

BETTING THE OPENING LINE

IS SPORTS BETTING IN THE CARDS FOR ARIZONA?



BY HEIDI McNEIL STAUDENMAIER & ED HERMES

IN SPORTS BETTING LINGO, THE “OPENING LINE” IS THE FIRST POINT SPREAD AVAILABLE FOR A GAME AND IS SUBJECT TO CHANGE BASED ON HOW INITIAL BETS ARE PLACED AND ON CHANGES IN GAME-TIME CONDITIONS. IN 2018, THE U.S. SUPREME COURT STRUCK A LONGSTANDING FEDERAL BAN ON MOST STATES AND TRIBES ENGAGING IN SPORTS BETTING. IN THE WAKE OF THIS MAJOR CHANGE, MANY STATES AND TRIBES ARE CONSIDERING CHANGES TO THEIR LAWS, CONSTITUTIONS AND GAMING COMPACTS TO ADD SPORTS BOOKS TO THEIR CASINO OPERATIONS. THIS ARTICLE TAKES STOCK OF THE STATE OF THE LAW IN ARIZONA AFTER *MURPHY V. NAT’L COLLEGIATE ATHLETIC ASS’N*¹ AND ANALYZES THE POSSIBILITY FOR CHANGES TO ARIZONA LAW AND TO THE ARIZONA TRIBAL COMPACTS TO LEGALIZE SPORTS BETTING IN ARIZONA.

THE FEDERAL FRAMEWORK BEFORE *MURPHY*

In 1988, Congress passed the Indian Gaming Regulatory Act (“IGRA”) in an attempt to provide for federal regulation of tribal gaming and “to promote tribal economic development, tribal self-sufficiency, and strong tribal government.”² IGRA categorized gaming into three classes.³ Class I games are traditional Indian games and are under the complete jurisdiction of Tribes.⁴ Class II games are non-table games, such as bingo, and are regulated by the Tribe with oversight from the federal government through the National Indian Gaming Commission (“NIGC”), so long as the state in which the Tribe is located permits such gaming for any purpose.⁵



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tion of a few states that had already legalized sports betting, such as Nevada.⁹ PASPA also expressly prohibited sports gambling on Indian lands.¹⁰ For the next 26 years, PASPA prohibited Tribes and most states from engaging in or authorizing sports betting.

STATES EXPAND SPORTS BETTING

In 2011 and again in 2014, in an effort to boost New Jersey's fledgling casinos, New Jersey enacted sports gaming legislation to authorize sports betting at New Jersey casinos and challenged the constitutionality of PASPA.¹¹ On May 14, 2018, the U.S. Supreme Court struck down PASPA in *Murphy v. Nat'l Collegiate Athletic Ass'n*.¹² The Court held that PASPA violated the anti-commandeering principle of the Constitution because it "unequivocally dictate[d] what a state legislature may and may not do" and equated it to Congress issuing a "direct order to state legislatures."¹³

While Tribes are central to casino gaming in the United States, the U.S. Supreme Court opinion mentions Tribal gaming only once—to briefly note "the enactment of the Indian Gaming Regulatory Act in 1988" and the positive effect the Act had on the proliferation of Tribal casinos.¹⁴

With PASPA no longer in place, the expansion of legalized sports betting quickly grew. Within two years, 16 states legalized some form of sports gambling.¹⁵

On October 16, 2018, the Santa Ana

Star Casino Hotel, a casino owned by the Pueblo of Santa Ana in New Mexico, booked its first sports bet in partnership with Nevada-based USBookmaking.¹⁶ The Pueblo of Santa Ana was able to offer sports betting quickly after *Murphy* because its state compact already permitted "any or all forms of Class III gaming"; as such, the Tribe did not need to negotiate or amend its state compact.¹⁷ This is unlike the Arizona Tribal Compacts, which restrict Tribal gaming to specific types of Class III gaming.¹⁸

On July 26, 2019, North Carolina passed a law to allow sports and horse race wagering on Tribal lands so long as all bettors make their wagers in-person at a Tribal casino.¹⁹ Similarly, on March 25, 2020, Washington passed a law to permit sports wagering at Class III Tribal casinos so long as wagers are made on-site at Tribal casinos.²⁰

By the end of 2020, it is possible a majority of U.S. states and territories (including Washington, D.C., and Puerto Rico),²¹ will have legalized sports betting.²²

INDIAN GAMING FRAMEWORK IN ARIZONA

The first four years after IGRA's passage marked an especially tumultuous period of strife between Arizona and Tribes that sought to operate Class III gaming on their Tribal lands. Following legal challenges and high-stakes disputes between the state and Tribes, a compromise was ultimately struck. Sixteen Arizona Tribes entered into com-

Games commonly played at casinos, such as slot machines, blackjack, craps and roulette, are considered Class III games under IGRA.⁶ IGRA restricts Tribal authority to conduct Class III gaming unless the Tribe and state negotiate a Tribal-State Gaming Compact that has been approved by the U.S. Secretary of the Interior.⁷ Although sports betting is not specifically mentioned in IGRA, the NIGC has stated that sports betting is a "Class III form of gaming," meaning "it may be played only pursuant to a Tribal-State Compact" and only if the relevant state and federal law allow it.⁸

In 1992, Congress passed the Professional and Amateur Sports Protection Act ("PASPA"), which outlawed sports gambling in the United States with the excep-



pacts with the state between 1992 to 1994.²³ These initial compacts were in effect from 1993 to 2003.²⁴

In 2002, Arizona voters approved Proposition 202, which authorized the continuation of Tribal gaming pursuant to new gaming compacts, and expanded the Tribes' ability to engage in Class III gaming.²⁵ In 2002 and 2003, the state signed gaming compacts with 21 of the 22 Tribes located in Arizona ("Compacts").²⁶ The Compacts are substantially identical and lasted for an initial term of 10 years.²⁷

The Compacts were automatically renewed for an additional 10-year term in 2013. After the expiration of an additional 10-year term, the Compacts:

shall thereafter be extended for an additional renewal term of three (3) years in order to provide the parties with an opportunity to negotiate new or amended Compact terms, unless the State or the Tribe notifies the other in writing ... that it does not intend to renew the Compact because of substantial non-compliance.²⁸

The current Compacts authorize only specifically enumerated types of Class III gaming, including gaming devices (such as slot machines), keno, off-track horse or dog race wagering, blackjack, poker and lottery.²⁹ Other types of Class III gaming not expressly listed as authorized in the Compacts are prohibited.³⁰ Most notably, craps, roulette and sports betting are not authorized in the Compacts and are therefore prohibited under IGRA.³¹

Under the Compacts, Tribes agreed to make contributions of a set percentage of net winnings generated by Class III gaming to state and local governments.³² Between 2004 and 2014, the Tribal casinos contributed \$1.1 billion to Arizona state and local governments.³³

THE OPPORTUNITY FOR ARIZONA SPORTS BETTING

Because sports betting is a form of Class III gaming that is prohibited under Arizona state law and not authorized in the exist-

ing Compacts, Arizona law and the Compacts would have to be amended to permit sports betting at the Tribal casinos.³⁴ As of May 2020, no state legislation permitting sports betting had been successfully passed. It is possible that efforts seeking to legalize sports betting in Arizona may continue in the future.

Recognizing the interest in Tribally operated sport books, on January 29, 2020,

TRIBES HAVE CONSIDERED GAMING AND SPORTS BETTING THAT ALLOWS CUSTOMERS TO PLACE BETS REMOTELY OFF-RESERVATION THROUGH THE INTERNET, BUT CURRENT LAW WOULD LIKELY PROHIBIT SUCH OFF-RESERVATION BETTING.

the NIGC issued guidance for Tribes seeking to run sports books through Tribal-State Compacts.³⁵ The NIGC provided four options or models for Tribes to consider in operating a sports betting operation: (1) a sports book wholly owned and operated by the Tribe; (2) a Tribally owned sports book with data and consultation provided by third parties; (3) a managed sports book; or (4) an individually owned sports book.³⁶

Given that "[s]ports betting is a data heavy industry that requires constant processing of a significant amount of sports related statistics," the NIGC encourages Tribes to consider Options 2 or 3—that is, hiring a third-party vendor to provide such services.³⁷ In such a case, IGRA and the NIGC regulations require all management agreements to be submitted to the NIGC for approval, and any unapproved management agreement is void.³⁸

WAGERING OUTSIDE INDIAN TRUST LANDS

Even before *Murphy*, Tribes have considered gaming and sports betting that allows customers to place bets remotely off-reservation through the internet.³⁹ However, the NIGC has repeatedly stated that IGRA "does not authorize off-reservation gaming ... [i]ncluding via the use of the Internet, even though the computer server may be


located on Indian lands."⁴⁰ The NIGC's current position is that the bettor must be physically on the Indian lands to make a sports wager because IGRA only allows gaming on Indian lands.⁴¹

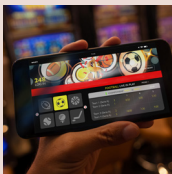
Tribes seeking to engage in internet-based sports betting also must navigate the Unlawful Internet Gambling Enforcement Act ("UIGEA"), passed to regulate online gambling.⁴² Unlike IGRA, the UIGEA does not make gambling legal or illegal directly; rather, it creates a system in which a "bet or wager" must be legal both where it is "initiated" and where it is "received."⁴³

In *State of California v. Iipay Nation of Santa Ysabel*,⁴⁴ the Ninth Circuit decided whether IGRA and UIGEA prevented the Iipay Nation from operating a server-based bingo game over the internet. The Ninth Circuit held that

both the UIGEA and IGRA prohibited the Tribe from doing so because the bets were initiated via a mobile device off-reservation where the gaming was unauthorized because IGRA limits tribal gaming to placing bets on Indian lands.⁴⁵ The Ninth Circuit further held that Congress expressly meant to apply the UIGEA to prevent off-reservation betting.⁴⁶ The Court reasoned that when Congress exempted bets or wagers "initiated and received or otherwise made exclusively" on tribal land (31 U.S.C. § 5362(10)(C)), Congress meant to prohibit wagers initiated off-reservation.⁴⁷

Similarly, IGRA and the UIGEA, at least as they are currently interpreted by the NIGC and the Ninth Circuit, would likely prohibit Arizona Tribes from allowing their patrons to make sports bets from their off-reservation homes. If the Arizona Tribal Compacts are amended to allow for sports betting, those bets likely would still need to be placed in person at a Tribal casino or otherwise on Tribal lands.

The area of sports betting continues to evolve as more states and Tribal gaming operations change or amend their laws or compacts to permit this additional form of gambling. How and whether Arizona determines to join the sports betting world also is likely to continue to evolve through 2020 and into 2021, if not beyond. 



endnotes

1. 138 S. Ct. 1461 (2018).
2. 25 U.S.C. §§ 2701-2721.
3. *Id.* § 2703(6), (7), (8).
4. *Id.* §§ 2703(6), 2710(a).
5. *Id.* U.S.C. §§ 2703(7), 2706(b), 2710(a)-(b).
6. *Id.* U.S.C. § 2703(7).
7. *Id.* U.S.C. § 2710(d).
8. See Kevin K. Washburn, Nat'l Indian Gaming Comm'n, Opinion Letter on WIN Sports Betting Game (March 13, 2001), <https://bit.ly/3ecoal8>.
9. 28 U.S.C. §§ 3702-3704.
10. *Id.* U.S.C. § 3704(b).
11. Haley Maynard, *What Are the Odds? The Potential for Tribal Control of Sports Gambling After Murphy v. NCAA*, 44 AM. INDIAN L. REV. 141, 147-149 (2019).
12. 138 S. Ct. 1461 (2018).
13. *Murphy*, 138 S. Ct. 1461, 1478, 1481-82.
14. *Id.* at 1469.
15. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Mar. 26, 2020), <https://es.pn/2AD1pZV>.
16. Press Release, Santa Ana Star Casino Hotel, *Santa Ana Star Casino Hotel First to Open Sportsbook in New Mexico* (Oct. 16, 2018), <https://bit.ly/37LE0kX>.
17. *Id.*; N.M. Stat. Ann. app. § 13 (effective as to the Pueblo of Santa Ana Dec. 30, 2016).
18. See A.R.S. § 5-601.02 (restricting Class III gaming in Arizona to specific types of gaming).
19. Steve Wiseman, *Lawmakers Pass Bill to Legalize Sports Betting at NC Tribal Casinos*, THE NEWS & OBSERVER (July 15, 2019), <https://bit.ly/2N4WaEK>; see also Rodenberg, *supra* note 15; S.B. 154, 2019 Gen. Ass., Reg. Sess. (N.C. 2019), 2019 N.C. Sess. Laws 163.
20. Adam Candee, *Washington Sports Betting First to Legalize in 2020 as Inslee Signs Bill*, LEGAL SPORTS REP. (Mar. 25, 2020), <https://bit.ly/2NemMmF>; see also Rodenberg, *supra* note 15; H.B. 2638, 66th Leg., Reg. Sess. (Wash. 2020).
21. *Amid Chaos in the American Commonwealth, Puerto Rico Legalizes Sports Betting*, YOGONET GAMING NEWS, <https://bit.ly/3hyzaMx> (last visited Apr. 7, 2020).
22. Rodenberg, *supra* note 15.
23. See Ariz. Dep't of Gaming, *Taking a Gamble: A History of Indian Gaming in Arizona*, AZ BIG MEDIA, May 18, 2011, <https://bit.ly/3fy9WMm>.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*; A.R.S. § 5-601.02.
29. A.R.S. § 5-601.02(C).
30. See *id.*
31. See generally *id.*
32. *Id.*
33. Jonathan B. Taylor, *The Economic Impact of Tribal Gaming in Arizona*, 2014, at 14 (2015), <https://bit.ly/37GwnfE>.
34. See Washburn, *supra* note 8.
35. NAT'L INDIAN GAMING COMM'N, BULL. NO. 2020-1, IGRA AND SPORTS BOOK OPERATIONS (2020), <https://bit.ly/2YRY950>.
36. *Id.* at 1-3.
37. *Id.* at 3.
38. 25 C.F.R. § 533.7.
39. See generally Washburn, *supra* note 8.
40. *Id.* at 3.
41. See *id.*
42. 31 U.S.C. §§ 5361-5367.
43. *Id.* § 5362(10).
44. 898 F.3d 960 (9th Cir. 2018).
45. *Id.* at 968-69.
46. *Id.* at 968.
47. *Id.*