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## Internet Gaming On & Off Tribal Lands

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## NOTES

### INTERNET GAMING ON & OFF TRIBAL LANDS

*Logan Blackmore*\*

#### *I. Introduction*

Since 1988, the Indian Gaming Regulatory Act<sup>1</sup> (IGRA) has provided American Indian tribes the authority to host gaming facilities on tribal lands. This Note will analyze the Ninth Circuit's decision in *California v. Iipay Nation of Santa Ysabel*<sup>2</sup> and its subsequent impact on the interpretation of IGRA. It will also discuss the relationship between IGRA and the Unlawful Internet Gaming Enforcement Act of 2006<sup>3</sup> (UIGEA) and how these acts affect Internet gaming.

The law is well-settled that American Indian tribes can offer gaming on tribal lands, but the question of whether Internet gambling is a permissible extension of this authorization is a nationwide matter of first impression. Before the ruling in *Iipay Nation*, no other court had specifically addressed whether Indian tribes may offer online gaming stemming from tribal lands where gaming is legal into jurisdictions where gambling is illegal. The Ninth Circuit Court of Appeals recently held that the placing of a bet or wager on a game constituted gaming activity not located "on Indian lands."<sup>4</sup> The Ninth Circuit's decision in *Iipay Nation* not to authorize Internet gaming is monumental. This Note will discuss its impact.

Furthermore, as tribal efforts to participate in Internet gambling persist, this Note will identify the potential benefits to tribes and states if Internet gaming were legalized at the federal level. Additionally, it will discuss the potential economic and financial benefits for tribes and states and the potential impacts on tribal-state compacts.

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1. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721 (2012)).

2. 898 F.3d 960 (9th Cir. 2018).

3. 31 U.S.C. §§ 5361-5367 (2012).

4. *Id.* at 961.

## II. *Statement of the Case: California v. Iipay Nation of Santa Ysabel*

### A. *Facts*

On November 3, 2014, Iipay Nation of Santa Ysabel began Desert Rose Bingo (DRB), a server-based bingo game that allows consumers to participate in online bingo over the Internet.<sup>5</sup> Iipay operated DRB through Santa Ysabel Interactive (SYI), Iipay's wholly owned subsidiary, on a set of servers located on Iipay's tribal lands.<sup>6</sup> Although the servers could be found on tribal land, the computerized bingo game was offered solely through the Internet, and there were no physical computers on which to play DRB.<sup>7</sup> In other words, the game could be accessed from anywhere with an Internet connection, not just tribal lands.

Iipay facilitated DRB through a web browser accessible on a computer or Internet-enabled device.<sup>8</sup> Once registered, a patron could create an account on the website, provide a payment method, and select a preferred bingo game.<sup>9</sup> After the patron selects the denomination of game, number of games, and number of cards, the patron would then click the "Submit Request!" button on the Request Form.<sup>10</sup> At that time, the patron's account would be debited for the corresponding amount selected on the Request Form.<sup>11</sup>

"[B]y submitting the Request Form, the patron has appointed an individual located at the casino, on Iipay's tribal lands, as the patron's 'proxy.'"<sup>12</sup> At all times, one SYI employee would be located at the casino to serve as the "Patron's Legally Designated Agent" responsible for representing all patrons.<sup>13</sup> Because the DRB software automatically generated all aspects of the game, playing bingo required no physical action on the part of the patron, the Designated Agent, or any other human.<sup>14</sup> The Designated Agent served as a passive observer and did not take any physical action within tribal lands.<sup>15</sup> After the game was completed, the

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5. *Id.* at 962, 963.

6. *Id.* at 962.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 963.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

patron could view the results of the game and replay a video of the game.<sup>16</sup> The patron's account would then be credited with any earnings.<sup>17</sup> The operations of DRB lasted about two weeks until California brought an action against the Tribe, challenging its online bingo website.<sup>18</sup>

### *B. Procedural History*

Not even fifteen days after the launch of Desert Rose Bingo, California brought an action against Iipay seeking injunctive relief to prohibit DRB from continuing operations.<sup>19</sup> The district court granted a temporary restraining order requiring DRB to cease operations for the remainder of the litigation.<sup>20</sup> The State of California filed two motions for summary judgment.<sup>21</sup> California's first motion argued that Iipay's DRB operations constituted impermissible Class III gaming.<sup>22</sup> The district court rejected this argument and instead classified DRB as Class II, not Class III. California's second motion contended that Iipay's DRB operations violated the UIGEA.<sup>23</sup> The district court accepted this argument and found that DRB did in fact violate the UIGEA.

As a result, the court's temporary injunction became permanent.<sup>24</sup> Iipay then appealed the district court's grant of summary judgment,<sup>25</sup> and the Ninth Circuit Court of Appeals affirmed.<sup>26</sup>

### *C. Issue of the Case*

It is undisputed that IGRA only applies to conduct occurring on Indian lands.<sup>27</sup> However, the present case addresses the issue of gaming that stems from servers within Indians lands but reaches outside of Indian land via the Internet to consumers located in a jurisdiction where gambling is not permitted. Before the court's ruling, "[n]o other circuit ha[d] opined on whether an Indian tribe can offer online gaming to patrons located off

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 963–64.

23. *Id.* at 964.

24. *Id.*

25. *Id.*

26. *Id.* at 969.

27. 25 U.S.C. § 2710(a)(2) (2012).

Indian lands in jurisdictions where such gambling is illegal.”<sup>28</sup> The specific dispute was whether the activities of DRB could realistically be considered to occur on Indian land. Thus, the answer depended on the court’s interpretation of IGRA and the UIGEA.

### 1. Indian Gaming Regulatory Act

IGRA was enacted by Congress in 1988.<sup>29</sup> The Act was enacted to allow “Indian gaming to be a valuable economic development tool.”<sup>30</sup> Under IGRA, “Congress sought to ensure that tribal gaming remained free from the influence of organized crime, and to provide tribes with a sound opportunity for economic development and the promotion of tribal self-government.”<sup>31</sup> The stated purpose of IGRA was to provide a mechanism for regulating gaming on Indian tribal lands.<sup>32</sup> Since the enactment of IGRA, numerous jurisdictional issues have emerged in federal and state courts.<sup>33</sup> The Act states that “[a]ny class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes . . . .”<sup>34</sup>

In 1987, the Supreme Court’s decision in *California v. Cabazon Band of Mission Indians*<sup>35</sup> spurred the debate that led Congress to pass IGRA. Two tribes in California challenged the State’s ability to enforce bingo regulations in federal court.<sup>36</sup> At the time, California state law did not fully prohibit gaming activities.<sup>37</sup> The Court reasoned that because the State did not prohibit all types of gaming, the matter was civil in nature. The holding in *Cabazon* provided that “other states would be unable to regulate gaming activities in Indian Country unless the state had a full prohibition-type scheme.”<sup>38</sup>

*Cabazon* prompted states to lobby Congress to authorize state regulation of Indian gaming, while prompting Indian tribes to lobby for legislation

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28. *Iipay Nation*, 898 F.3d at 964.

29. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 12.01, at 858 (Nell Jessup Newton et al. eds., 2005).

30. *Id.* § 12.01, at 859.

31. *Id.*

32. *Id.*

33. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987).

34. 25 U.S.C. § 2710(a)(2) (2012).

35. 480 U.S. 202 (1987).

36. *Id.* at 204.

37. *Id.* at 210.

38. 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, 233 (2012-2013).

furthering tribal sovereignty.<sup>39</sup> Harmonizing these efforts birthed IGRA: a tool to promote economic development and hopefully improve the self-sufficiency of tribes on Indian lands.

IGRA established three classes of gaming and requires tribes to enter into tribal-state compacts to participate in certain classes of gaming.<sup>40</sup> Each class of gaming has a different regulatory authority.<sup>41</sup> Class I is defined 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.”<sup>42</sup> Class II games include “the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)” and other card games that are explicitly authorized or not explicitly prohibited by the laws of the state.<sup>43</sup> Class II games explicitly prohibit “electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.”<sup>44</sup> “If using the Internet to offer a game transforms the game from a Class II to Class III, the game will be subject to state regulation and a tribe’s Tribal-State Compact.”<sup>45</sup> Lastly, Class III gaming includes “all forms of gaming that are not class I gaming or class II gaming.”<sup>46</sup> In an effort to balance states’ power over gaming activity within their jurisdictional borders, IGRA requires states and tribes to enter into gaming compacts to provide Class III gaming on Indian lands.<sup>47</sup> This reserves in states some discretionary authority to regulate how gaming is conducted within the state. When entering into these tribal-state compacts, IGRA dictates that states have an obligation to negotiate in good faith.<sup>48</sup>

IGRA has been extremely successful in furthering many of the policy goals it was enacted to achieve. Tribes have experienced an increase in

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39. *Id.*

40. *Id.* at 234-35.

41. Racheal M. White Hawk, Comment, *A New Formula for Tribal Internet Gaming*, 56 JURIMETRICS J. 47, 55 (2015).

42. 25 U.S.C. § 2703(6) (2012).

43. *Id.* §§ 2703(7)(A)(i), 7(A)(ii)(I-II).

44. *Id.* § 2703(7)(B).

45. Heidi McNeil Staudenmaier & Anthony J. Carucci, *iGaming Under the Indian Gaming Regulatory Act: A Look at Santa Ysabel and the Iowa Tribe of Oklahoma’s Contrasting Approaches to Indian iGaming*, INDIAN GAMING LAWYER, Spring 2016, at 22, 23, [https://www.imgl.org/sites/default/files/media/publications/igamingundertheindiangamingregulatoryact\\_staudenmaier\\_carucci\\_igl\\_spring\\_2016.pdf](https://www.imgl.org/sites/default/files/media/publications/igamingundertheindiangamingregulatoryact_staudenmaier_carucci_igl_spring_2016.pdf).

46. 25 U.S.C. § 2703(8) (2012).

47. *Id.* § 2710(d)(3)(A).

48. *Id.* § 2710(d)(7)(B).

economic development and tribal self-sufficiency, but confusion remains surrounding the ambiguous language of the Act. There also remains a large amount of confusion surrounding the legality of Internet gaming based on the interplay of IGRA and the other primary federal legislation governing tribal gaming: the UIGEA.

## 2. *Unlawful Internet Gambling Enforcement Act*

In 2006, Congress passed the UIGEA specifically to combat unlawful online gambling in “response to findings of the National Gambling Impact Study Commission recommending laws prohibiting wire transfers to Internet gambling sites and the banks which serve them, as well as other pressures.”<sup>49</sup> The UIGEA does not make online gambling legal or illegal; it is merely a regulatory mechanism.<sup>50</sup> It was enacted as a way to enforce existing Internet gambling laws that, by themselves, were inadequate.<sup>51</sup>

In general, the UIGEA makes it illegal to fund unlawful Internet gambling activities.<sup>52</sup> The UIGEA states that,

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling (1) credit, or the proceeds of credit, . . . (2) an electronic fund transfer, . . . (3) any check, draft, or similar instrument[;] . . . or (4) the proceeds of any other form of financial transaction . . . .<sup>53</sup>

The Act seeks to reduce unlawful Internet gambling by stopping banks and other financial institutions from completing transactions with websites involved in unlawful Internet gambling.<sup>54</sup>

Because the UIGEA depends on existing federal and state laws, its definition of “unlawful Internet gambling” is vague. The Act defines “unlawful Internet gambling” as:

[P]lac[ing], receiv[ing], or otherwise knowingly transmit[ing] a bet or wager by any means which involves the use . . . of the Internet where such bet or wager is unlawful under any

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49. Thompson, *supra* note 38, at 250; see Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2012).

50. California v. Iipay Nation of Santa Ysabel, 898 F.3d 960, 964–65 (9th Cir. 2018).

51. Brandon P. Rainey, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. LEGIS. 147, 148 (2009).

52. *Id.* at 149; see also 31 U.S.C. § 5363.

53. 31 U.S.C. § 5363.

54. Rainey, *supra* note 51, at 149.

applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.<sup>55</sup>

Since the UIGEA relies on the applicable state law of a given jurisdiction, there are various meanings across different jurisdictions on what constitutes unlawful gambling. IGRA was passed before Internet gambling became a prevalent issue, leaving it “unclear how the IGRA’s regulatory provisions interact with the vague provisions contained in the UIGEA.”<sup>56</sup>

This vague definition of “unlawful Internet gaming” has been highly criticized “as flawed legislation that was hurriedly enacted without substantial congressional consideration.”<sup>57</sup> Senator Bill Frist, who proposed the UIGEA, “attached the legislation to an unrelated port-security bill just moments before it was voted on.”<sup>58</sup> Despite attempts by the drafters to address the problems of Internet gambling, “the UIGEA fails to fully accomplish its objectives because of a lack of serious enforcement.”<sup>59</sup> This failure is attributed to the vagueness of key terms of the Act, including “unlawful internet gambling.”<sup>60</sup> Recent congressional proposals have attempted to amend the UIGEA to provide clarification, but none of the proposals adequately address the flaws of the legislation.<sup>61</sup> The proposed Unlawful Internet Gambling Enforcement Clarification and Implementation Act of 2008 recognized the lack of clarity in federal law governing non-sports-related Internet gambling but ultimately failed to provide any answer within the Act.<sup>62</sup> This invited the Ninth Circuit in *Iipay Nation* to provide its own interpretation of the language of these two federal acts.

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55. 31 U.S.C. § 5362(10)(A).

56. Thompson, *supra* note 38, at 230.

57. Jeffery S. Moad, Note, *The Pot’s Right: It’s Time for Congress to Go “All In” for Online Poker*, 102 KY. L.J. 757, 766 (2013).

58. Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 7 DUKE L. & TECH. REV., no. 1, 2008, ¶ 2, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1181&context=dltr>.

59. Jonathan Conon, Comment, *Aces and Eights: Why the Unlawful Internet Gambling Enforcement Act Resides in “Dead Man’s” Land in Attempting to Further Curb Online Gambling and Why Expanded Criminalization Is Preferable to Legalization*, 99 J. CRIM. L. & CRIMINOLOGY 1157, 1158–59 (2009).

60. *Id.* at 1159.

61. *Id.* at 1160–61.

62. *Id.* at 1181 (citing Unlawful Internet Gambling Enforcement Clarification and Implementation Act of 2008, H.R. 6663, 110th Cong. (2008)).



*D. Argument and Holding*

Iipay Nation challenged the district court ruling by asserting that DRB's "gaming activity" occurred on servers located on tribal lands and any activity conducted outside of its tribal lands was "merely pre-game communications" between the patron and his or her Designated Agent.<sup>63</sup> Iipay further argued that where there is ambiguity in the meaning of "gaming activity" or "on tribal lands," it must be construed in favor of the Tribe.<sup>64</sup> In turn, California argued there was no ambiguity within the meaning of "gaming activity," and the "gaming activity" in this case was the "patron's decision to wager money on the bingo game, which occurs off Indian lands."<sup>65</sup>

The Ninth Circuit held the "bet or wager" on the Iipay's server-based bingo game was in fact "gaming activity" that violated the UIGEA and did not fall within the protection of IGRA.<sup>66</sup> The district court based this determination on the rationale that, by clicking the "Submit Request!" button, "patrons were staking something of value on the outcome of the bingo game . . . ."<sup>67</sup> The proxy argument actually worked against Iipay in this case.<sup>68</sup> If clicking "Submit Request!" is not considered "gaming activity" within the meaning of IGRA, and is instead an administrative issue, it cannot be protected under IGRA.<sup>69</sup>

Next, Iipay argued that the UIGEA does not contain any substantive prohibitions on previously legal gambling and does not alter any tribal-state compacts. Put another way, if DRB would have been legal without the enactment of the UIGEA, it would remain legal after the passage of the Act.<sup>70</sup> This argument was also unavailing, as the court stated it could both be true that the UIGEA did not alter IGRA and that DRB violated the UIGEA.<sup>71</sup> Nodding to general statutory construction principles, the Ninth

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63. *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 965 (9th Cir. 2018).

64. *Id.* at 965-66; *see Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (noting that statutes should be interpreted in favor of Indian tribes and ambiguities resolved in their favor).

65. *Iipay Nation*, 898 F.3d at 966; *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 792 (2014) (contending that "gaming activity" under IGRA is "the gambling in the poker hall," as opposed to off-site licensing or operation of the games).

66. *Iipay Nation*, 898 F.3d at 966.

67. *Id.*

68. *Id.* at 967.

69. *Id.*

70. *Id.* at 968.

71. *Id.*

Circuit clarified that “absent a direct conflict, courts should give effect to co-existing federal statutes.”<sup>72</sup>

No direct conflict existed—or at least the court could not envision any direct conflict—between IGRA and the UIGEA to justify not giving effect to both statutes.<sup>73</sup> Since the UIGEA requires that bets placed over the Internet be legal both where initiated and where they are received, Iipay Nation violated the UIGEA because the “gaming activity” occurred off the reservation and violated state law.

### *III. Analysis and Discussion*

Iipay Nation of Santa Ysabel Tribe was one of the first tribes to offer Internet gambling by launching Desert Rose Bingo in 2014, but it is not the only tribe to challenge the legality of offering online Internet gambling services. The Ninth Circuit essentially held that the Tribe’s position argued against itself. This holding will quite possibly affect tribal efforts to legalize online Internet gaming going forward.

The legality of Internet gambling has changed drastically over the years, and it seems it will eventually result in legalization within the states.<sup>74</sup> “History shows that the technology is usually ahead of the regulation, and there is no clearer example of this than Internet gambling law.”<sup>75</sup> States and tribes are continually testing the boundaries and interplaying effects of the federal Internet gambling laws.<sup>76</sup> “While states have the power to regulate gambling policy within their borders, the federal government may step in if gambling activity crosses state or national borders through its power under the Commerce Clause of the Constitution.”<sup>77</sup> Congress has used its interstate commerce power to enact several federal statutes that apply to Internet gaming, but there remains substantial uncertainty with how federal law interacts with state law.<sup>78</sup>

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72. *Id.* (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992)).

73. *Id.*

74. Benjamin Miller, *The Regulation of Internet Gambling in the United States: It’s Time for the Federal Government to Deal the Cards*, 34 J. NAT’L ASS’N ADMIN. L. JUDICIARY 527, 528 (2014).

75. *Id.* at 530.

76. *Id.* at 528.

77. *Id.* at 532.

78. *Id.*

*A. Implications from California v. Iipay Nation of Santa Ysabel on IGRA*

IGRA's language explicitly provides governance over "gaming activity" located "on Indian lands."<sup>79</sup> "The fact that IGRA only governs gaming 'on Indian lands' is a crucial consideration for whether tribes can offer Internet gaming. If any gaming is found to occur off-reservation, then it will be subject to state regulation."<sup>80</sup> In addition to the geographical limitations within the statutory language, IGRA only permits the states to regulate Class II gaming, which is overseen by the National Indian Gaming Commission (NIGC).<sup>81</sup> If Internet usage transforms a game from Class II to Class III, the game will no longer be subject to IGRA and will instead be subject to a tribe's tribal-state compact and current state legislation.<sup>82</sup>

The holding in *California v. Iipay Nation of Santa Ysabel* makes it clear that "at least some of the 'gaming activity' associated with DRB does not occur on Indian lands and is thus not subject to Iipay's jurisdiction under IGRA."<sup>83</sup> The court ruling clarifies that, for IGRA to apply, a patron must be physically "on Indian lands" both when the bet is initiated and when it is accepted.<sup>84</sup> Since IGRA is not in effect because of the court's decision as to where the gaming occurs, IGRA does not shield DRB from violation of the UIGEA.<sup>85</sup> The UIGEA requires that a "bet or wager" be legal where it is placed and where it is received.<sup>86</sup> Therefore, the court's holding in *Iipay Nation* that some of the gaming occurred off the reservation subjects the Tribe's operations to state regulation.<sup>87</sup>

The district court in this case also held that online bingo would remain a Class II game, and the game would not transform into Class III simply because of the medium through which the game is offered.<sup>88</sup> If the court had held that the online bingo game was transformed into a Class III game, then the Iipay Nation's operations would be subject to the agreement within the tribal-state compact. At that point, the Tribe would have to negotiate the ability to engage in Internet gaming with the state in order to participate. Tribes have recently been successful in participating in Internet gambling

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79. 25 U.S.C. § 2701(5) (1988).

80. Staudenmaier & Carucci, *supra* note 45, at 23.

81. 25 U.S.C. § 2710(a)(2) (2012).

82. Staudenmaier & Carucci, *supra* note 45, at 23.

83. *California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 967 (9th Cir. 2018).

84. *Id.*

85. *Id.*

86. *Id.* at 965.

87. Staudenmaier & Carucci, *supra* note 45, at 23.

88. *Iipay Nation*, 898 F.3d at 964.

through tribal-state compacts. It is the states' discretion as to the agreement they reach with tribes in their tribal-state compacts, but there has been an increase in state approval of Internet gambling as states realize its potential benefits.

*B. Recent State Approval of Internet Gambling*

The Iowa Tribe of Oklahoma presents a different approach to establishing tribal authority to offer online gaming. The Iowa Tribe was recently approved by the Western District of Oklahoma to launch an online poker site that offers online gambling throughout the United States and internationally.<sup>89</sup> The issue was first presented to an arbitrator pursuant to the Gaming Compact the Tribe had with the State of Oklahoma.<sup>90</sup> The dispute presented for the arbitrator to resolve was:

Whether the use of the internet (worldwide web) to conduct a "covered game" (for free and real money play), when the players are located outside the boundaries of the State of Oklahoma/United States and its territories during the entirety of the gaming transaction, is authorized under the Compact.<sup>91</sup>

The arbitrator ruled in favor of the Tribe, stating, "use of the Internet is merely using technology to play covered games as a way to increase tribal revenues. It does not extend or restrict the scope of the games and does not amend the compact in any way."<sup>92</sup> The Iowa Tribe was able to achieve what the Iipay Nation of Santa Ysabel was unable to in California. As a result of this decision, tribes within the State of Oklahoma have the same opportunity to engage in online gambling.

The Western District of Oklahoma's decision to uphold the arbitration award marks a significant step forward for tribes to engage in online Internet gambling. "The Arbitration Award confirms the Tribe may engage in the offering of 'covered games' under the Gaming Compact originating on Tribal Lands."<sup>93</sup> While these agreements only allow for tribes to provide

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89. *See* Iowa Tribe of Oklahoma v. Oklahoma, No. 5:15-CV-01379-R, 2016 WL 1562976 (W.D. Okla. Apr. 18, 2016).

90. *Id.* at \*1.

91. *Id.* at \*2.

92. Brianna Bailey, *Small Iowa Tribe of Oklahoma Will Launch International Poker Website After Arbitrator's Ruling*, NEWSOK (Dec. 29, 2015, 12:00 AM), <https://newsok.com/article/5469553/small-iowa-tribe-of-oklahoma-will-launch-international-poker-website-after-arbitrators-ruling>.

93. *Iowa Tribe*, 2016 WL 1562976, at \*2.

Internet gaming internationally, they are taking steps toward a greater political acceptance of intrastate and interstate gambling.

*C. Proxy Play Theory in Action*

For Iipay Nation to have succeeded on its claim, it was not necessary for the Tribe's Internet gaming operations to comply with IGRA.<sup>94</sup> "If the state authorizes the tribe to accept online transactions from anywhere within the state, then the tribe operates pursuant to state law and IGRA is not implicated."<sup>95</sup> New Jersey was one of the first states to successfully implement statutorily created Internet gaming regulations that allow for the proxy play theory that Iipay Nation was unable to successfully use.<sup>96</sup> The New Jersey state statute provides that "Internet gaming . . . shall be deemed to take place where a casino's server is located in Atlantic City regardless of the player's physical location within this State."<sup>97</sup> This means that patrons may participate in Internet gambling anywhere within the state because it is legal both where the bet is placed and where the bet is received.

From this decision, New Jersey saw a large increase in tax revenue, but not as much as the State projected.<sup>98</sup> Morgan Stanley released a research report that estimated sixty percent of online gaming transactions within New Jersey were rejected because financial institutions still believed the transaction was a violation of the UIGEA.<sup>99</sup> The State has attributed the realization of a lower amount of revenues to the misconceptions surrounding what is and what is not a violation of the UIGEA.<sup>100</sup> The confusion surrounding the interplay between state law, IGRA, and the UIGEA is part of the reason New Jersey was unable to benefit from the expected revenue of permitting Internet gambling.

The Pala Band of Mission Indians made significant steps in online tribal gambling by taking advantage of New Jersey's proxy theory legislation. In 2014, the Pala became the first California tribe to host an online gambling

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94. White Hawk, *supra* note 41, at 74–75.

95. *Id.* at 75.

96. *See id.*

97. N.J. STAT. ANN. §§ 5:12–95.20 (West 2013).

98. Adrienne Lu, *Online Gambling Revenues Fall Short*, USA TODAY (June 24, 2014, 11:24 AM), <https://www.usatoday.com/story/news/nation/2014/06/24/stateline-online-gambling-revenues-fall-short/11306661/>.

99. *Id.*

100. *See id.*

site.<sup>101</sup> The Tribe received a license to launch a gambling site in New Jersey in alliance with Atlantic City's Borgata Hotel Casino & Spa.<sup>102</sup> This marked a huge step for tribal participation in Internet gambling, but it is still limited to New Jersey residents.<sup>103</sup> This Tribe has shown the possibilities of proxy play theory without state opposition. However, hurdles remain for tribes within states that have legalized Internet gaming. This is because of the misconceptions surrounding the legality of Internet gambling that have arisen due to a complicated and confusing regulatory scheme.

#### *IV. Implications of Federally Legalizing Internet Gaming*

Congress originally enacted IGRA as a means of providing statutory authority for Indian gaming "to promote tribal economic development, tribal self-sufficiency, and strong tribal government."<sup>104</sup> Similar to arguments made by *Iipay Nation*, some have posited that tribes have the right to offer Internet gaming services as long as the computer servers are located "on Indian lands" in order to maintain these same policy goals.<sup>105</sup> The National Indian Gaming Commission (NIGC) does not support this argument and has stated that the "use of the Internet, even though the computer server may be located on Indian lands, would constitute off-reservation gaming to the extent that any of the players were located off of Indian lands."<sup>106</sup> IGRA only regulates gaming that occurs "on Indian lands," and thus, IGRA would not protect any tribe allowing players to place wagers from a computer located outside of Indian Country.<sup>107</sup> This is consistent with the Ninth Circuit's holding in the litigation between California and *Iipay Nation*.<sup>108</sup>

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101. *Pala Band of Mission Indians Becomes First to Launch Online Gambling Site*, VALLEY ROADRUNNER (Dec. 10, 2014), <http://www.valleycenter.com/Articles-News-c-2014-12-10-90186.113122-Pala-Band-of-Mission-Indians-becomes-first-to-launch-online-gambling-site.html>.

102. *Id.*

103. *Id.*

104. White Hawk, *supra* note 41, at 49 (internal quotations omitted).

105. *Id.* at 77.

106. Letter from Kevin K. Washburn, Gen. Counsel, Nat'l Indian Gaming Comm'n, to Joseph M. Speck, Nic-A-Bob Prods. (Mar. 13, 2001), <https://www.nigc.gov/images/uploads/game-opinions/WIN%20Sports%20Betting%20Game-Class%20III.pdf>.

107. White Hawk, *supra* note 41, at 76.

108. *See generally* California v. *Iipay Nation of Santa Ysabel*, 898 F.3d 960 (9th Cir. 2018).

As a result, the court found Iipay Nation violated the Unlawful Internet Gambling Enforcement Act for “unlawful internet gaming.”<sup>109</sup> Tribes also face a similar risk of federal prosecution under the Travel Act or IGRA.<sup>110</sup> For this reason, in order for tribes to benefit from the federal legalization of Internet gaming, IGRA should be amended to allow for Internet gaming “on Indian lands” as long as the tribe’s computer servers are located within the reservation.<sup>111</sup> This would legalize Internet gaming at the federal level, and states would be left with the ability to choose whether or not they wish to legalize Internet gaming within their respective borders.

*A. Internet Gaming Should Be Legalized Federally, Allowing States to Choose*

State opt-outs for federally legalized Internet gaming solve many problems presented by the large discrepancies across states’ stances on gaming.<sup>112</sup> Given the various regulations on gaming, states should be allowed to opt in or out of Internet gaming within their jurisdictions.<sup>113</sup> “[F]ederal law[] ha[s] often been unclear, and [its] enforcement has been unpredictable and inconsistent. Regulation cannot operate effectively in this way if the goal is to maximize the benefits that the Internet gambling industry can offer the United States.”<sup>114</sup> Gambling has typically been viewed as reserved for state supervision.<sup>115</sup> States have the ability to individually decide whether to legalize and how to regulate gambling within their respective jurisdictions.<sup>116</sup>

Until recently, several states expressed confusion on whether the Wire Act of 1961<sup>117</sup> prohibited states from legalizing Internet gaming. In response to this confusion, the Office of Legal Counsel (OLC) released a memo that “opened the door for states to legalize Internet gambling, giving them freedom to explore the frontier of Internet gambling regulation.”<sup>118</sup> As

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109. *Id.*

110. White Hawk, *supra* note 41, at 77 (referencing the Travel Act of 1961, 18 U.S.C. § 1952 (2012)).

111. *Id.*

112. *Id.* at 73.

113. *Id.*

114. Miller, *supra* note 74, at 546.

115. Conon, *supra* note 59, at 1163.

116. *Id.*

117. 18 U.S.C. § 1084 (2012).

118. Miller, *supra* note 74, at 546 (referencing Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to

a result of the memo, three states have successfully legalized Internet gaming: Nevada, Delaware, and New Jersey.<sup>119</sup> With the recent trend in state legalization, it would be beneficial to clarify current federal law and create an overarching grant of federal authority for states to choose whether to opt in or opt out of legalizing Internet gambling.

In recent years, there have been multiple proposals for legalization and federal regulation of Internet gambling.<sup>120</sup> Some of these proposals include the Internet Gambling Regulation, Consumer Protection, and Enforcement Act of 2013,<sup>121</sup> the Internet Gambling Regulation and Tax Enforcement Act of 2013,<sup>122</sup> and the Internet Poker Freedom Act of 2013.<sup>123</sup> Each of these proposed bills and regulatory systems retain unique features that possess strengths and weaknesses for future legislation.<sup>124</sup> Any future federal proposals must clarify the existing federal law as to the legality of Internet gambling in order to provide the most efficiency.<sup>125</sup> Much of the existing federal law surrounding Internet gambling is unclear, and clarification of existing federal law would strengthen enforcement to ensure an effective system of regulation.<sup>126</sup>

The proposal must also address other primary concerns, including consumer protection, job creation, revenue taxation, and operations' licensing.<sup>127</sup> The benefits of legalizing and regulating Internet gambling are evidenced through numerous legislative findings and state statutes. As proposals for federal legislation arise, these elements will continue to be debated, and hopefully resolved, to provide for an effective means of regulation from which tribes and states may benefit.

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In-State Adults Violate the Wire Act, 35 Op. O.L.C. (Sept. 20, 2011), <http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

119. *See id.*

120. *Id.* at 558-62.

121. H.R. 2282, 113th Cong.

122. H.R. 3491, 113th Cong.

123. H.R. 2666, 113th Cong.

124. Miller, *supra* note 74, at 564.

125. *Id.* at 565.

126. *See* H.R. 2282 § 101(a)(7) ("Federal law needs to be updated to make clear its relationship to Internet gambling to strengthen enforcement and to ensure an effective Internet gambling enforcement structure . . .").

127. Miller, *supra* note 74, at 565.



### *B. Economic Development for Tribes*

Many tribes argue that Internet gaming “has the potential to create economic development opportunities for Indian Country.”<sup>128</sup> In 2009, it was estimated that Indian gaming raised \$26.5 billion in profit and provided over 600,000 people employment in jobs related to tribal gaming.<sup>129</sup> The money generated by Indian gaming was used to “build tribal independence, update existing infrastructure, fund education programs, and benefit tribal communities in many other positive ways.”<sup>130</sup> Indian gaming is estimated to control eighty-six percent of the total gaming market within the United States.<sup>131</sup> If tribes could profit from Internet gaming by the same percentage they gain from regular gaming, they could potentially generate \$2.5 billion in additional revenue.<sup>132</sup> This would drastically impact the economies of tribes around the country and further the same policies IGRA was originally designed to promote.

On the other hand, many tribes argue that Internet gaming is potentially harmful to tribal economic development. Tribes worry they may not receive the benefits of the increase in state-operated and state-licensed Internet gaming.<sup>133</sup> Gambling revenues are critical to the sustainability of tribal economies.<sup>134</sup> The revenue generated from brick-and-mortar casinos was intended to promote financial sustainability for tribes.<sup>135</sup> Tribes argue that states’ participation in online gaming will leave Indian tribes at a “competitive disadvantage because states will have larger markets for gaming than tribes.”<sup>136</sup> These tribes argue that Congress should grant tribes the ability to operate interstate Internet gaming sites in order to prevent states from realizing the majority of the benefits.<sup>137</sup> This would provide tribes the authority to participate in Internet gaming operations without the

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128. Caitlin McGarry, *Tribal Gaming Moving Online?*, TRIBAL GOVERNMENT GAMING, <https://tribalgovernmentgaming.com/article/tribal-gaming-moving-online/> (last visited Apr. 8, 2019).

129. Thompson, *supra* note 38, at 229.

130. *Id.*

131. *Id.*

132. *Id.*

133. I. Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line up to Place Their Bets*, 45 CONN. L. REV. 653, 688 (2012).

134. *Id.*

135. Dave Palermo, *Internet Gambling: Threat or Opportunity?*, INDIAN COUNTRY TODAY (Mar. 8, 2010), <https://web.archive.org/web/20100312075451/http://www.indiancountrytoday.com/national/86925867.html>.

136. Thompson, *supra* note 38, at 256.

137. *Id.*

added competition of state operations. This argument is consistent with the original policy motives of implementing IGRA and would further the economic development and self-sufficiency of tribes in states that elect to permit Internet gambling.

In an effort to further tribes' ability to participate in Internet gambling, the Tribal Internet Gaming Alliance (TIGA) was formed. This group is an intergovernmental organization designed to "facilitate, offer, regulate and promote legal internet gaming on behalf of its member tribes."<sup>138</sup> It also focuses on assisting its tribal members in maintaining the sole proprietary interest in Internet gaming.<sup>139</sup> TIGA has gained support over the years as tribes recognize the need to remain proactive as potential opportunities arise.<sup>140</sup> Organizations like TIGA help ensure that, if Internet gambling is federally legalized in the future, tribes do not lose out on any potential benefits by being forced to compete with state operations.

### *C. Effect on Tribal Compacts*

Currently, tribes may enter into compact agreements with the state to allow online gambling.<sup>141</sup> Since the Department of Justice Opinion on the Wire Act, the online gaming activity must only be legal where the bettor or operator is located.<sup>142</sup> This presents a huge opportunity for tribes to enter into compacts with states to participate in international gaming to reach jurisdictions where Internet gaming is legal.<sup>143</sup> "If a state legalized Internet bingo or poker, tribes could also conduct those games over the Internet, and would not need a tribal-state compact."<sup>144</sup> Patrons would still need to be present in a jurisdiction where the online gaming was legal, but there would no longer be the restriction of a required compact with the state in order to participate. State legalization would have a significant impact on tribal-state compacts. Currently, states that wish to allow Internet gaming may do so and may freely contract on types of revenue sharing agreements and regulations the tribes must follow to participate in Internet gambling.

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138. Treaty of the Tribal Internet Gaming Alliance (July 25, 2013), <https://turtletalk.files.wordpress.com/2013/10/tiga-treaty-final-2013-7-25.pdf>.

139. *Id.*

140. White Hawk, *supra* note 41, at 70-71.

141. Rose & Bolin, *supra* note 133, at 677-78.

142. *Id.* at 685.

143. *Id.*; see *Iowa Tribe of Oklahoma v. Oklahoma*, No. 5:15-CV-01379-R, 2016 WL 1562976 (W.D. Okla. Apr. 18, 2016).

144. Rose & Bolin, *supra* note 133, at 689-90.

Current revenue-sharing agreements between tribes and states within the tribal-state compacts are able to bring in millions of dollars a year in state and local taxes.<sup>145</sup> Furthering the revenue capabilities of the tribes through Internet gaming would allow states and tribes to enter into similar agreements to increase tax revenues.<sup>146</sup> The added protection of an overarching federal regulation over these compacts would mitigate any potential risk to American consumers.<sup>147</sup> Some states have already entered into these types of revenue sharing agreements, which have brought in a significant increase in overall revenues for the state.<sup>148</sup>

#### *D. State Benefits*

As Internet gaming legislation is expanding, states are looking at how this will impact raising revenue.<sup>149</sup> The few states that have implemented legislation permitting Internet gaming are benefiting tremendously from allowing tribes to participate in the operations. "Internet gaming is in high demand in the United States, as evidenced by the fact that Americans currently spend \$7 billion per year gaming online even with a tenuous legal status in the United States"<sup>150</sup> If structured correctly, states and tribes would benefit from federally permitted and regulated Internet gaming.<sup>151</sup> However, in the absence of federal regulation over Internet gaming, states individually regulate Internet gaming. There is a need for an overarching federal regulation to protect consumers and tribes from variations in state law.

States that oppose the legalization of Internet gaming are concerned with the inherent issues associated with gambling. One of the main issues with Internet gambling is how to keep underage users from participating.<sup>152</sup> Many online gambling websites do not have age verification processes in place, and the websites that do are "easily manipulated by minors."<sup>153</sup> States are also concerned with individuals who develop problems from irresponsible gambling that negatively impact personal relationships and finances.<sup>154</sup> Additionally, states are concerned with fraud by gambling site

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145. *Id.* at 689 n.236.

146. *Id.*

147. *Id.*

148. *Id.* at 692.

149. *Id.* at 685.

150. White Hawk, *supra* note 41, at 68.

151. *Id.*

152. Thompson, *supra* note 38, at 244.

153. *Id.* at 245.

154. *Id.*

operators.<sup>155</sup> In these instances of fraud, gaming sites may “fix” games to be unfair for participants, or other players may discover ways to cheat by hacking the site.<sup>156</sup> These online gaming sites can also be effective means for laundering money.

As a result of the UIGEA, online gaming has been pushed overseas where federal law enforcement is unable to reach. Consequently, this forces American consumers to use unregulated foreign Internet gambling sites.<sup>157</sup> States are left with “no recourse against offshore sites that provide gambling services to their residents.”<sup>158</sup> An overarching federal legalization would provide general regulations that Internet gaming sites must meet, which would mitigate the risks that concern states. States would be able to provide additional regulations over these sites that protect patrons and address their specific concerns. Federal legalization of Internet gaming, along with strict state and federal regulation, would provide more protection to American consumers than a ban on Internet gaming. Nevada has successfully implemented these types of regulatory schemes that specifically work to address the concerns of Internet gambling.

Nevada has long been known for its gambling operations. Home of Las Vegas, the state continues to be a leader in the legalization and regulation of the gambling industry.<sup>159</sup> Nevada was one of the first states to legalize online gaming in 2013.<sup>160</sup> The state statute requires fees to license and operate online gaming.<sup>161</sup> The cost of an initial license, which lasts for two years, is \$500,000, and license renewal fees cost \$250,000.<sup>162</sup> The costly licensing fees provide the state with the financial capacity to operate and regulate the Internet gaming operations. The revenues generated by online gaming are a significant factor the state takes into consideration when approving gambling operations.<sup>163</sup> The Nevada Gaming Commission, which was granted the power to oversee the administration and regulation of Internet gaming operations, is responsible for setting forth location and security standards for the computer systems.<sup>164</sup> These strict, technical

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155. *Id.*

156. *Id.* at 245–46.

157. *Id.* at 246–47.

158. *Id.* (citing MALCOLM K. SPARROW, CAN INTERNET GAMBLING BE EFFECTIVELY REGULATED? MANAGING THE RISKS 46 (2009)).

159. Miller, *supra* note 74, at 547.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 548.

164. *Id.* at 549.

compliance and licensing regulations are instrumental for the state to “ensure the protection of consumers, including minors and vulnerable persons, prevent fraud, guard against underage and problem gambling, avoid unauthorized use by persons located in jurisdictions that do not authorize interactive gaming[,] and aid in law enforcement.”<sup>165</sup> Nevada has taken into consideration and mitigated the risks of the policy concerns regarding Internet gambling. Similar regulatory safeguards should be implemented in any future federal regulatory system.

Over the years, there has been a significant increase in support of legalizing Internet gambling by the states. This is largely due to the potential benefits of additional revenue. As more states begin implementing legislation to allow for Internet gambling, federal regulation should seek to resolve discrepancies in regulatory schemes from state to state and ensure that states are taking appropriate measures to provide safe, efficient Internet gaming operations.

#### V. Conclusion

The holding in *California v. Iipay Nation of Santa Ysabel* helped resolve some of the confusion surrounding state and federal law regarding Internet gaming. The court held that the language “on Indian lands” within IGRA means the betting must be legal both where it is placed and where it is received. It also identified that gaming activity occurs off of Indian lands by the placement of a bet or wager. Therefore, if state legislation does not allow Internet gambling, a tribe’s operations are not legal. The district court in this case also ruled out the notion that gaming over the Internet is transformed from Class II to Class III gaming. This case is monumental in helping clarify some of the vague language within IGRA and the UIGEA.

Even though *Iipay Nation of Santa Ysabel* lost in California, that does not mean tribes should give up hope in creating and participating in legalized Internet gaming. There are many different avenues that have permitted other tribes to establish similar Internet gaming facilities. Many tribes have successfully established Internet gaming operations in other states. As states continue to legalize Internet gaming, this type of gaming will only increase in popularity over the years.

Internet gaming provides a number of immense benefits waiting to be realized for tribes, as well as states. Increased revenues from regulated Internet gaming promotes tribal economic independence that could have a tremendous impact on tribes. States would enjoy the profits of Internet

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165. *Id.* (citing NEV. REV. STAT. § 463.745(2) (2013)).

gaming through revenue-sharing agreements in tribal-state compacts. By bringing offshore Internet gaming back to the United States, states would also provide American consumers with protection through legislative regulation and address the policy concerns associated with Internet gaming.