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SHAPING THE FUTURE OF INDIAN GAMING LAW

CELEBRATING

30
YEARS

OF
TRIBAL GAMING

The Status of Indian Gaming After 30 Years
of the Federal Indian Gaming Law

The State of Indian Gaming in
Arizona, Florida, Minnesota, New England,
Oklahoma, Oregon and Washington

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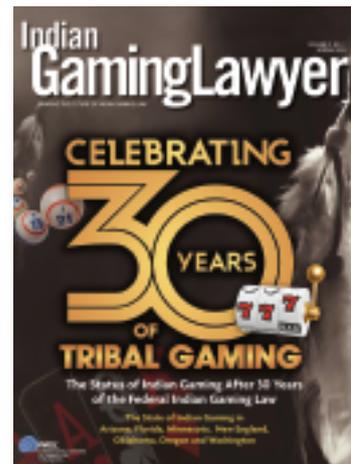


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CONNECTICUT:

Foxwoods Resort Casino

Tribal Gaming – or Commercial Out-of-State Owned Casinos?

BY ROBERT GIPS & MICHAEL-COREY F. HINTON

The right of Tribes in Connecticut to conduct gaming initially was affirmed, as in many other states, over fierce state objection. In 1985, after the Chief State's Attorney threatened tribal leaders with criminal prosecution if the Mashantucket Pequot Tribal Nation ("Pequot" or "MPTN")¹ opened a bingo hall on the Tribe's reservation, the Tribe sought a declaratory judgment and injunctive relief in federal district court. The resulting decision, *Mashantucket Pequot Tribe v. McGuigan*², concluded that Connecticut's bingo laws were civil rather than criminal in nature and enjoined the State's threatened prosecution of those operating bingo games on the Reservation under tribal law. *Pequot v. McGuigan* was one of the initial cases brought by tribes nationally leading up to the Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians*³, which affirmed the right of tribes to regulate bingo and arguably gambling where a state's laws on the matter were found to be civil and regulatory rather than criminal and prohibitory. *Cabazon* in turn served as the primary impetus for the enactment by Congress of the Indian Gaming Regulatory Act⁴ ("IGRA") in 1988.

Following enactment of IGRA, MPTN approached the State of Connecticut to attempt to negotiate a compact under IGRA to govern Class III gaming on the Pequot reservation.⁵ The State refused to negotiate, and when no compact had been completed more than 180 days after the request to negotiate, MPTN filed suit in federal court seeking a declaration that the State had failed to negotiate in good faith and a declaratory judgment that IGRA required the State to negotiate in good faith regarding Class III gaming.⁶ Governor Lowell Weicker went so far as to call a special

session of the State legislature in an attempt to abolish various Connecticut gambling laws and to remove what he perceived to be the basis of the MPTN's claims, but this effort failed. In September, 1990, the Second Circuit affirmed the State's obligation to negotiate⁷ and good faith negotiations finally ensued. The parties reached a near-complete agreement on the terms of a compact, which was ultimately accepted and promulgated by the Secretary of the Interior. Foxwoods Resort Casino then opened its doors to Class III table games in February, 1992.

Las Vegas casino owner Steve Wynn began a full-court press to persuade Connecticut to authorize him to open casinos in Hartford and Bridgeport almost immediately after Foxwoods proved to be a successful operation despite being limited to table games. Governor Weicker's concern that this initiative would open the flood-gates to casinos all over the state led him to reverse his strenuous opposition to expansion of the scope of gaming at Foxwoods. In January 1993, MPTN and Connecticut agreed that the State would recognize MPTN's asserted right to operate video facsimile games in return for payments of 25% of gross revenues from these machines, with Pequot agreeing to make such payments for so long as no other entity was authorized by the State to operate such machines. In 1994, the Mohegan Tribe was federally recognized and entered into a compact with Connecticut in 1994 that, like the Pequot compact, provided for the continuation of the video facsimile game payments to the State if no other entity was authorized by the State to conduct such gaming or other commercial casino games.

This framework has proven remarkably durable and mutually



beneficial. Connecticut has chosen not to authorize any non-tribal casinos, and tribal gaming has been an unprecedented success for the Tribe, the State and for local and regional economies in the State. Video facsimile game contributions to the State from Foxwoods and Mohegan Sun through 2017 have totaled over \$7.2 billion since Pequot and Mohegan opened their doors. The Tribes are among the most significant employers in the State, employing well over 10,000 people with good wages and excellent health care, and creating innumerable spin-off jobs and employment in small and large businesses within Connecticut. Equally importantly, like all tribal government gaming operations elsewhere around the country, Foxwoods and Mohegan are and always will be locally owned and controlled, with revenues and profits recirculating within and supporting the local and regional economies rather than being exported as dividends to out-of-state corporations and shareholders.

The success of tribal gaming in Connecticut reinforced long-standing efforts to legalize gaming in neighboring states, and was a primary impetus for next-door neighbor Massachusetts to authorize casinos in November, 2011.⁸ In 2014, MGM Resorts International became the first commercial operator to receive a license to conduct gaming in Massachusetts and was authorized to construct a \$950 million casino in Springfield.⁹ One of the primary markets for MGM's intended casino is northern Connecticut and in particular, the Hartford metropolitan market, with MGM's Springfield site located about a half hour away, right up Interstate 91, from downtown Hartford.

The prospect of the loss of Connecticut revenues and jobs to MGM's Massachusetts casino led the Connecticut legislature in 2015 to begin the process of authorizing a new casino that would ultimately end up being sited in East Windsor, just outside Hartford. The new facility is to be licensed and regulated under state law, and owned and operated through MMCT Venture, LLC, a joint venture of the Pequot and Mohegan Tribes.¹⁰ MGM lobbied heavily against the initial law that permitted MMCT to conduct an RFP for the ultimate casino site and unsuccessfully challenged this legislation in federal court.¹¹ MGM reportedly spent over \$5 million in lobbying fees and TV and radio ads in 2016 and 2017 to defeat the subsequent, proposed legislation to authorize MMCT to operate a casino.¹² Notwithstanding this barrage, the authorizing legislation passed with broad bi-partisan support and was signed into law by Governor Malloy on June 27, 2017.¹³

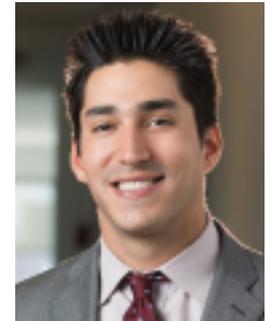
As part of the planning process for the new MMCT Ventures casino in East Windsor, the Tribes and the State sought to clarify that the authorization of a new state-regulated casino on non-reservation land operated by a business jointly and exclusively owned by the Tribes would not alter or interfere with the long-standing agreements whereby the Tribes obtained the exclusive right to operate video facsimile games and commercial casino games within Connecticut in return for a percentage of the revenue derived from machine play. In April 2016, and again in April 2017, the Tribes requested technical assistance from the Department of the Interior ("Interior" or "Department") concerning proposed compact amendments that would confirm this understanding. Interior provided supportive technical assistance to the Tribes in letters in April 2016 and in May 2017.

On August 2, 2017, following the provision of technical assistance by Interior and the final passage of authorizing legislation by the State at the end of June, the compact amendments were executed by the Tribes and the State, and submitted to Interior for approval. IGRA and its implementing regulations require the Secretary of the Interior to act on compact amendments within 45 days, either by (a) approving such amendments, or (b) disapproving such amendments, if they (i) violate IGRA, (ii) violate any other provision of federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) violate the trust obligations of the United States to Indians.¹⁴ Under IGRA and its implementing regulations, Interior's failure to approve or disapprove an amendment results in the amendment being deemed approved by operation of law, with the Department required to publish notice of the 'deemed approval' in the Federal Register within 90 days of the submission of the amendment.¹⁵

With no advance warning whatsoever, to the shock and dismay of both Tribes and the State of Connecticut, on September 15, 2017 Interior sent the Tribes substantially identical letters neither approving nor disapproving the amendments. Instead, Interior stated it was "returning" the amendments, because the Department considered the amendments "premature and likely unnecessary" and because there was "insufficient information" to evaluate whether the new commercial casino facility owned and operated by the Tribes would breach the exclusivity provisions of the Tribes' compacts.



Robert Gips



Michael-Corey F. Hinton

Continued on next page



Because the action of “returning” the amendments is not allowed by IGRA and its implementing regulations, and because the Department failed to publish notice of the deemed approval of the amendments within the statutory 90-day period, the Tribes and the State of Connecticut were left no recourse but to commence litigation. In November, 2017, the Tribes and the State collectively filed suit against Interior in the U.S. District Court for the District of Columbia. The jointly-filed suit seeks a declaration that the amendments were deemed approved by operation of the law and an order to require the Secretary to publish notice of such approval in the Federal Register.¹⁶

Interior has not explained why it did not approve the amendments, cited a federal law or specific legal support for its decision, nor even informed the Tribes and the State what further information it had allegedly needed (but had not requested) to make a determination. But articles recently appearing in the press may provide a clue.

On February 1, 2018, *Politico* published an article which alleged that the September 15, 2017 letter that “returned” the amendments was the direct result of “numerous meetings and phone calls” between “[Interior Secretary] Zinke and other senior department officials”, MGM lobbyists (including Trump campaign fundraisers and former senior Interior officials), and the company’s Republican supporters in Congress.¹⁷ The article lists a series of contacts between Interior and advocates for MGM, including but not limited to multiple phone calls between Secretary Zinke, Nevada Senator Heller, and Nevada Rep. Amodei; a meeting between Interior officials and White House deputy chief of staff Rick Dearborn that was scheduled for September 14, 2017, the day before the September 15th Interior letter was transmitted; and an August 29, 2017 meeting hosted by Secretary Zinke at which several MGM lobbyists, including Brian Ballard, a major Trump campaign donor, were present.¹⁸

On February 2, 2018, the *Connecticut Mirror* published an

1 Disclosure note: author Robert Gips has been of counsel to the Mashantucket Pequot Tribal Nation since 1983.

2 626 F. Supp. 245 (D.Ct Conn. 1986)

3 480 U.S. 202 (1987)

4 25 U.S.C. §2701 *et seq.*

5 *Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1027 (2nd Cir. 1990).

6 *Id.* at 1025.

7 *See Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2nd Cir. 1990).

8 Act of Nov. 22, 2011, ch. 194, 2011 M.A. Acts (providing for the expansion of casino gaming in the Commonwealth).

9 Philip Marcelo, WBUR News, MGM Named First Official Casino Operator, *available at* <http://www.wbur.org/news/2014/06/13/mgm-mass-first-licensed-casino> (last visited Feb. 12, 2018).

10 Special Act No. 15-7, S.B. No. 1090, Jun. 19, 2015 (an act concerning gaming to protect Connecticut jobs and to encourage tourism in Connecticut).

11 *MGM Resorts International Global Gaming Development, LLC v. Malloy*, 861 F.3d 40 (2nd Cir. 2017)

12 Public Act No. 17-19, Substitute for S.B. 957, Jun. 27, 2017 (an act concerning the regulation of a casino gaming facility in Connecticut by MMCT Venture, LLC).

13 *See* Press Release: Gov. Malloy Signs Legislation Authorizing East Windsor Entertainment and Gaming Facility (Jun. 27, 2017), *available at* <http://portal.ct.gov/Office-of-the-Governor/Press-Room/Press-Releases/2017/06-2017/Gov-Malloy-Signs-Legislation-Authorizing-East-Windsor-Entertainment-and-Gaming-Facility> (last visited Feb. 12, 2018).

14 *See* 25 U.S.C. §2710(d)(8)(B) and (C); 25 C.F.R. §293.11 and 293 C.F.R. §14.

15 25 U.S.C. §2710(d)(8)(C); 25 C.F.R. §293.12

16 *State of Connecticut et al. v. Zinke*, Case No. 1:17-cv-02564-RC, filed Nov. 29, 2017 (D.D.C.)

17 Nick Juliano, *Politico*, “Zinke’s agency held up Indians’ casino after MGM lobbying” (Feb. 1, 2018) *available at* <https://www.politico.com/story/2018/02/01/zinkes-indian-casino-interior-312671> (last visited Feb. 13, 2018).

18 *Id.*

19 Mark Pazniokas, *The Connecticut Mirror* (Feb. 2, 2018) *available at* <https://ctmirror.org/2018/02/02/mgm-spends-3-8m-lobbying-in-hartford-but-wins-in-washington/> (last visited Feb. 13, 2018).

20 Nick Juliano, *POLITICO*, “Lawmakers want casino probe from Interior Watchdog” (Feb. 12, 2018), *available at* <https://www.politico.com/story/2018/02/12/interior-department-watchdog-casino-339166> (last visited Feb. 13, 2018).

21 *Id.*



article entitled “MGM Spends \$3.8 Million Lobbying in Hartford but Wins in Washington”¹⁹ that laid out similar points.

Following these articles, it was reported that senior Connecticut lawmakers, including Senators Blumenthal and Murphy and Congressmen Larson and Courtney, have formally requested the Interior Department’s inspector general to launch an investigation into Interior’s actions in this matter.²⁰ The request for investigation pointed out that Interior had not identified any problems with the tribes’ plan in its guidance letters, and stated that “Interior’s subversion of its own guidance – after multiple interventions by parties with no apparent connection to the Interior’s legal trust responsibilities to Indian Tribes – may suggest the department abrogated its duty to properly carry out its legal trust responsibilities regarding the two Tribes”.²¹

Clearly the stakes are high – for the Tribes, for Connecticut, and for IGRA’s process for approval of compacts and compact amendments, as required under federal law. It remains to be determined whether the efforts of the Tribes and Connecticut to work together as anticipated by IGRA will be thwarted. Hopefully, the framework for this decades-long mutually beneficial success story will be affirmed. ❁

“ Clearly the stakes are high – for the Tribes, for Connecticut, and for IGRA’s process for approval of compacts and compact amendments, as required under federal law. It remains to be determined whether the efforts of the Tribes and Connecticut to work together as anticipated by IGRA will be thwarted. ”

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