

TRIBAL SOVEREIGNTY AND FINTECH REGULATIONS: THE FUTURE OF CO-REGULATING IN INDIAN COUNTRY

Jenadee Nanini*

CITE AS: 1 GEO. L. TECH. REV. 503 (2017)

<https://perma.cc/A3HQ-V772>

Native American tribes possess something special—tribal sovereignty.¹ “Tribal sovereignty includes tribes’ right to govern themselves, define their own membership, manage tribal property, and regulate tribal business and domestic relations.”² Tribal sovereignty also recognizes the existence of a government-to-government relationship between tribes and the U.S. government.³ This relationship often complicates the intersection of tribal, state, and federal law. This is increasingly true in a world connected online. Specifically, it has spurred debate in regard to online lending and co-regulation of financial technology in Indian Country.⁴ While tribes try to grow their economies through financial technology opportunities, outside third parties are seizing the opportunity to exploit tribal sovereignty and immunity as a means to make large profits “on” the reservation via the internet through online “rent-a-tribe”⁵ models. Tribes must be able to regulate these online

* GLTR Staff Member; Georgetown Law, J.D. expected 2017; Washington State University, B.S. 2011. © 2017, Jenadee Nanini.

¹ Today, there are 567 federally recognized American Indian and Alaska Native tribes and villages. See *Frequently Asked Questions*, U.S. DEP’T OF THE INTERIOR INDIAN AFFAIRS (Feb. 12, 2017, 11:04 AM), <https://www.bia.gov/FAQs/> [<https://perma.cc/F5TE-64WL>].

² *Tribal Sovereignty*, LEADERSHIP CONF., <http://www.civilrights.org/indigenous/tribal-sovereignty/> (last visited Feb. 12, 2017) [<https://perma.cc/8GA7-BVQ7>].

³ *Id.*

⁴ See 18 USCS § 1151 (the term “Indian country” is defined as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same”).

⁵ Ben McLannahan, *US Authorities in Crackdown on “Rent-a-Tribe” Payday Lenders*, FIN. TIMES (June 28, 2015), <https://www.ft.com/content/82ca6198-1dc3-11e5-aa5a-398b2169cf79>, [<https://perma.cc/J2WB-LC37>] (“Rent-a-tribe models refer to lenders that start on Indian Reservations to bypass state laws that regulate high-interest loans. Lenders will partner with a small and cash-strapped Native American community and offer loans over the internet, bypassing state interest-rate caps and other restrictions by claiming sovereign immunity.”).

financial entities because the impact is imminent and the need for financial technology is Indian Country is a means of survival for the tribe.

Economic development in Indian Country is scarce.⁶ Tribes are typically located in isolated areas and are becoming more dependent on technology advancements and e-commerce to maintain economic sustainability and connectivity. Economic stability in Indian Country often comes from gaming which alone is at least a \$30 billion-dollar industry,⁷ federal funding, and more recently from e-commerce and other internet businesses. A growing need to increase the number of tribal entities online, build tribes' economic status, and engage with online lending naturally drives tribes to engage in financial technology ventures.

Tribes have been quick to embrace financial technology in Indian Country. Tribes located in remote areas without sufficient traffic to engage profitably in casino gambling have found revenue from consumer lending over the internet for example.⁸ Some tribes regulate tribal enterprises, provide online lending, educate and protect consumers, and use financial technology to increase tribal lending opportunities. Many tribes have created individual tribal lending entities (hereinafter "TLE"), which are typically tribal chartered and funded by a third party.⁹ TLEs make loans over the internet to consumers throughout the United States.¹⁰ These loans may be on terms that are unlawful under state laws where the borrowers reside.¹¹ Tribes aim to gain revenue through these ventures and to adequately regulate the practice. However, due to the lack of funding, tribes need a third party to fund these entities. The third

⁶ Native American tribes in the United States face many socio-economic deficits compared to other minority and white peers. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW [§ 21.04] (Nell Jessup Newton ed., 2015) (in 2005, the average unemployment rate for Indians on or near reservations was 49%); see also ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY, 7 (West Academic, 3rd ed. 2015) (in 2006, Native Americans were found to be poorer than their white peers with 27% below the poverty line).

⁷ Martin Owens, *Could US Indian Tribes Set up Their Own Internet Gambling?*, CALVIN AYRE (July 1, 2015), <http://calvinayre.com/2015/07/01/business/could-us-indian-tribes-set-up-their-own-internet-gambling/> [<https://perma.cc/9TAC-MFBA>].

⁸ Hilary B. Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, AM. BAR ASS'N: BUS. L. TODAY (Mar. 2013), http://www.americanbar.org/publications/blt/2013/03/04_miller.html [<https://perma.cc/XF2Z-ES3C>].

⁹ *Id.* (TLEs are financed by a third party and because TLEs are deemed an "arm" of the tribe, TLEs benefits from the tribe's sovereign immunity).

¹⁰ *Id.*

¹¹ *Id.*

parties capitalize on this model, earning massive profits and circumventing state laws—using the location of the tribes.¹²

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to recover from the financial crisis in 2008.¹³ The Dodd-Frank Act directed the Consumer Financial Protection Bureau (CFPB) to respect the status of tribal governments as co-regulators and to allow tribes to oversee e-commerce businesses and protect consumers.¹⁴ Prior to the Dodd-Frank Act, “federal enforcement of substantive consumer lending laws against non-depository payday lenders was generally limited to civil prosecution by the Federal Trade Commission (FTC).”¹⁵ However, no reported decisions could be found regarding the FTC’s assertion of jurisdiction over TLEs.¹⁶ Thus, CFPB now is in new terrain with no precedent of asserting jurisdiction of TLEs in Indian Country. TLEs are considered “covered persons” under the Act.¹⁷ However, tribes are not stated in the definition of “covered persons.”¹⁸ In fact, tribes likely will argue given their sovereignty, tribes alone have the power to decide whether to and on what terms they may lend to others online.¹⁹ Currently, three tribal lenders are asking that the Ninth Circuit halt the mandate to comply with civil investigation demands by the CFPB.²⁰ The tribal lending companies plan to

¹² Paul Walsh & Neal St. Anthony, *State Bars Internet Lender, Wins \$11.7M Settlement Over 'Rent-Tribe' Loans*, STAR TRIBUNE (Aug. 18, 2016), <http://www.startribune.com/state-bars-internet-lender-wins-11-7m-settlement-over-rent-a-tribe-loans/390577961/> [<https://perma.cc/53GT-P97J>] (providing an example in which CashCall Inc. collected payments that were higher than allowed by state law through a rent-a-tribe model).

¹³ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010).

¹⁴ John R. Shotton, *Tribes Holding Up Their End of the Bargain on Fintech Regulations*, HILL (June 2, 2016), <http://thehill.com/blogs/congress-blog/economy-budget/282013-tribes-holding-up-their-end-of-the-bargain-on-fintech> [<https://perma.cc/DHF8-378U>].

¹⁵ See Miller *supra* note 8 (these were of unfair and deceptive acts and practices (UDAP) proscribed by federal law).

¹⁶ *Id.*

¹⁷ Dodd-Frank Act, *supra* note 13, at Sec. 410(2)(b).

¹⁸ *Id.*

¹⁹ See Miller *supra* note 8 (presenting reasons why tribes may argue CFPB cannot assert jurisdiction over TLEs. For example, tribes may further argue “*a fortiori* that tribes are “states” within the meaning of Section 1002(27) of the Act and thus are co-sovereigns with whom supervision is to be coordinated.”).

²⁰ Andrew Westney, *Tribal Lenders Ask 9th Circ. To Pause OK of CFPB Probe*, LAW360 (Apr. 12, 2017), <https://www.law360.com/articles/912882/tribal-lenders-ask-9th-circ-to-pause-ok-of-cfpb-probe> [<https://perma.cc/37ZK-B3RW>].

take the split decisions regarding the question of the proper structure of CFPB's authority under the Consumer Financial Protection Act over tribes and tribal companies to the Supreme Court.²¹

In 2012, the Native American Financial Services Association (“NAFSA”) was formed in order to advocate for Native American sovereign rights to regulate and to enable tribes to offer responsible online lending products.²² This would allow tribal regulators to control the exploitation of financial technology issues such as the “rent-a-tribe” model. Through the protection of consumer rights and sovereign immunity, NAFSA “provides vital services to tribally operated lenders serving the under-banked with better short term financial services, furthering economic development opportunities in Indian Country.”²³ This entity has become vital in facilitating tribes’ co-regulation in areas such as online lending. Nonetheless, as technology advances, the federal government continues to increase oversight. For example, in 2016 the Office of the Comptroller of the Currency (OCC) released “Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective” to support responsible innovation in the federal banking system.²⁴ To adjust to the ever-changing laws, regulations, and technology some tribes have followed suit and developed their own regulations or commissions. For example, the Otoe-Missouria Tribe established the Consumer Finance Services Regulatory Commission to protect consumers and online lending businesses, which other tribes have also done.²⁵ In 2016, the

²¹ *Id.*

²² Native American Financial Services Association, *Native American Tribes to Congress: Respect Our Sovereignty*, PR NEWSWIRE (Feb. 11, 2016), <http://www.prnewswire.com/news-releases/native-american-tribes-to-congress-respect-our-sovereignty-300219044.html> [<https://perma.cc/4HKN-GU2G>].

²³ *Id.* (Barry Brandon, Executive Director of NAFSA noted that Dodd-Frank, the legislation that created the CFPB, specifically assigns co-regulator status to tribal nations).

²⁴ For example, in 2016 the Office of the Comptroller of the Currency (OCC) released “Supporting Responsible Innovation in the Federal Banking System: An OCC Perspective” to support responsible innovation in the federal banking system. *See* Mitchell S. Eitel, *Regulatory Guidance Regarding FinTech Products and Services*, SULLIVAN & CROMWELL LLP (Apr. 5, 2016), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Regulatory_Guidance_Regarding_FinTech_Products_and_Services.pdf [<https://perma.cc/D48K-WD68>]; *see also* OFFICE OF THE COMPTROLLER OF THE CURRENCY, SUPPORTING RESPONSIBLE INNOVATION IN THE FEDERAL BANKING SYSTEM: AN OCC PERSPECTIVE (Mar. 31, 2016), <http://occ.gov/publications/publications-by-type/other-publications-reports/pub-responsible-innovation-banking-system-occ-perspective.pdf> [<https://perma.cc/F9SP-D3T5>].

²⁵ *See* Shotton, *supra* note 14.

Tunica Biloxi Tribe of Louisiana started a regulatory commission to oversee tribal consumer lending.²⁶ The tribe recognized that the federal government has taken the role in lending through the Consumer Financial Protection Bureau (CFPB), and so that is the model the tribe looked at.²⁷

In 2016, tribes actively continued to request that the United States Congress honor tribal sovereignty and ensure the CFPB does as well with any rule they produce on short-term lending.²⁸ Tribes can sufficiently regulate online lending themselves. John R. Sotton, Chairman of the Otoe-Missouria Tribe, stated in *The Hill*, “As sovereign nations it is time for Washington [D.C.] to recognize that our businesses are not only legal and lawful, but have strict regulations already in place providing oversight of our tribal enterprises and ensuring consumers are protected.”²⁹ Moreover, Sherry Treppa, Chairperson of the Habematolel Pomo of Upper Lake, stated that she remains “concerned that the CFPB is developing its proposed action in a vacuum without consulting with tribes to learn about the innumerable tools that we have developed...”³⁰ She too urged Congress to “take an approach that respects tribal sovereignty and one that takes account of both consumer need and the robust self-regulation that sovereign tribes have established.”³¹

Tribes should be allowed to regulate or co-regulate in the financial technology space when the tribe has created tribal laws and commissions that are consistent with federal regulations. Tribes are in the best position to understand and guard against “rent-a-tribe”³² models. Many outside lenders take advantage of tribes and sovereign immunity. For example, CashCall tried to exploit state lending laws and limits by conducting business on reservations.³³ The U.S. District Court for the Central District of California

²⁶ Mark Fogarty, *Tunica Biloxi Launches Consumer Lending Regulatory Commission*, INDIAN COUNTRY MEDIA NETWORK (April 13, 2016), <https://indiancountrymedianetwork.com/travel/tunica-biloxi-launches-consumer-lending-regulatory-commission/> [<https://perma.cc/32RZ-XKHZ>].

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Shotton, *supra* note 14.

³⁰ See Native American Financial Services Association, *supra* note 22.

³¹ *Id.*

³² See McLannahan, *supra* note 5.

³³ See *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. CV 15-7522-JFW (RAOx), 2016 U.S. Dist. LEXIS 130584 (C.D. Cal. Aug. 31, 2016) (holding that CashCall Inc. violated federal law when it offered high-interest loans through a firm based on tribal lands in states where such loans were barred).

recently ruled against such behavior in a win for CFPB.³⁴ This presents a typical scheme with online lending that the tribe should be able to regulate or co-regulate to prevent.

Amid fast-paced change surrounding the Dodd-Frank Act,³⁵ the right for tribes to co-regulate will be an issue in e-commerce and financial technology to watch. Most recently, President Trump signed an executive order to erode much of the Dodd-Frank Act. Trump directed his Treasury Secretary nominee to draft a report within 120 days identifying laws, treaties and regulations that conflict with his de-regulatory principles.³⁶ Results of the new administration's actions could potentially impede or erode the tribal right to co-regulate and will impact the ability of tribes to control their own e-commerce. Given that tribes have unique needs and practices, local control over the sovereign nation and their own entities makes sense. A change to local control could impact how tribes interact with outside players, manage short-term lending, and a rollback could be detrimental to their economic status if tribal needs are not accurately calculated by federal regulations. Arguably, tribes know their industries best and will be able to develop regulations specific to each tribe more effectively. A sovereign nation that meets regulation standards and regulates their own entities sufficiently should be able to act parallel to a federal regulation that does the same thing. We should continue to honestly follow the CFPB Tribal Consultation policy³⁷ as federal regulations advance and allow co-regulation with tribes.

³⁴ *Id.*

³⁵ Antoine Gara, *With A Stroke Of The Pen, Donald Trump Aims To Wave Goodbye To The Dodd Frank Act*, FORBES (Feb. 3, 2017), <http://www.forbes.com/forbes/welcome/?toURL=http://www.forbes.com/sites/antoinegara/2017/02/03/with-a-stroke-of-the-pen-donald-trump-will-wave-goodbye-to-the-dodd-frank-act/&refURL=https://www.google.com/&referrer=https://www.google.com/> [https://perma.cc/L9DR-3MMG]; *see also* Exec. Order No. 13772, 82 FR 9965 (Feb. 8, 2017), <https://www.federalregister.gov/documents/2017/02/08/2017-02762/core-principles-for-regulating-the-united-states-financial-system> [https://perma.cc/WL8B-HTAU].

³⁶ *Id.*

³⁷ CONSUMER FIN. PROT. BUREAU, TRIBAL CONSULTATION POLICY (Apr. 22, 2013), http://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf [https://perma.cc/H55Q-JKXK].