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# GAMING LEGALNEWS

## THE MASSACHUSETTS MUDDLE: WHAT DOES IT MEAN FOR THE MASHPEE WAMPANOAG?

*by Dennis J. Whittlesey*

The Mashpee Wampanoag casino project planned for the town of Taunton in southeastern Massachusetts received a major setback when the state Gaming Commission voted last week to suspend the legislated tribal priority for a license in that portion of the state. The priority was part of a statewide casino plan enacted by the state legislature two years ago authorizing three casinos in the state with a preference giving an Indian tribe the rights to the license designated for the southeastern part of the state. That preference clearly was intended to benefit the Mashpee Wampanoag, which was federally recognized in the spring of 2007 through a Department of the Interior administrative process. Non-tribal casinos were authorized for two other areas of the state, and those licenses are the subject of competition among casino development teams.

The Gaming Commission action was a predictable consequence of the legislative priority itself, in that the law established timelines for the Tribe that many believed would be virtually impossible to meet. Indeed, the Tribe's deadline to get the gaming into trust status in a timely manner has been extended to give Interior additional time in which to accept the proposed casino site into trust status for gaming.

The Mashpee propose to operate a $500 million destination resort casino in Taunton, although it must be noted that the Taunton site is the third identified during six years of the tribal efforts to develop a casino. The other sites were within the Town of Middleborough and New Bedford. In addition to changing proposed gaming sites, the Tribe also replaced its original development team after it had executed a comprehensive local services agreement with Middleborough in July 2007. The peripatetic search for a gaming site has consumed money and a considerable amount of time, causing delay that was cited by the Commission in its unanimous vote to allow commercial casino developers to apply for the license. Such applications will constitute competition for a license that Mashpee has viewed as its legislated entitlement.

At last week's hearing, Gaming Commission Chairman Stephen Crosby declared that the law provided for opening up the competition to non-Indian entities if it appears that Mashpee will be unlikely to obtain the federal trust status necessary for tribal gaming. While Interior officials have declared that they are "expediting" consideration of the trust application and expect a final decision sometime during 2013, the continuing delays led to the Commission's invocation of the law's requirement that it "must" seek commercial bids for the license if *it decides* that the Tribe will not get land into trust for an Indian casino.

Mashpee Chairman Cedric Cromwell urged the Commission to not approve commercial casino applications, noting that the Tribe is proposing to pay "hundreds of millions of dollars" to the state in return for the exclusive right to conduct casino gaming in the designated region. He asserted that the Tribe will continue to develop and operate its project even if the third license goes elsewhere, meaning that the Tribe will develop a fourth casino in the state pursuant to the federal Indian Gaming Regulatory Act. Part of that assertion included the statement that a federal Indian casino would make no payments into the state's treasury. Commission Chairman Crosby responded that if the Tribe does not obtain status for the land and the third license is not issued, then the state would lose the $85 million license fee and annual tax revenue of approximately $100 million.

The controversy is far from over, and the outcome is far from certain.

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Meanwhile, the Massachusetts House of Representatives took action last week that could result in the legalization of online poker in the state, an activity that potentially could have adverse impacts on the "brick and mortar" casino gaming revenues anticipated from the "three casino" plan already on the books. This bill was attached to the FY 2014 budget and would authorize online poker to be offered by up to three separate operators. A much broader bill was introduced in the state Senate in February that proposes to go beyond online poker by authorizing online casino games.

The Massachusetts Muddle seems to have a life of its own. Whether and how the Mashpee Wampanoag casino project will be affected by these latest developments is unknown, but events are moving quickly on Beacon Hill. It is safe to say that the overall picture is constantly changing and is likely to continue doing so.

## NIGC PUBLISHES FINAL RULE FOR TRIBAL SELF-REGULATION

*by Patrick Sullivan*

Gaming tribes, particularly tribes conducting only Class II gaming, should take notice of the publication by the National Indian Gaming Commission ("NIGC") of a revised final rule for Self-Regulation of Class II Gaming earlier this month.

For Las Vegas style Class III gaming, the Indian Gaming Regulatory Act ("IGRA") divides regulatory authority between state and tribal governments. But for Class II gaming, which includes bingo, electronic bingo gaming devices, and non-house banked card games, the NIGC is the primary regulator. In January 2012, the NIGC issued a Notice of Proposed Rulemaking regarding tribal self-regulation under IGRA, and after extensive consultation, it released a final rule on April 4 to be published at 25 CFR Part 518.

IGRA's "self-regulation" provisions at 25 U.S.C. § 2710(c) allow qualifying tribal gaming regulatory bodies to obtain a certification allowing them to take over day-to-day oversight of Class II gaming operations from NIGC and reduce their fees paid to NIGC. The seldom-discussed self-regulation provisions in IGRA are written broadly, but Indian tribes have complained that the NIGC regulations are not faithful to the statute. Many tribes voiced the same complaints in consultation: (1) the self-regulation certificate was too difficult to attain; (2) the compliance costs of self-regulation outweighed the benefits; and (3) the previous NIGC regulations clawed back the investigative power that Congress intended to return to qualifying tribes. As of today, only two Indian tribes have attained the certificate – Grand Ronde in Oregon and Menominee in Wisconsin.

NIGC's rulemaking process sets the standard for government consultation with Indian tribes. In 2000, President Clinton issued Executive Order 13175, requiring that when Indian tribes are affected, federal agencies must engage in government-to-government consultation as early in the rulemaking process as possible. Indian tribes have long objected that an opportunity to comment on proposed rules already drafted by agencies is not real consultation; they want input into the first draft. In response, NIGC Commissioners and attorneys from NIGC's Office of General Counsel conducted 30 consultations throughout Indian Country with tribal leaders, tribal gaming commissioners, and tribal attorneys – even before the regulations were officially proposed.

### The New Regulations Streamline the Certification Process

IGRA Section 2710(c) allows tribes that conduct Class II gaming for three years to petition for a certificate of self-regulation. The Commission *shall* issue a certificate if the tribe meets a set of criteria that indicates it has operated without evidence of criminal or dishonest activity, accounted for all revenues, and has adequate systems for accounting, licensing of employees, and enforcement of tribal gaming regulations.

While former NIGC regulations implementing Section 2710 focused on tribal gaming operations, the new certification inquiry instead examines the effectiveness of the tribal regulatory authority and provides a comprehensive checklist of criteria regarding required accounting, monitoring, licensing, and enforcement practices. The new process significantly reduces supporting document submissions, shortens the approval process, and reduces the wait for a final, appealable decision. The NIGC Office of Self-Regulation makes an initial determination that the application is complete and coordinates an onsite visit. The Office of Self-Regulation forwards findings and a recommendation to the full Commission and the tribe, which may add a response to the recommendation. The full Commission issues preliminary findings as to whether the approval criteria are met and then issues a decision within thirty days. The Commission's decision is a final agency action, appealable in federal district court. Applicants may withdraw their application and resubmit at any time.

### The New Regulations Ease the Burdens of Compliance

IGRA requires that self-regulating tribes are required to submit resumes for every employee "hired and licensed by the tribe." The new regulations properly limit this requirement to the members of the tribal regulatory body. This clarification saves tribes and NIGC a huge amount of paperwork, but it does not exempt tribes from notifying

NIGC of licenses issued to key employees and primary management officials as required by IGRA. Self-regulating tribes must continue to provide an annual independent audit and resumes of all employees of the tribal regulatory body.

**The New Regulations Restore Monitoring, Inspection, and Background Investigations to the Tribes**

The new regulations no longer claw back NIGC inspection powers that IGRA withdrew. Self-regulation limits the Commission's enumerated powers to (a) monitor Class II gaming, (b) inspect gaming premises, (c) conduct background investigations, and (d) inspect tribal gaming books and accounting records. This is a substantial limitation of key NIGC functions, some of which appear to be at odds with other regulations describing investigation requirements. These ambiguities could lead to disputes between NIGC and self-regulating tribes about the remaining scope of NIGC authority.

In any case, it is clear that self-regulation does not disturb any of the Chairman's powers to (i) order temporary closures, (ii) levy civil fines, (iii) approve tribal gaming ordinances, or (iv) approve management contracts. Nor does it disturb any other powers delegated to the Chairman by the Commission. Finally, self-regulation does not displace the Commission's enumerated powers to adopt regulations, set budgets and fee rates, issue subpoenas, hold hearings, and permanently close gaming facilities.

**Conclusion**

In practice, the new regulation means that Class II gaming tribes that are able to obtain the certification can exercise more sovereignty over their gaming operations and reduce their NIGC regulation costs. Many tribal casinos have generated consistent revenue from Class II machines alone, without the burdens of state compacts and revenue sharing. As technology improves, Class II machines are becoming more profitable and less distinguishable from Class III machines. The new regulations, paired with the technological developments, may make Class II gaming more attractive than ever.

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