

OLR Backgrounder: Off-Reservation Casino

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Issue

Summarize the relevant issues and events that have occurred regarding the proposed establishment of a third casino in Connecticut, to be located at an off-reservation site.

Summary

In 2011, a Massachusetts law authorized casinos to be built after a bidding process (Mass. Gen. Laws Ann [ch. 23k](#)). MGM Resorts International, a global hospitality and entertainment company, was ultimately selected to build a casino in Springfield, which is scheduled to open in 2018.

In response to this development, the Connecticut legislature, during the 2015 session, considered legislation authorizing off-reservation casino gaming jointly run by the Mashantucket Pequot and Mohegan tribes, which respectively operate the Foxwoods and Mohegan Sun on-reservation casinos. The original bill ([SB 1090](#)) voted out of the Public Safety and Security Committee authorized the tribes to operate up to three off-reservation casinos.

Before the Senate took up the bill, the six legislative leaders asked the Connecticut attorney general how the legislation might affect the memorandum of understandings (MOU) between the state and the tribes. Currently, in order to legally operate slot machines, both tribes have separate agreements with the state to contribute 25% of its gross slot machine revenue to the state. In return the state agreed not to pass any law allowing anyone else to operate slots or other commercial casino games (see both the Mashantucket Pequot [MOU](#) and Mohegan [MOU](#)).

On April 15, 2015, the attorney general responded that passing this legislation may (1) affect the MOUs so that the tribes no longer needed to make payments to the state, (2) lead to third-party challenges on the casino licensing process, and (3) allow additional tribes that gain federal recognition to build new casinos. He cautioned that these issues “pose significant uncertainties and potentially serious ramifications for the existing gaming relationships between the State and the Tribes.”

Ultimately, the General Assembly passed [SA 15-7](#), which, among other things, created a process for the tribes, through a business entity owned exclusively by them, to issue a request for proposals (RFP) to possibly establish an off-reservation casino.

After passage of the special act, MGM and the Schaghticoke Tribal Nation filed separate lawsuits in federal court alleging that the special act violated both the Equal Protection Clause of the 14th Amendment and the Commerce Clause. The federal court dismissed MGM’s case because MGM did not adequately allege an injury, thus did not have legal standing to sue. MGM appealed to the Second Circuit Court of Appeals, which has not issued a ruling to date. After the dismissal of MGM’s case, the Schaghticoke tribe voluntarily dismissed its lawsuit.

Pursuant to the special act, the Mashantucket Pequot and Mohegan tribes jointly created MMCT Venture, LLC to find a suitable site for the casino. Originally, MMCT received five proposals from four municipalities (East Hartford, East Windsor, Hartford, and Windsor Locks), but decided to reopen the bidding process and received five RFPs from the same four municipalities and South Windsor. Of these five, MMCT has narrowed it down to two (East Windsor and Windsor Locks).

Public Safety and Security Committee

In 2015, the Connecticut legislature considered legislation authorizing off-reservation casino gaming. The Public Safety and Security Committee raised [SB 1090](#), *An Act Concerning Gaming* and held a public hearing on March 17, with over 450 people submitting testimony.

By a 15-8 vote, the committee passed the bill which authorized the Department of Consumer Protection to issue licenses to the Mashantucket Pequot and Mohegan tribes to jointly operate up to three off-reservation casinos, under a MOU executed between the attorney general and the tribes. The location of any of the facilities was subject to approval by the legislative body of the host municipality, and only after the municipality held a public hearing on the proposal.

Background on Existing Slot Agreements

The federal gaming procedures prescribed to govern casino gaming at Foxwoods included a moratorium on all video facsimile machines, which includes slot machines, until the state and the Mashantucket Pequots could resolve the dispute as to the legality of slot machines.

The Mashantucket Pequots opened the Foxwoods Casino in 1992 with table games but not slot machines. In 1993, the Mashantucket Pequots and the state signed a MOU resolving the dispute surrounding the operation of slot machines. The state gave the Mashantucket Pequots the exclusive right to operate slot machines in return for a monthly contribution of 25% of gross slot revenue, but if the contribution fell below \$100 million in any year, the rate would increase to 30%.

In 1994, the Mohegan tribe gained federal recognition and then-Governor Weicker negotiated a gaming compact with the Mohegans and separate MOUs with both the Mashantucket Pequot and Mohegan tribes. Under separate, but virtually identical, MOUs, each tribe contributes 25% of its gross slot machine revenue to the state. If either tribe's contribution falls below \$80 million in any year, its rate increases to 30%.

The MOUs also expanded the scope of the original Foxwoods MOU by conditioning the tribes' contribution to the state on the state not permitting others to operate any casino games, not just slot machines.

2015 Attorney General Memo

The six legislative leaders asked the attorney general to analyze how [SB 1090](#) (File 506), if passed, would affect the existing slot MOU agreements the state has with each tribe.

In his memo (see Appendix 1), the attorney general raised concerns that passing [SB 1090](#) may (1) affect the existing MOUs so the tribes no longer needed to make payments to the state, (2) lead to third-party challenges on the casino licensing process, and (3) allow additional tribes that gain federal recognition to build new casinos. Further, he cautioned that these issues "pose significant uncertainties and potentially serious ramifications for the existing gaming relationships between the State and the Tribes."

Slot Moratorium

The federal procedures and the compact only authorize the Mashantucket Pequot and Mohegan tribes to operate slot machines under certain conditions. These conditions include (1) an agreement between the tribe and state (e.g., MOU), (2) a court order, or (3) a change in state law

that allows the operation of slot machines by any person, organization, or entity. Currently, both tribes are able to operate slot machines because of the MOUs each has with the state. But if there were a court order or change in state law, the tribes would no longer need an MOU to operate slot machines (thus, the MOU would no longer be applicable and the tribes would not need to contribute 25% of their slots revenue to the state).

Since the proposed legislation authorized the tribes to jointly operate a casino, the attorney general argued, it could be construed that the joint entity is a different entity than each tribe, thus allowing this new entity to operate a casino could violate both MOUs. Therefore, the attorney general suggests that any legislation should have the tribes' agreement that it is not in violation of the existing MOUs and that only the tribes may own an equity interest in whatever business entity is formed.

The attorney general also contends that passing the proposed legislation could be read to end the moratorium because the state would have passed a law that allows casino gaming, even though it authorizes a joint entity owned entirely by both tribes.

A possible solution to these issues is to have a new MOU between the state and tribes stating that the proposed legislation does not affect the existing MOUs. These types of amendments require approval from the U.S. Department of the Interior's Bureau of Indian Affairs (BIA) (see [25 C.F.R. § 293.4\(b\)](#) and [25 C.F.R. § 291.14](#)). However the BIA does not provide prospective review or approval. It only provides technical assistance (see below). As a result, the attorney general warned that approval of a new MOU is not guaranteed.

The attorney general concluded this portion of his analysis by stating that there is a lot of uncertainty with little legal precedent or guidance in this area of law. If the legislature decided the benefits of allowing an off-reservation casino outweigh the risks, the attorney general suggested the legislation include (1) provisions conditioning the legislation to state that the current slot moratorium is not affected, (2) appropriate waivers of tribal immunity, and (3) an express provision terminating the authority granted to the tribes and a repeal of the law if the tribes contested the new MOU or a court ever concludes that the new agreement is invalid.

Third-Party Court Challenge

The attorney general cautioned that if enacted, there could be third-party challenges claiming the legislation granted the tribes the exclusive right to conduct gaming, which violates the Equal Protection Clause of the U.S. Constitution (see Footnote 1 of the Attorney General Memo).

In addition, there could also be claims that the legislation is unconstitutional because it violates the Commerce Clause since granting the tribes the exclusive right to conduct casino gaming in the state unconstitutionally discriminates against interstate commerce.

The attorney general concluded that he is unable to predict with any certainty how a court would resolve either of these issues, but he suggested that the legislation include a nonseverability provision that voids the law if a court rules that any part of it is unconstitutional, invalid, or unenforceable.

MGM and the Schaghticoke tribe filed lawsuits citing [SA 15-7](#) violated both the Equal Protection and Commerce clauses of the U.S. Constitution, see below for more detail.

Other Tribes

The Mashantucket Pequot and Mohegan tribes are able to operate casinos on tribal land under the federal Indian Gaming Regulatory Act (IGRA). IGRA only allows casino gaming on tribal land if the state where it is located has not prohibited gambling. Under this framework, although the state claimed it did not authorize gaming, the Second Circuit Court of Appeals disagreed and held that Connecticut allowed gaming because of its “Las Vegas Night” statute (which has since been repealed) (*Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024 (2nd Cir. 1990)).

But if this casino legislation was passed, it could serve as a new trigger and significantly increase the likelihood a newly federally recognized tribe could operate a casino under federal law. (For more information on the tribal casino approval process, see OLR Report [2013-R-0373](#).)

Special Act 15-7

The legislature passed [SA 15-7](#), which created a process for, rather than authorizing, the establishment of an off-reservation casino that would be operated through a jointly owned business entity owned by the Mashantucket Pequot and Mohegan tribes.

Under the act, the business entity may issue a RFP and enter into a development agreement with a municipality to possibly establish a casino. Any agreement, as well as the establishment of the casino, is contingent upon state law being changed to actually allow the tribes to operate an off-reservation casino.

Any municipality may respond to the RFP. If the tribal business entity issues an RFP, it must submit a report for the previous calendar month summarizing its activities to the top six legislative leaders; Public Safety and Security Committee; and attorney general. The report must be submitted by the 25th of each month, beginning not later than one month after issuing the RFP.

The act also states that, if a final judgment of any court holds any provision of the act invalid, unlawful, or unconstitutional, the remaining provisions are inoperative and have no legal effect. The act was effective June 19, 2015.

Lawsuits

After the passage of [SA 15-7](#), MGM and the Schaghticoke Tribal Nation, one of the tribes seeking federal recognition, separately applied to the secretary of the state to establish a limited liability corporation pursuant to the special act. Both were denied. After these rejections, both MGM and the tribe filed federal lawsuits claiming that [SA 15-7](#) violated both the Equal Protection Clause of the 14th amendment, because the act is a race-based set-aside, and the Commerce Clause, because it favors the tribes and bars outside competitors (see *MGM Resorts v. Malloy et al.*, 3:15-cv-1182-AWT and *Schaghticoke Tribal Nation v. Merrill et al.*, 3:16-cv-00380-AWT).

In response to the suits, the attorney general filed a motion to dismiss, which stated that [SA 15-7](#) only allows the Mashantucket Pequot and Mohegan tribes to seek proposals for a casino and further legislation is needed to authorize a third casino. Further, there is nothing preventing MGM from seeking casino locations itself, similar to the tribes.

For this reason, in June 2016, a federal district judge dismissed the MGM complaint on the grounds MGM did not adequately allege an injury, thus did not have legal standing to sue. After the ruling, MGM appealed to the Second Circuit Court of Appeals which heard arguments in November, but has not issued a decision (see *MGM Resorts v. Malloy et al.*, 0:16-cv-02158).

After the dismissal of MGM's lawsuit, the Schaghticoke tribe voluntarily dismissed its lawsuit. The tribe withdrew its lawsuit without prejudice, which means it could file it again if it chose to.

BIA Letter

As a result of the attorney general's memo, the Mashantucket Pequot and Mohegan tribes sought the BIA's technical assistance on the proposed amendment to alter the MOUs. The BIA responded on April 25, 2016 (see Appendix 2).

In its response, the BIA reiterated that the letter should not be construed as a preliminary decision or advisory opinion. But the BIA did state that the proposed amendment generally confirms that a proposed law authorizing a new state-regulated casino would not violate the tribe's existing exclusivity arrangement if the casino is jointly and exclusively owned by the tribes.

MMCT Venture

After the passage of [SA 15-7](#), the Mashantucket Pequot and Mohegan tribes formed MMCT Venture, LLC as the jointly owned business entity required by the act. On October 1, 2015, MMCT published instructions to municipalities on how to submit a RFP.

MMCT received five proposals from four municipalities (East Hartford, East Windsor, Hartford, and Windsor Locks), with Windsor Locks submitting two proposals. East Hartford's proposal would have renovated the Showcase Cinemas along I-84; Hartford would have developed land in the North Meadows, near the Xfinity Theater; East Windsor would have renovated the Showcase Cinemas along I-91, a former Wal-Mart, and another piece of real estate; and Windsor Locks would have used an airport terminal or off-track betting parlor.

In February 2016, the tribes announced that East Windsor was no longer being considered for the third casino. This was a result of the developer not having an option on the real estate property where he proposed to build the casino.

In September 2016, after receiving amended applications, MMCT decided to reopen the RFP process. In this round of RFPs, five municipalities (East Hartford, East Windsor, Hartford, South Windsor, and Windsor Locks) submitted proposals. South Windsor proposed developing town-owned land off of I-291, while East Windsor only focused on the Showcase Cinemas, and Windsor Locks expanded their proposal to include building on a tobacco field off of Route 20.

In early January 2017, MMCT announced its two finalists, East Windsor and Windsor Locks. The tribes have conducted public hearings in both towns. Windsor Locks has stated it would hold a referendum on the project, while East Windsor has stated that it does not need to.

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