



# SPORTS BETTING & TRIBAL GAMING IN THE WEST:

## ARIZONA, CALIFORNIA AND NEW MEXICO

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### ARIZONA

Now that sports betting is effectively legal under federal law as a result of the U.S. Supreme Court's decision in May, many states are in the process of evaluating whether to legalize sports betting within their borders. Arizona is no exception. Under Arizona law, gambling—including sports betting—is still, for the most part, illegal.<sup>1</sup> Regulated gambling, including gambling “conducted in accordance with a tribal-state gaming compact,” is not illegal, however, so long as the gambling is conducted in accordance with state law.<sup>2</sup>

Since 2002, twenty-two tribes have entered into gaming compacts with Arizona.<sup>3</sup> The compacts give Tribes the exclusive right to operate Class III gaming, which includes blackjack, poker, keno, and most other “Las Vegas Style” games.<sup>4</sup> In exchange for this exclusive right, participating Arizona Tribes contribute a share of their Class III gaming revenue to the state.<sup>5</sup> Notably, sports betting is not listed under the permissible Class III games in the compact, so as of now, neither the Tribes nor anyone else in Arizona can legally operate sports betting.

What needs to happen before sports betting can be conducted legally in Arizona? From the Tribes' perspective, they need an amendment to their current compacts which will require state agreement and approval from the Secretary of the Interior. For the state to conduct sports betting, state law needs to be changed and the current exclusivity provisions of the tribal gaming compacts need to be considered.

Both the state and some of the Tribes have indicated that they would be open to negotiating this point. After the Court issued its decision in *Murphy*, Governor Doug Ducey tweeted that the Court's ruling is “positive news” and that Arizona had been “working on a modernized gaming compact.”<sup>6</sup> Gov. Ducey also stated that *Murphy* could “give[] Arizona options that could benefit [its] citizens and [its] general fund.”<sup>7</sup>

Even before the Court issued *Murphy*, Arizona State Senator Dave Farnsworth predicted a high likelihood that a bill legalizing sports betting in Arizona would be passed by the legislature.<sup>8</sup> Another Senator, Sonny Borelli, approved of legalizing sports betting in Arizona to distribute the funds to education and increase teacher pay.<sup>9</sup> The Navajo Nation's counsel has



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stated that the Navajo Nation “is very interested in sports betting and in finding ways to expand their casino offerings.”<sup>10</sup>

Arizona citizens also appear to lean toward supporting sports betting. One Arizona statewide survey found that, of those questioned, 51.5% supported legalizing sports betting, rising to around 67% when the pollers stated that sports betting “could bring millions of dollars to the state that could be directed towards education, road improvements and other important resources.”<sup>11</sup> One report predicted that, if Arizona legalized sports betting, it could recover between \$35 million and \$178 million in taxes by 2023.<sup>12</sup> But some are skeptical about legalizing sports betting for



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the purpose of generating “quick revenue.”<sup>13</sup>

The tribal compacts begin expiring in 2022, so it is likely that sports betting will be included in discussions concerning new compacts.

## CALIFORNIA

For sports betting to be legal in California, the California legislature and the citizens of California must amend the State Constitution that currently prohibits sports betting in the state.

Currently, the Tribes cannot conduct sports betting at their tribal casinos unless their existing compact is amended or renegotiated to include sports betting as a permissible form of Class III gambling.

If the State of California legalizes sports betting statewide, the existing compacts with the Tribes will likely have to be amended or renegotiated in light of the exclusivity provisions of gambling in tribal casinos.

## California Law

The California Constitution states that the “[l]egislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State.”<sup>14</sup> Similarly, it also declares that the “[l]egislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.”<sup>15</sup> However, on July 20, 2017, in anticipation of the Supreme Court decision striking down PASPA, California Assemblyman Adam Grey introduced a proposal for an amendment to the California Constitution, which would add the following language: “[n]otwithstanding subdivisions (a) and (e), if the federal Professional and Amateur Sports Protection Act (28 U.S.C. Sec. 3701, et seq.) is amended or repealed to allow sports wagering in California, the Legislature may authorize sports wagering.”<sup>16</sup>

In addition to the California Constitution, the State of California has several provisions of the Penal Code which deal with unlawful gaming in the state. For example, participating in “any bet, bets, wager, wagers, or betting pool or pools made between the person and any other person . . . upon the result of any lawful trial . . . or contest . . . of skill, speed, or power of endurance of person or animal” is a punishable infraction under the California Penal Code.<sup>17</sup>

Furthermore, every person who “records, or registers any bet or bets, wager or wagers, upon the result . . . of any trial . . . or contest . . . of skill, speed or power of endurance of person or animal” shall be punished by fine or imprisonment.<sup>18</sup>

## Tribal Compacts

The California Constitution provides that “the Governor is authorized to negotiate and conclude compacts . . . for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian Tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to these compacts.”<sup>19</sup> Under the Amended and Restated Tribal-State Compact between the State of California and the Viejas Band of Kumeyaay Indi-

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California State Legislature, Sacramento, California.



California Assemblyman Adam Grey

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Continued from previous page

ans (the “Compact”), the Tribe is given exclusive rights to engage in gaming in the State of California.<sup>20</sup> This exclusivity provision is identical in all of the tribal gaming compacts in the State of California.

The Compact authorizes the Tribe to engage in gaming activities expressly listed in the Compact, but prohibits Class III gaming activities that are not expressly permitted.<sup>21</sup> The Compact authorizes gaming devices, any banking or percentage card game, and the operation of any devices or games authorized under state law to the California State Lottery.<sup>22</sup> However, the Compact limits the Class III gaming allowed in tribal casinos by prohibiting banking and percentage games prohibited by state law or Art. IV, § 19 of the California Constitution. There is also a prohibition on Class III gaming that is not expressly authorized in the Compact,<sup>23</sup> including sports wagering.

Additionally, the Compact contains a provision that specifies what the Tribe is allowed to do in the event the exclusive rights to gaming devices in tribal casinos is breached. “In the event the exclusive right of Indian Tribes to operate gaming de-

VICES IN CALIFORNIA IS ABROGATED BY THE ENACTMENT, AMENDMENT, OR REPEAL OF A STATE STATUTE OR CONSTITUTIONAL PROVISION . . . THAT GAMING DEVICES MAY LAWFULLY BE OPERATED BY ANOTHER PERSON, ORGANIZATION OR ENTITY (OTHER THAN AN INDIAN TRIBE PURSUANT TO A COMPACT) WITHIN CALIFORNIA,” THE TRIBE HAS THE RIGHT TO (I) TERMINATE THE COMPACT AND STOP OPERATING THE GAMING DEVICES, OR (II) CONTINUE UNDER THE TERMS OF THE COMPACT AND NEGOTIATE REDUCED RATES OF REVENUE SHARING WITH THE STATE.<sup>24</sup>

### Public Response

There is already a constitutional amendment working its way through the California legislature and the initial petition paperwork has been filed to get the issue of legal sports betting on the ballot as soon as 2020.<sup>25</sup> While some state legislators pushed to get the issue on the ballot for November of this year, that timeline is likely not feasible. Supporters of legalization cite increased state revenue from an activity which is already occurring rampantly in underground circles.

The Tribes’ responses have not been as positive. The Tribes

<sup>1</sup>Ariz. Rev. Stat. § 13-3303 (2018).

<sup>2</sup>Ariz. Rev. Stat. § 13-3301 to -02 (2018). Tribal compacts are a part of Arizona state law. Ariz. Rev. Stat. § 5-601.02 (2018).

<sup>3</sup>Tribal Gaming: General History, Ariz. Dep’t Gaming (last visited June 28, 2018), <https://gaming.az.gov/about/history>.

<sup>4</sup>Ariz. Rev. Stat. § 5-601.02(D)(6)(b)(iii) (2018); Class II and Class III FAQ, Ariz. Dep’t Gaming (last visited June 28, 2018), <https://gaming.az.gov/class-ii-and-class-iii-faq>.

<sup>5</sup>Ariz. Rev. Stat. § 5-601.02 (D)(6)(b)(vii)(b) (2018).

<sup>6</sup>Doug Ducey (@dougducey), Twitter (May 14, 2018, 10:51 AM), <https://twitter.com/doug-ducey/status/996085545984974848>.

<sup>7</sup>Id.

<sup>8</sup>Eric Ramsey, Sports Betting Legalization Efforts Coming Together in Two New States, Legal Sports Rep. (Apr. 9, 2018, 10:31 AM), <https://www.legalsportsreport.com/19691/sports-betting-arizona-and-minnesota/>.

<sup>9</sup>Id.

<sup>10</sup>Howard Fischer, Capitol Media Services, Ducey, Tribes, AG Happy with SCOTUS Sports Gambling Decision, Ariz. Capitol Times (May 14, 2018), <https://azcapitoltimes.com/news/2018/05/14/ducey-tribes-ag-happy-with-scotus-sports-gambling-decision/>.

<sup>11</sup>Howard Fischer, Capitol Media Services, IN Arizona, Legalized Sports Betting Not Out of the Question, Ariz. Daily Sun (May 25, 2018), [https://azdailysun.com/news/local/in-arizona-legalized-sports-betting-not-out-of-the-question/article\\_ba360019-bdf0-5c24-91c4-7319a6a41173.html](https://azdailysun.com/news/local/in-arizona-legalized-sports-betting-not-out-of-the-question/article_ba360019-bdf0-5c24-91c4-7319a6a41173.html).

<sup>12</sup>Editorial, Sports Betting: A Pool of Revenue for Arizona, Daily Miner (June 7, 2018, 5:59 AM), <https://kdminer.com/news/2018/jun/07/miner-editorial-sports-betting-pool-revenue-arizon/>.

<sup>13</sup>Ramsey, *supra* note 8 (statement by Maricopa County Attorney Bill Montgomery).

<sup>14</sup>Cal. Const. Art. IV, § 19(a).

<sup>15</sup>Cal. Const. Art. IV, § 19(e).

<sup>16</sup>Cal. Assemb. Const. Am. 18, Cal. 2017-18 Reg. Sess.

<sup>17</sup>Cal. Penal Code § 336.9(a).

<sup>18</sup>Cal. Penal Code § 337(a).

<sup>19</sup>Cal. Const. Art. IV, § 19(f).

<sup>20</sup>Preamble, 2014 Amended and Restated Compact between the State of California and the Viejas Band of Kumeyaay Indians.

<sup>21</sup>Section 3.1, Compact.

<sup>22</sup>Section 4.1(a)-(c), Compact.

<sup>23</sup>Section 4.1(e), Compact.

<sup>24</sup>Section 12.4, Compact.

<sup>25</sup>Patrick McGreevy, Legalized sports betting could be on California ballot after court ruling, L.A. Times, May 14, 2018.

<sup>26</sup>Bob Egelko & Kevin Fagan, California voters could act on legalized sports betting as early as November, S.F. Chronicle, May 14, 2018.

<sup>27</sup>Hugo Martin, Sports gambling may be coming to California - but it's unclear who will take your bets, L.A. Times, May 20, 2018.

<sup>28</sup>N.M. Stat. Ann. § 11-13, APP. 2007 Agreement, Section 3(A); 2015 Agreement, Section 3(A), (“Compact”).



believe that the exclusivity provision of the compacts gives them the exclusive rights to conduct sports betting in their casinos on the tribal lands.<sup>26</sup> If the state legalizes sports betting in card clubs and racetracks, the Tribes believe this would violate the exclusivity provisions of the compacts.

The Tribes will likely challenge the proposed Constitutional Amendment, or at least demand to be financially compensated for the alleged breach of the compacts. Although card club and racetrack owners would like to add sports betting to their establishments, they expect the tribal casinos will fight back. As a result, it is possible the State of California may have to either renegotiate the compacts with the Tribes concerning this issue of sports betting and the exclusivity provision, or provide them with financial compensation.<sup>27</sup>

## NEW MEXICO

In contrast to the Arizona and California tribal gaming compacts, the New Mexico compacts are exceedingly broad in terms of authorized Class III gaming—allowing Tribes to offer “any or all forms of Class III gaming.”<sup>28</sup> This language has been interpreted as broadly as the plain text suggests—in 2015 the New Mexico Attorney General determined that the intent of the legislature had been to allow tribal casinos to conduct any form of Class III gaming, without exception.<sup>29</sup>

“Betting” and “gaming activity” are generally prohibited in New Mexico.<sup>30</sup> These prohibitions cover sports betting,<sup>31</sup> however, they explicitly exempt any betting or gaming “otherwise permitted by law.”<sup>32</sup> New Mexico permits Class III betting made pursuant to Class III compact and some non-tribal licensed gaming, like pari-mutuel betting at racetracks.<sup>33</sup> Thus, it appears that New Mexico Tribes operating casinos are *currently* legally authorized to offer sports betting pursuant to the Supreme Court decision.

The New Mexico Tribes appear to have a quasi-monopoly on sports betting. Under the compact, the Tribes are required to pay a percentage of “net win” to the state (in 2018 these payments were over \$17 million).<sup>34</sup> However, the compact contains

an “exclusivity clause”—that is, the Tribes are only legally required to continue making payments to the state as long as New Mexico does *not* legalize general Class III gaming, or expand pre-existing non-tribal Class III gaming.<sup>35</sup> In 2015, the New Mexico Attorney General determined that an expansion of non-tribal Class III gaming rights would violate the compacts and result in loss of revenue payments.<sup>36</sup>

To date, the New Mexico Tribes have been largely silent regarding sports betting. The CEO of the Navajo Nation Gaming Enterprise stated that the Navajo were “definitely interested” in setting up sports betting at their New Mexico casinos.<sup>37</sup> With regards to non-tribal Class III gaming facilities, in May the spokesperson for Sunland Park Racetrack and Casino stated that the park was “excited by the possibilities” of sports betting.<sup>38</sup>

Interestingly, the general population seems to disfavor legalized sports betting. Both major New Mexico newspapers have published opinion articles highly critical of sports gambling;<sup>39</sup> the chairman of the New Mexico Racing Commission has expressed reservation over the idea,<sup>40</sup> and state representative Bill McCamley stated, “we need to have a conversation of how [sports betting] will be done before we move forward with anything.”<sup>41</sup> Further, a recent survey discovered that only 36.6 percent of Bernalillo County (where Albuquerque is located) support state legalization of sports betting.<sup>42</sup>

All that said, state representative Antonio Maestas announced plans to introduce a sports betting bill in 2019 and gambling research firm Eilers & Krejci estimates that New Mexico could legalize sports betting within seven years.<sup>43</sup> ❄

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<sup>26</sup>Opinion No. 13-02, 2013 WL 6181403 (N.M. Att’y Gen. 2013) (“Class III A.G. Report”).

<sup>27</sup>N.M. Stat. Ann. §§30-19-2 to -3, 60-2E-4. Specifically, N.M. Stat. Ann. §30-19-2 makes it a misdemeanor to, among other things, place a “bet,” while §30-19-3 makes it a fourth degree felony to establish a commercial facility that receives “bets.” Further, the New Mexico Gaming Control Act prohibits all “gaming” unless authorized by the Act, or state or federal law that permits the activity. N.M. Stat. Ann. §60-2E-4; see State of New Mexico *ex rel.* New Mexico Gaming Control Bd., v. Ten (10) Gaming Devices, 2005-NMCA-117, ¶17, 138 N.M. 426, 428, 120 P.3d 848, 850.

<sup>28</sup>“Bet” is defined as a “bargain in which the parties agree that, dependent upon chance, even though accompanied by some skill, one stands to win or lose anything of value specified in the agreement” but does not include business contracts, contests, the state run lottery, or betting otherwise permitted by law. N.M. Stat. Ann. §30-19-1.

<sup>29</sup>N.M. Stat. Ann. §30-19-1(B)(4); see N.M. Stat. Ann. §60-2E-4 (B) (“Gaming activity is permitted in New Mexico only if it is conducted in compliance with and pursuant to: . . . a state or federal law . . . that expressly permits the activity or exempts if from the application of the state criminal law, or both.”).

<sup>30</sup>Class III A.G. Report, note 29.

<sup>31</sup>Compact, Section 11(A)–(C); Press Release, New Mexico Gaming Control Board (May 4, 2018), (available at [http://www.nmgcb.org/uploads/FileLinks/3445fc4bd0244654b086c5b7a7fa3c34/2018\\_qtr1.pdf](http://www.nmgcb.org/uploads/FileLinks/3445fc4bd0244654b086c5b7a7fa3c34/2018_qtr1.pdf)).

<sup>32</sup>Compact, Section 11, D(1)(d). Permitted non-tribal Class III gaming includes the state-sponsored lottery, pari-mutuel betting on horse and bicycle racing, operation of gaming machines, and some fundraising by non-profits. Compact, Section 11, D(1)(d).

<sup>33</sup>Class III A.G. Report, note 29.

<sup>34</sup>Bill Donovan, *High Court Opens Door to Sports Betting*, Navajo Times (May 17, 2018), <https://navajotimes.com/reznews/high-court-opens-door-to-sports-betting/>.

<sup>35</sup>Adrian Ochoa, *U.S. Supreme Court Oks Sports Gambling: Will Texas & New Mexico Move for Legalization?*, KVIA (May 14, 2018, 8:20 PM), <http://www.kvia.com/news/el-paso/us-supreme-court-oks-sports-gambling-will-texas-new-mexico-move-for-legalization-741910276>.

<sup>36</sup>Milan Simonich, *Sports Betting Can't Save a Poor State*, Santa Fe New Mexican (June 3, 2018), [http://www.santafenewmexican.com/news/local\\_news/sports-betting-can-t-save-a-poor-state/article\\_b2c9d86e-de3b-5dc0-a288-5e6184c230b7.html](http://www.santafenewmexican.com/news/local_news/sports-betting-can-t-save-a-poor-state/article_b2c9d86e-de3b-5dc0-a288-5e6184c230b7.html); Albuquerque Journal Editorial Board, *Editorial: Odds Favor a lot of Scrutiny Before Allowing Sports Gambling in NM*, Albuquerque Journal (May 27, 2018, 12:02 AM), <https://www.abqjournal.com/1177120/odds-favor-a-lot-of-scrutiny.html>;

<sup>37</sup>Ed Johnson, *States' Rush to Sports Betting Might Be Quite a Horse Race*, Albuquerque Journal (Mar. 25, 2018, 12:05 AM), <https://www.abqjournal.com/1150361/states-rush-to-sports-betting-might-be-quite-a-horse-race.html>

<sup>38</sup>Ochoa, note 38.

<sup>39</sup>Steve Soliz, *Poll Finds Mixed Opinions Over Legal Sports Betting*, KOB4 (May 23, 2018, 9:19 PM), <https://www.kob.com/sports/sports-betting-gambling-poll-supreme-court-decision-carroll-strategies/4920306/>.

<sup>40</sup>Albuquerque Journal Editorial Board, note 39; *Sports Betting Could Spread to 32 U.S. States*, CBS News: Moneywatch (Oct. 2, 2017, 8:33 AM), <https://www.cbsnews.com/news/sports-betting-could-spread-to-32-u-s-states/>.