Office of The Attorney General
State of Connecticut

April 15, 2015

The Honorable Martin M. Looney
Senate President Pro Tempore
Legislative Office Building
Room 3300
Hartford, CT 06106

The Honorable Bob Duff
Senate Majority Leader
Legislative Office Building
Room 3300
Hartford, CT 06106

The Honorable Brendan J. Sharkey
Speaker of the House of Representatives
Legislative Office Building
Room 4110
Hartford, CT 06106

The Honorable Joe Aresimowicz
House Majority Leader
Legislative Office Building
Room 4110
Hartford, CT 06106

The Honorable Leonard A. Fasano
Senate Minority Leader
Legislative Office Building
Room 3400
Hartford, CT 06106

The Honorable Themis Klarides
House Minority Leader
Legislative Office Building
Room 4200
Hartford, CT 06106

Dear Legislator Leadership:

This letter addresses various legal issues raised by the possible enactment of legislation that would change state law to authorize the Mashantucket Pequot Tribe and the Mohegan Tribe (collectively, the "Tribes") to operate jointly casino gaming facilities outside their respective reservations. Specifically, we address two separate legal issues: (1) implications of the proposed legislation for the existing gaming compacts with the Tribes; and (2) the effects such legislation could have if additional tribes achieve federal tribal acknowledgment. Both of these issues pose significant uncertainties and potentially serious ramifications for the existing gaming relationships between the State and the Tribes.

The purpose of this letter is not to diminish the concerns prompting this legislation. I am sympathetic to the desire to promote economic development, assist the State in competing with gaming enterprises in neighboring states, and protect the economic well-being of our existing federally recognized tribes with whom Connecticut has a special and mutually beneficial relationship. Rather, this letter is offered to identify legal uncertainties to assist your careful
consideration of the risks associated with the proposed legislation, and offer possible ways to mitigate those risks.

As we understand it, the proposed legislation would include the following principal elements: The law would authorize the licensing of one or more casino gaming facilities to be operated by some form of joint venture of the Tribes. The facilities would not be located on reservation lands and would not involve the federal government taking any lands into trust for the Tribes. The gaming facilities and operations would be subject to state law and regulation. An agreement would be entered into between the State and the Tribes addressing certain issues relating to licensing and operation of the gaming facilities, including a specified percentage of gross operating revenues to the state and the municipality in which the facilities are to be located. See Raised Bill No. 1090.1

**Existing Gaming Agreements**

The proposed legislation must be viewed against the backdrop of the existing agreements between the State and the Tribes. In 1991, under the provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701 et seq., the Secretary of the Interior approved the Final Mashantucket Pequot Gaming Procedures (Mashantucket Procedures), governing the operation of casino gaming on the Mashantucket reservation.2 In 1994, the State and the Mohegan Tribe entered into a Gaming Compact (Mohegan Compact), similarly governing the operation of casino gaming on the Mohegan reservation. Both the Mashantucket Procedures and the Mohegan Compact contain provisions imposing a moratorium on video facsimile games – commonly referred to as video slot machines – absent certain conditions. Specifically, § 15(a) of the Mashantucket Procedures provides:

> Notwithstanding the provisions of section 3(a)(ix), the Tribe shall have no authority under this Compact to conduct Class III video facsimile games as defined pursuant to section 3(a)(ix) unless and until either: (a) it is determined by agreement between the Tribe and the State, or by a court of competent jurisdiction, that by virtue of the existing laws and regulations of the State the

---

1 If enacted, the proposed legislation may face third-party court challenges, the outcomes of which are difficult to forecast. For example, a third party could claim that granting the exclusive right to conduct gaming to the Tribes, particularly where that gaming will be conducted off reservation land, violates the Equal Protection Clause of the U.S. Constitution. See *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 18-20 (1st Cir. 2012) (raising serious doubts under the equal protection clause about Massachusetts law granting preference in awarding gaming license to Indian tribe). Similarly, a third party could seek to have the proposed legislation declared unconstitutional as a violation of the Commerce Clause, alleging that, by granting the right to conduct gaming exclusively to the Tribes for the purpose of protecting in-state economic interests from interstate commerce, the State would be unconstitutionally discriminating against interstate commerce. See *United Haulers Ass'n v. Oneida-Herkheimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). We are unable to predict with any certainty how a court would resolve such issues. In light of the uncertainties discussed below, it would be prudent to include a nonseverability provision in the proposed legislation that voids the law if a court determines that all or any part of it is unconstitutional, invalid or otherwise unenforceable.

2 The Mashantucket Procedures are not technically a gaming compact, but rather procedures approved by the Secretary of the Interior following a mediation process pursuant to IGRA. See 25 U.S.C. § 2710(d)(7)(B)(vii). The distinction is not material for purpose of this discussion.
operation of video facsimiles of games of chance would not be unlawful on the grounds that the Tribe is not located in a State that permits such gaming for any purpose by any person, organization, or entity within the meaning of 25 U.S.C. § 2710(d)(1)(B) (it being understood and agreed that there is a present controversy between the Tribe and the State in which the Tribe takes the position that such gaming is permitted under the existing laws of the State and the State takes the position that such gaming is not permitted under the existing laws of the State); or (ii) the existing laws or regulations of the State are amended to expressly authorize the operation of any video games of chance for any purpose by any person, organization or entity. Upon such determination the operation by the Tribe of video facsimile games of chance shall be subject to the applicable provisions of the Standards of Operation and Maintenance for Games of Chance adopted pursuant to section 7 of the Compact.

Mashantucket Procedures, § 15(a) (emphasis added). A substantively identical provision is found at § 15(a) of the Mohegan Compact. Thus, the operation of video facsimile games may become permissible in one of three ways: by agreement of the State and the Tribe; by a court order; or by a change in State law that allows the operation of video facsimile games for any purpose by any person, organization or entity. See A.G. Op. No. 93-004 (Feb. 11, 1993). ³

As a resolution of the dispute between the State and the Tribes over video facsimile games referenced in § 15(a), both Tribes entered into memoranda of understanding (MOUs) with the State that suspended the moratorium on video facsimile games. Under the MOUs, the Tribes could operate video facsimile games and the State would receive 25 percent of the gross operating revenues from those games. The MOUs further provided that the right to operate video facsimile games and the payments to the State would continue "so long as no change in State law is enacted to permit the operation of video facsimiles or other commercial casino games by any other person and no other person within the State lawfully operates video facsimile games or other commercial games...." Mohegan MOU dated May 17, 1994, at 2 (emphasis added). Thus, under the MOUs, the Tribes' authority to operate video facsimile games and the payment to the State would both cease if State law permitted any person other than the Tribes to operate such games or other commercial casino games. See A.G. Op. No. 94-003 (Feb. 4, 1994).

The proposed legislation would change state law to authorize the Tribes to operate video facsimile and other casino games. The MOUs would arguably not be implicated by this change in state law; their provisions would be terminated only by a change in state law that authorizes "any other person" to operate such games — to wit, any person other than the Tribes. However, because the proposed legislation would authorize both Tribes to operate video facsimiles and other casino games jointly, it arguably would violate both MOUs by allowing someone other

³ In addition, Section 17(d) of the Mashantucket Procedures and Mohegan Compact provide that the Tribes shall not be deemed to have waived "the right to request negotiations for a tribal-state compact with respect to a Class III gaming activity which is to be conducted on the Reservation[5] but is not permitted under the provisions of this Compact, including forms of Class III gaming which were not permitted by the State for any purpose by any person, organization, or entity at the time when this compact was negotiated but are subsequently so permitted by the State, in accordance with 25 U.S.C. §2710 (d) (3) (A)." (Emphasis added).
than the Tribe that is a party to the respective MOUs – that is, the other Tribe – to operate such games. It would be prudent, therefore, to condition the effectiveness of any legislation upon an agreement among the State and the Tribes that such legislation is not a violation of the existing MOUs. Such legislation also should make clear that only the Tribes may own an equity interest in whatever business entity is formed to operate casinos.

That is not the end of the inquiry, however. As noted above, the moratoria on video facsimile games set forth in the Mashantucket Procedures and the Mohegan Compact themselves can be ended by a change in state law that allows any person for any purpose to operate video facsimile games, language that appears to be drawn from IGRA itself. See 25 U.S.C. § 2710(d)(1)(B). Unlike the existing MOUs, § 15(a) does not include the word "other." Arguably, the proposed legislation could be deemed a change in state law that would terminate the moratorium, affording the Tribes the right to conduct video facsimile games free of the payment requirements under the MOUs. How a court or other competent authority might resolve this legal issue is at best uncertain.

It is our understanding that there have been discussions about a possible solution to this uncertainty through a new memorandum of understanding between the State and the Tribes. Such agreements would memorialize mutual understandings that the language of § 15(a) was not intended to, and does not, include a change in state law that would authorize only the Tribes to engage in gaming under state law. Although presumably such an agreement would include waivers of tribal immunity, the enforceability of this possible solution is itself uncertain.

Amendments to gaming compacts under IGRA require approval by the Secretary of the Interior (Secretary). The Mashantucket Procedures and the Mohegan Compact both expressly require amendments to be approved by the Secretary. See Mashantucket Procedures, § 17(c); Mohegan Compact, § 17(c). In addition, the federal regulations governing gaming compacts expressly provide that "[a]ll amendments, regardless of whether they are substantive amendments or technical amendments, are subject to review and approval by the Secretary." 25 C.F.R. § 293.4(b); see 25 C.F.R. § 291.14 (amendments for gaming procedures). Moreover, the requirement for Secretarial review and approval cannot be waived. As the Interior Department has explained:

[T]he Secretary must review and approve all amendments to gaming compacts. It is of no consequence that such a document is titled "memorandum of understanding" or something else. Absent Secretarial review and approval of an amendment to a compact, and publication of the notice of approval in the Federal Register, it would be of no force and effect under IGRA.


It is possible that an agreement between the State and the Tribes memorializing their mutual understanding of the moratorium language could be deemed an effective amendment of § 15(a) – changing "any person" to "any person other than the Tribes." If that is the case, the
agreement, if not submitted as an amendment to the Secretary for approval, would not be enforceable.  

On the other hand, if the State and Tribes were to submit for Secretarial approval express amendments clarifying the moratorium language so that the enactment of the proposed legislation would not result in a lifting of the moratorium, there is no certainty as to whether the Secretary would approve the amendment or what the scope of the Secretary's review would be. In particular, it is unclear if the Secretary's review would encompass the broader context of the compacts, including the MOUs and their payment requirements to the State.

Given the unique nature and history of the State's gaming relationships with the Tribes, there is very little in the way of legal precedent or guidance that allows for a confident analysis of these complex and uncertain legal questions. In light of this uncertainty and the attendant risks, the legislature should carefully weigh the anticipated benefits of the proposed legislation against the risks it poses to the current arrangements of the existing MOUs. If the legislature concludes that the likely benefits outweigh such risks, it would be advisable to include in the legislation provisions that might mitigate potential adverse consequences for the State. This could include, for example, conditioning the authority to conduct gaming not just on an agreement as to the State's and Tribes' mutual understanding that the moratorium is not implicated, with appropriate waivers of tribal immunity, but also an express provision terminating the authority granted to the Tribes and a repeal of the law if the Tribes ever contest that mutual understanding or a court or other competent authority concludes, for any reason, that the agreement memorializing that mutual understanding is invalid, illegal or unenforceable. Though such provisions may help mitigate the risks associated with the proposed legislation, they would by no means eliminate that risk.

**Additional Federally Acknowledged Tribes**

A second issue relates to the potential implications of this proposed legislation for any additional federally acknowledged Indian tribes. Although the federal Bureau of Indian Affairs (BIA) previously denied the acknowledgment petitions of the Eastern Pequot, Schaghticoke and Golden Hill Paugussett petitioners, the BIA is currently in the process of considering significant changes to the existing acknowledgment regulations. These changes could result in the acknowledgment of one or more of the previously denied Connecticut petitioners. A federally acknowledged tribe has rights under IGRA that, under certain circumstances, would allow it to engage in casino gaming operations on Indian lands. Specifically, IGRA provides that a tribe may engage in so-called Class III gaming activities on Indian lands, subject to a tribal-state gaming compact, if such activities are located in a state that "permits such gaming for any purpose by any person, organization, or entity...." 25 U.S.C. § 2710(d)(1)(B).

In 2003, the General Assembly repealed the so-called "Las Vegas Nights" law, which permitted nonprofit organizations to operate certain games of chance for the purpose of raising

---

4 It might be advisable to request guidance from the Interior Department to obtain its views as to whether amendments are required under the gaming compact regulations; however, it does not appear that there is a formal process for making such a request under the regulations that would necessarily result in a binding decision on the issue.
charitable funds. See Conn. Gen. Stat. §§ 7-186a et seq. (repealed). It was this state law that triggered IGRA's provisions for the Mashantucket Pequot and Mohegan Tribes. See Mashantucket Pequot Tribe v. Connecticut, 737 F. Supp. 169 (D. Conn.), aff'd, 913 F.2d 1024 (2d Cir. 1990), cert. denied, 499 U.S. 875 (1991). The purpose of the repeal was to eliminate that trigger for any future additional federally acknowledged tribes. See A.G. Op. No. 2003-011 (June 10, 2003). The enactment of the proposed legislation, authorizing the Tribes to conduct casino gaming under state law, could serve as a new trigger and would significantly increase the likelihood that newly acknowledged tribes would succeed in asserting the right to casino gaming under IGRA.

Conclusion

The proposed legislation poses several legal issues that cannot be resolved with a high degree of certainty. This Office remains available to assist in evaluating the many very important concerns raised.

Very truly yours,

GEORGE JEPSEN

cc: Governor Dannel P. Malloy
The Honorable Stephen D. Dargan
The Honorable Timothy D. Larson
Co-chairs, Public Safety and Security Committee