



Office of the Attorney General
State of Connecticut

(860) 808-5319

The Honorable Dannel P. Malloy
Governor
State Capitol
210 Capitol Avenue
Hartford, CT 06106

Dear Governor Malloy:

You have requested an opinion, in light of the enactment of Special Act 15-7 and the subsequent developments pursuant to it, of the risks associated with moving forward with the process for authorizing a casino gaming facility operated by an entity jointly owned by the Mashantucket Pequot Tribal Nation (MPTN) and the Mohegan Tribe of Indians of Connecticut (Mohegan) (collectively, Tribes). Specifically, you request an opinion about (1) the potential for success of constitutional challenges to the grant of an exclusive right to the Tribes to operate a casino; (2) the risks to the State's current revenue sharing arrangements with the MPTN and Mohegan if the Mashantucket Pequot Gaming Procedures and Mohegan Gaming Compact are amended to facilitate the operation of such a facility; and (3) the impact on future tribal gaming in Connecticut.

By way of initial background, Special Act 15-7 established a process under which a tribal business entity, registered with the Secretary of the State and owned exclusively by the MPTN and Mohegan, could issue requests for proposals to municipalities for the possible establishment of a casino gaming facility. The Special Act expressly provided that the tribal business entity was prohibited from establishing a casino gaming facility until subsequent legislation was enacted to permit the operation of such a facility. This process has since progressed such that the Tribes' evaluation of potential sites for a facility is concluding and the General Assembly is considering legislation to authorize gaming at such a facility.

As you indicate, on April 15, 2015, prior to the enactment of Special Act 15-7, we provided a letter to the legislative leadership about various legal issues raised by the possible enactment of legislation authorizing MPTN and Mohegan to jointly operate a gaming facility off of reservation land (2015 Letter). The 2015 Letter summarized the nature of the existing gaming arrangements between

the State and the MPTN and Mohegan, and discussed each of the legal issues that you raise. A copy of the 2015 Letter is attached.

Our 2015 letter identified certain legal risks to the State's interests. We must exercise caution in providing a full legal analysis in a public letter given our responsibility to defend the State's interests in any existing, and perhaps future, litigation or other proceedings relating to these topics. We note two additional and important caveats. First, clear legal guidance in this area is sparse, and the factual and historical backdrop to our analysis is unique. Second, your questions call for predictions as to how a federal government agency within a new presidential administration will, as a matter of policy, choose to exercise its authority. As a result, forecasting likely legal or administrative outcomes is unusually difficult. However, for the reasons discussed below, we reiterate that we remain concerned about the risks associated with each of the identified issues. Moreover, we cannot say with any degree of reasonable certainty that those risks are negligible or that they have been or can be substantially mitigated.

Potential for Success of Constitutional Challenges

As to the first issue you raise, the 2015 Letter indicated that third parties could claim that granting an exclusive right to conduct gaming to the Tribes off of reservation land violates the equal protection clause of the U.S. Constitution. 2015 Letter, at 2 n.1 (citing *KG Urban Enterprise, LLC v. Patrick*, 693 F.3d 1 (1st Cir. 2012)). In *KG Urban*, the court raised serious questions about whether a state law that provided a preference to an Indian tribe in granting gaming licenses would be subject to strict judicial scrutiny as a racial, rather than a political, classification, and thus presumptively unconstitutional. *KG Urban*, 693 F.3d at 18-20. The 2015 Letter also noted that a third party could assert a claim under the commerce clause of the United States Constitution that the granting of an exclusive right to the Tribes for the purpose of protecting in-state economic interests was unconstitutional discrimination against interstate commerce. 2105 Letter, at 2 n.2 (citing *United Haulers Ass'n v. Oneida-Herkheimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007)). We indicated in the 2015 Letter that we were unable to predict with any certainty how a court might resolve such claims.

After the enactment of Special Act 15-7, MGM Resorts International Global Gaming Development, LLC (MGM) brought an action in federal court challenging the constitutionality of the Special Act and asserting both equal protection and commerce clause claims of the sort we discussed in the 2015 Letter. Those claims rely, in substantial part, on legislative history materials that are alleged to demonstrate an explicit intention through Special Act 15-7 to

discriminate in favor of a specific in-state entity and against out-of-state competitors. This office successfully moved to dismiss MGM's lawsuit on the basis that MGM did not suffer any real injury under the Special Act's preliminary process and therefore lacked standing to sue at this point. *MGM Resorts Int'l Global Gaming Dev. v. Malloy*, No. 3:15cv1182(AWT) (D. Conn. June 23, 2016). In dismissing MGM's action, the court did not reach the claims' merits. MGM has appealed the dismissal to the United States Court of Appeals for the Second Circuit, and the appeal presently awaits a decision from the court.

If the state were to pass a law permitting only the Tribes to operate a casino, we would be unable to present in a future challenge the same arguments asserted in the motion to dismiss, *i.e.*, standing, ripeness and justiciability based upon the preliminary nature of the process established by Special Act 15-7. Thus, there is an increased likelihood that a court would reach the merits of equal protection or commerce clause challenges.

As noted, we must be circumspect in our comments in light of our responsibility to defend such claims if, as is foreseeable, they are asserted and their merits litigated. To be sure, legislation currently pending to approve a joint tribal casino does not explicitly reference or rely upon the process that was previously established in Special Act 15-7 and that is currently being challenged in litigation. However, it is foreseeable that *any* legislation resulting in approval of the joint tribal entity's operation of a casino will be challenged as effectuating and furthering an allegedly discriminatory intent first manifested in Special Act 15-7 in violation of the commerce and equal protection clauses of the United States Constitution.

We do believe that there are potentially meritorious defenses that we would be able to raise against these constitutional claims, including that the special nature of state-tribal relationships permit special legislative treatment and require judicial deference. However, the relative novelty of the legal issues such claims would present makes it difficult to predict their outcome with confidence. We caution that the potential of equal protection or commerce clause challenges succeeding in this context is not at all insubstantial.

Risks to Current Revenue Sharing Arrangements

The 2015 Letter discussed in detail the basis of the State's relationship with the Tribes under the Mashantucket Procedures and the Mohegan Compact (together, the Compacts) and the corresponding Memoranda of Understanding (MOUs) that provide for revenue sharing from the operation of video facsimile

games (colloquially known as video slot machines). *See* 2015 Letter, at 2-3. In the 2015 Letter, we advised that legislation authorizing the Tribes to operate a gaming facility off reservation land could constitute a change in state law that would end the moratorium on operating video facsimile games and permit the Tribes to operate video facsimile games free of the payment requirements under the MOUs. *Id.* at 4. We accordingly recommended that the Compacts be amended to make clear that such legislation would not trigger the termination of the moratorium, and that the amendments be submitted to the Secretary of the Interior for approval. We cautioned, however, that

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.

Id. at 5.

Since the 2015 Letter, there have been several developments, but none completely resolves the concerns we previously expressed, namely that the Secretary's review might extend to raising objections about the existing payment arrangements.

First, on April 25, 2016, Acting Assistant Secretary – Indian Affairs Lawrence S. Roberts issued a "technical assistance" letter in response to the requests of the Tribes to review proposed amendments to the Compacts. It stated that the proposed amendments reflected "the unique circumstances" of the Tribes and the State and that it was their view that the Tribes' "existing exclusivity arrangement would not be affected by a new State-authorized casino that is jointly and exclusively owned" by the Tribes.

For several reasons, the technical assistance letter does not resolve completely the concerns we previously raised about the risks associated with amending the Compacts. First, the letter itself expressly provides that it should not be construed as a preliminary decision or advisory opinion, and that any compact amendment would still require formal final approval. More importantly, the technical assistance letter does not directly address the concerns we raised: the likelihood of approval and the scope of the Secretary's review. Instead, the technical assistance letter's nonbinding guidance seemed to address the separate question of whether, absent amendments to the MOUs and Compacts, legislation authorizing a gaming facility would affect the "existing exclusivity arrangement."

The Interior Department, however, lacks jurisdiction to adjudicate disputes arising out of gaming compacts. The federal courts have exclusive jurisdiction over such disputes. Moreover, for the reasons set forth in our 2015 Letter, we continue to believe that passing such legislation absent amendments to the Compacts and MOUs poses serious risks to the State's agreements with the Tribes.

While the technical assistance letter may have been intended to provide the Tribes and the State with some assurance that the proposed amendments would be approved and that the Department did not intend to revisit the existing exclusivity arrangement, it did not offer meaningful insights into the standards or considerations that would govern the breadth and substance of its review. Its reference to the "existing exclusivity arrangements," which are contained in the MOUs, not the Compacts to which the proposed amendments related, suggests that the Department would review and consider the entirety of the relationships between the Tribes and the State, including the MOUs, if proposed amendments to the Compacts were submitted.¹

The Mohegan Tribe also submitted to our office a letter from its counsel, Dentons, suggesting that the Secretary could not, when reviewing the proposed amendments, alter or disapprove the existing Compacts or revenue sharing arrangements. We acknowledge that there are many factors supporting Dentons' conclusions. Those factors include the Secretary's historical practice of rejecting very few compact amendments, the fact that the existing revenue sharing arrangements between the State and the Tribes have been in place for decades, and the State's and Tribes' longstanding reliance on their validity and enforceability. We also credit Dentons' representation that the Secretary's actions have, in the past, been limited to approving (expressly or by inaction) or rejecting proposed amendments, and that there appears to be little or no precedent for an amendment review resulting in the disapproval of existing compact provisions. In other words, we agree with Dentons' that it would be highly unusual, if not unprecedented, for the Secretary, in the context of reviewing proposed amendments, to affirmatively invalidate or modify existing payment arrangements not directly related to the terms of the proposed amendments.

Additionally, we note facts suggesting that the BIA has long been aware of the existing MOUs without questioning their validity. The Mohegan MOU

¹ In addition, the Secretary's decision approving any proposed amendments could potentially be subject to an aggrieved third party's court challenge, asserting that the proposed amendments violate IGRA or federal constitutional or other law. *See Amador County v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011).

was included with its Compact submission to the Department of the Interior and the Assistant Secretary for Indian Affairs, to whom the Secretary had delegated his authority to approve compacts under IGRA, approved both the Mohegan Compact and the Mohegan MOU. Although the Mashantucket MOU was never submitted to the Department of the Interior, the Department was aware of the Mashantucket MOU at the time it approved the Mohegan Compact and MOU. Indeed, in approving the Mohegan MOU, the Department's letter specifically acknowledged that "the federally recognized Indian *tribes* in Connecticut" had purchased "a valuable right from the State" because the State had agreed to "not allow commercial operation of slots by any other entity as long as the *tribes* continue to make the agreed payments." *See* December 5, 1994 Approval Letter from the Department of the Interior to the Mohegan Tribe (emphasis added).

Our position has been, and remains, that both MOUs were contemplated and permissible under the terms of the Compact moratoria and therefore are valid and enforceable. They have been in place for more than twenty years and have never been called into question by the Interior Department. Moreover, its staff, in issuing the recent technical assistance letter, appears to have given at least some consideration to the MOUs without casting any aspersions on them, explicitly referencing the exclusivity arrangements in the MOUs in concluding that the Tribes' exclusivity is not likely to be impacted.

In sum, we concur with Dentons that the Interior Department, were it to follow past practice, would likely review a proposed amendment without disturbing or casting doubt upon the existing MOU provisions governing payment arrangements.

However, it cannot be ignored that there has been a change in presidential administrations. There is no guarantee that the Interior Department will follow past practice in the exercise of its authority, nor even that it will adhere to the limited views expressed in the technical assistance letter. Notably, in his past business ventures, President Trump was actively involved in pursuing casino gaming interests in Connecticut, and the significance of those activities, among other things, for our present considerations is, at best, difficult to judge.

Thus, we cannot assure you that, in evaluating proposed amendments to the Compacts, the Secretary's review would necessarily *not* undertake at least some consideration and discussion of the validity under IGRA of the MOUs' revenue sharing arrangements. The technical assistance letter is not binding and, as noted, a new presidential administration is now in place. The fact that the Interior Department has never called the payment arrangements into question and

that it referenced the Mashantucket MOU in its letter approving the Mohegan MOU and Compact is not conclusive evidence that it deems the Mashantucket MOU valid notwithstanding the fact that it was never submitted to and formally approved by the Department.

Ken Salazar, a former Secretary of the Interior and now private attorney, has provided you with a letter on behalf of MGM that details a variety of predicted potential negative consequences that might arise in the event proposed compact amendments are submitted to the Secretary. He also submitted written testimony to the Public Safety and Security Committee reiterating his view that the proposed amendments likely would not be approved and that the mere submission of those amendments likely would trigger a broader review of the existing payment arrangements. Secretary Salazar concluded that there is a substantial risk that the Department would invalidate the existing revenue sharing arrangement on the grounds that they far exceed amounts the Department has previously approved and that Connecticut state law impermissibly directs those funds to the State's General Fund.

The potential outcomes Secretary Salazar predicts would be inconsistent with the Department's general practice of leaving undisturbed existing compact provisions when reviewing compact amendments. We caution, however, that should the Secretary's review or decision on a proposed amendment include a discussion or analysis casting doubt in some way on the validity of the existing payment arrangements, the State and its tribal partners would confront difficult questions about the legality and enforceability of the MOUs.

As we emphasized in the 2015 Letter, "[g]iven 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." 2015 Letter, at 5. Developments since then, including the technical assistance letter, have not completely eliminated these uncertainties. Weighing such uncertainties against the current challenges to the State's gaming industries is of course ultimately a policy decision.

Future Tribal Gaming

As to the third issue – the potential implications for future tribal gaming – the 2015 Letter noted that the enactment of legislation authorizing the Tribes to engage in gaming activities off reservation land would "significantly increase the likelihood that newly acknowledged tribes would succeed in asserting rights to

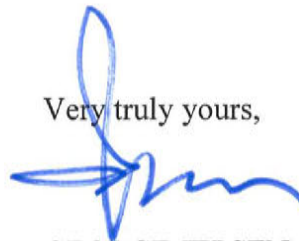
casino gaming under IGRA." 2015 Letter, at 6. IGRA provides that a federally recognized tribe may engage in Class III gaming activities on Indian lands, subject to a tribal-state compact, if such activities are located in a state that "permits such gaming for any purpose by any person, organization, or entity...." 25 U.S.C. § 2710(d)(1)(B). We have no reason to change our assessment of this issue.²

Conclusion

In sum, the risks attendant to authorizing a casino gaming facility operated by an entity jointly owned by the MPTN and Mohegan, while impossible to quantify with precision, are not insubstantial and cannot be mitigated with confidence. We are not in a position to opine on the nature or extent of the economic or other benefits that may result from approving such an entity or whether any such benefits justify the risks described in this letter, however minimal they may be.

We trust this is responsive to your questions, and we remain available to discuss these issues further with you or your staff.

Very truly yours,



GEORGE JEPSEN
ATTORNEY GENERAL

² In the 2015 Letter we noted that at that time the Bureau of Indian Affairs (BIA) was in the process of considering significant changes to the federal tribal acknowledgment regulations. In the meantime, the BIA adopted new acknowledgment regulations that, among other things, prohibit previously denied petitioners, such as the Eastern Pequot, Schaghticoke, and Golden Hill Paugussett petitioners in Connecticut, from re-petitioning for tribal acknowledgment under the new regulations. 25 C.F.R. § 83.4(d). That rule is likely to be the subject of court challenges by one or more of those previously denied petitioners.