious about sports wagering*, CDC Gaming Reports (Jan. 30. 2018), https://www.cdcgamingreports.com/commentaries/some-indian-casinos-cautious-about-sports-wagering/.
[76] *Id.*

[from Indian gaming revenues]."[77] This is mostly because of the 130 tribes that operate gaming facilities, only those closest to "major population centers have thrived while most others make just enough to cover the bills."[78] Consequently, "[o]f the more than $30 billion in revenue produced by Indian gaming, just a couple dozen casinos are responsible for about three-fourths of the haul."[79] As San Carlos Apache Tribal Chairman Raymond Stanley from Arizona puts it, even though about 80% of the San Carlos Apache Tribe's casino employees are tribal members, the tribe overall "really [doesn't] have a lot to show for it at the moment[,]" and thus the "real benefit right now [for the tribe] is employment."[80]

As indicated by several tribal leaders and Indian gaming experts throughout the country, the profitability for sports betting in Indian gaming is questionable at best, and as such, it makes sense for many tribes to observe while waiting in the background and evaluate what the return on investment rates are for those tribes that immediately jump into the novelty of sports gambling. This rings particularly true for the tribes that are struggling with profits and their bottom line.

V. Conclusion

The research firm Eilers & Krejcik Gaming recently published a report in which it estimates that a regulated sports betting market could generate upwards of $6 billion dollars a year.[81] However, that is a profit margin projection that will have to be divided among both commercial and tribal casinos, and, as the laws of economics would predict, market saturation will surely

[77] ABC NEWS San Carlos, AZ., *Casinos Not Paying Off for Indians*, ABC NEWS (Aug. 31, 2017), http://abcnews.go.com/US/story?id=95944&page=1.
[78] *Id.*
[79] Sortal, *Some Indian casinos cautious about sports wagering*, CDC Gaming Reports (Jan. 30. 2018).
[80] ABC NEWS San Carlos, AZ., *Casinos Not Paying Off for Indians*, ABC NEWS (Aug. 31, 2017).
[81] Darren Heitner, *How Legalized Sports Betting Could Bring in $6.03 Billion Annually By 2023,* Forbes (Sep. 27, 2017) https://www.forbes.com/sites/darrenheitner/2017/09/27/how-legalized-sports-betting-could-bring-in-6-03-billion-annually-by-2023/#2981f88179ec.

impact those numbers negatively. While it may be easy for state and tribal governments currently operating gambling establishments to get enticed into the collective thrill associated with the potential legalization of sports gambling, the complex regulatory structure and sheer logistics of getting an operation of that nature off the ground may prove too daunting for many tribes. As shown throughout this paper, there are more than enough reasons for tribes that are not fiscally prepared to invest in such a venture to hold off until there is more consistent, stable, and concrete data regarding the profitability of sports gambling in a tribal casino setting. Just as well, tribes that have current tribal-state gaming compacts with favorable terms to them are less likely to consider renegotiating said compacts. As with any renegotiation, there is always the potential for getting less favorable terms in the new agreement. Tribes currently positioned in a gainful setting will likely not be willing to compromise or risk their advantageous positioning for the sake of a new sports gambling venture that has not proved to be more beneficial than, for example, a bank of slot machines. In a similar vein, real estate (read: space) in tribal casinos is a hot commodity, as many tribal-state gaming compacts dictate the number of devices that a tribe can have within the facility.[82] Taking just those few factors into consideration, it would not make sense for some tribes to sacrifice facility space that could be filled with other devices on a gamble that has yet to play out in Indian gaming.

For the tribes that are financially poised to make such an investment, and are willing to negotiate a new or amended tribal-state compact with their respective state governments, sports gambling may be something that works for them in a post-PASPA world. However, it may be in the form of attracting more casino or gambling patrons to the Indian gaming facility, and not necessarily in the profit margin context. In other words, tribal governments willing to take the

[82] ARIZ. TRIBAL–STATE COMPACT § 3(c)(2003).

risk on sports gambling will initially be more attracted to the idea of getting additional people *into* their facility to potentially spend money on other offerings, than they will in making a big profit off the sports gambling *itself*, at least until real data and reliable metrics come out for Indian gaming relative to sports gambling.

The legal and regulatory framework and interplay between the federal, state, and tribal governments that has been in place for almost 30 years now for Indian gaming will continue to operate in a post-PASPA world, and may give some peace of mind to all three governments despite the complexities and inter-governmental relations and dealings that it requires. The biggest shift in law and regulation regarding sports gambling will most certainly come from statutes written by the states as they begin the legalization process after PASPA's strike-down in the Supreme Court of the United States. A federal sports gambling regulation scheme would likely be the fastest way to provide tribes with guidance nationally in one foul swoop, but it is more likely that the federal government will allow the states to make their own legislation for this purpose. This is more practical, as states are ultimately the ones dealing with the more complex issues of compacting with Indian gaming tribes, while also trying to peacefully navigate the at times turbulent waters of matters particular to the state, such as cardrooms and how those will affect tribal-state relations and state legislation moving forward.

While many states are already busy drafting their sports gambling statutes, tribes, on the other hand, are anxiously preparing for the renegotiation and challenging issues that many times accompany tribal-state compacting agreements. It may be easy to focus on the positives of a potential expansion of commercial and Indian gaming when it comes to the novelty of sports gambling, coupled with the fear of missing out on the new trend/opportunity in gaming. However, as the data currently shows, there are plenty of unanswered questions that tribes will

need to consider before engaging in a new Indian gaming business venture that they may not be fully prepared for. Ultimately, the complexity of the intergovernmental legal and regulatory framework lends for inconsistent and unpredictable projections regarding the legalization of sports gambling in Indian gaming.