Are Casinos Inevitable in Massachusetts?

- A tribe first must have the federal government take land in trust
- Then they must satisfy one of the two relevant exceptions to the rule that tribes may not gamble on lands acquired after 1988
- If they pass these hurdles, the tribe must still negotiate a compact with the Commonwealth
- The Commonwealth must negotiate a compact in good faith, which means that it does not have to allow any type of gambling that is currently illegal in the state – this includes class III slot machines

There are many hurdles to overcome before a tribe could conduct gaming in the Commonwealth. At each of these points, the tribe could be denied.

All of this points to tribal casinos being far from inevitable.

Casinos in Massachusetts are Not Inevitable

There are two major obstacles, each with several hurdles, that the Wampanoag must overcome before they are able to open a casino in Massachusetts. Even if the tribe clears all of the hurdles, if the Commonwealth does not want an Indian casino, the most the Wampanoag can possibly get is table games but no class III – "Vegas-style" – slot machines.[1] Since slot machines make up 70-80% of a casino's gambling revenue, it is highly questionable whether casino developers would be interested in investing in a casino that does not have slot machines.

A. Land in Trust

First hurdle: Getting land in trust

- Gambling may only occur on Indian lands (for tribes in MA, this means land that has been taken in trust).[2] Right now neither of the two recognized tribes in Massachusetts have Indian lands.
- The Mashpee Wampanoag tribe has requested that the federal government take the land in Middleborough into trust and designate it as the tribe's initial reservation.
- This is a lengthy process. The Governor has already challenged the Mashpee Wampanoag's application. There has to be an environmental impact review and a detailed analysis by the Secretary of the Interior on a variety of issues such as the impact on the state resulting from the removal of the land from the tax rolls, the distance from Mashpee to Middleborough (approximately 40 miles), and the tribe's ties to the land.[3]
- The U.S. Supreme Court has agreed to hear a case that may prohibit the Secretary of the Interior from taking any land into trust for any tribe recognized by the federal government after 1934 (this includes the Wampanoag).[4] The case will not be heard until late fall 2008 or sometime in 2009. It is doubtful that with a case pending in the Supreme Court the Secretary will make any decisions on the land in trust application until the case has been resolved.

Second hurdle: Land must still satisfy certain requirements for there to be a casino

- The Indian Gaming Regulatory Act (IGRA) places certain restrictions on gambling on lands acquired in trust by the Secretary after October 17, 1988.[5] So, if the Wampanoag are successful in having the land in Middleborough taken into trust, the question remains whether the tribe is able to build a casino on this land.
- There are two ways that the Wampanoag will try to get land in trust for gambling purposes: 1) if the land is designated as an initial reservation, or 2) if the Governor and Secretary of the Interior agree that the tribe should be permitted to open a casino on the tribe's land (assuming the tribe gets the land in trust).[6]

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[1] Class II gaming is broadly defined as the game of bingo, while class III gaming is broadly defined as casino games, including slot machines.
[2] 25 U.S.C. § 2710; 25 U.S.C. § 2703 (4).
[3] 25 C.F.R. § 151.11.
[4] Carcieri, Gov. of RI v. Kempthorne, Docket # 07-526 (cert granted Feb. 25, 2008).
[5] 25 U.S.C. § 2710.
[6] *Id.*

- Initial reservation: there is very little on the books right now about this;[7] however, the Secretary has proposed rules for determining if land should be deemed an initial reservation for purposes of gambling. According to the proposed rules, the Secretary will look to see whether the land is located within an area where the tribe has historical and cultural ties and a majority of the tribe's members reside within fifty (50) miles of the location of the land. This would be a stretch for the Wampanoag.[8]
- Governor agreement: first, the Governor has already opposed the Wampanoag's land in trust application; second, even if he were to agree with the Secretary, this provision is in clear violation of the Commonwealth's constitution (it is a violation of separation of powers).[9] Therefore, the legislature has the power – and if the legislature does not want the land to be used for gambling purposes, it cannot be used for that purpose.

B. Compact for Class III Gaming

Third hurdle: if they get land in trust for gaming, they still need a compact

- If land is taken into trust, a tribe cannot conduct class III gaming without a tribal-state compact. There are two ways this can happen – a state enters into a compact voluntarily within 180 days of a tribe's request to negotiate a compact, or no compact is reached within 180 days and the courts and federal government become involved.[10]
- Once a tribe has jurisdiction over Indian lands, if requested, a state must negotiate with the tribe in good faith to enter into a compact to engage in class III gaming.[11]
- If the Commonwealth negotiates with the Wampanoag in good faith for a gaming compact, and no compact can be reached, there is no casino.
- If the federal court finds that the state failed to negotiate in good faith, the court must order the parties to enter into a compact within 60 days.[12]
- If within 60 days a compact cannot be agreed upon, the tribe and state must each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator selects from the two proposed compacts.[13]
- If a state does not then consent to the proposed compact chosen by the mediator, the mediator notifies the Secretary of the Interior and the Secretary must prescribe procedures that are consistent with the proposed compact selected by the mediator under

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[7] 25 U.S.C. § 467; *see also* Memorandum from the Acting Associate Solicitor, Division of Indian Affairs to the Regional Director, Midwest Regional Office, Bureau of Indian Affairs, *Indian Land Opinion: Match-E-Ba-Nash-She-Wish Band of Pottawatomi Indians of Michigan* (June 25, 2003).

[8] http://www.doi.gov/bia/Section%2020%20consultation%20draft%20of%203-15-06.pdf.

[9] *See* Taxpayers of Michigan Against Casinos v. State, 685 N.W.2d 221 (Mich. 2004) (stating, "to date, every other state supreme court that has addressed whether the governor or the legislature of a state has the authority to bind the state to a compact with an Indian tribe under IGRA has concluded that the state's governor lacks the power unilaterally to bind the state to tribal gaming compacts under IGRA"); Saratoga Cty. Chamber of Commerce v. Pataki, 100 N.Y.2d 801, 810 (2003) ("Every State high court to consider the issue has concluded that the State Executive lacks the power unilaterally to negotiate and execute tribal gaming compacts under IGRA"); *citing* State ex rel. Clark v. Jonson, 904 P.2d 11 (N.M. 1995); State ex rel. Stephan v. Finney, 836 P.2d 1169 (Kan. 1992); Narragansett Indian Tribe v. Rhode Island, 667 A.2d 280 (R.I. 1995); McCartney v. Attorney General, 587 N.W.2d 824 (Mich. App. 1998).

[10] 25 U.S.C. § 2710.

[11] *Id*.

[12] *Id*.

[13] *Id*.

which class III gaming may be conducted – but only that gambling which is allowed in the state (Massachusetts = no slot machines).[14]

Fourth hurdle: prove that the state did not negotiate in good faith

- The above scenario is based on whether the state negotiates a compact in good faith.
- According to federal law, a court must determine whether the state negotiated in good faith[15] – and may consider the state's concerns about "the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities." A state may not demand direct taxation of the tribe or its lands.[16]
- Otherwise, good faith is very generally defined by the courts. Some argue that a state must negotiate for any gambling permitted in the state by any means.[17] If a federal court in Massachusetts were to follow this, then the Commonwealth would have to negotiate for "Las Vegas Nights" type games (table games) that we allow charities to engage in, but no class III "Vegas-style" slot machines. A tribe could have class II bingo slots; however, these slots are less lucrative for players and the house and take longer to play than class III slots, as players are playing each other, not the house. Since class II slots are less lucrative, this calls into question whether a casino developer would invest in a casino that does not have class III slot machines.

Summary

Casinos are not inevitable. The Wampanoag first must have the federal government take land in trust. Then they must satisfy one of the two relevant exceptions to the rule that tribes may not game on lands acquired after October 17, 1988. If they pass these hurdles, the tribe must still negotiate a compact with the Commonwealth. If the state does not want gambling, and negotiates in good faith, there will not be a casino. The best case scenario for casino proponents is that a court finds that the Commonwealth did not negotiate in good faith, and the tribe gets class III table games and the less lucrative class II slot machines. Finally, this process can take years. In Texas, a state that has resisted Indian casinos, and has a similar public policy as the Commonwealth on gambling, 18 years have passed since the Kickapoo Tribe first requested that the state enter into a gaming compact. They are still waiting.

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[14] *Id.*; *see also* MASS. GEN. LAWS ch. 271, § 5A.

[15] The Secretary of the Interior has also promulgated regulations (called "Secretarial Procedures") for those instances where a tribe and state cannot come to an agreement on a compact. 25 C.F.R. § 291. In August 2007, the Fifth Circuit Court of Appeals held that the Secretarial Procedures were invalid in that they were an unreasonable interpretation of federal law. Texas v. U.S., 497 F.3d 491 (5th Cir. 2007). While this is not controlling in the First Circuit (where Massachusetts is), it brings into question the constitutionality of the Secretarial Procedures. The case has been appealed to the US Supreme Court and is awaiting a decision on whether the court will hear the case.

[16] 25 U.S.C. § 2710(d)(3)(A).

[17] *See, e.g.*, Texas v. U.S., 497 F.3d 491 (5th Cir. 2007); Ponca Tribe of Oklahoma v. Oklahoma, 37 F.3d 1422 (10th Cir. 1994); Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1032 (2d Cir.1990); Ysleta Del Sur Pueblo v. Texas, 852 F.Supp. 587, 596 (W.D.Tex.1993), rev'd on other grounds, 36 F.3d 1325 (5th Cir.1994); Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F.Supp. 480, 482 (W.D.Wis.1991).