

# Building “Walls” to Enhance Tribal-State Cooperation

## *Designing Successful Regulatory Structures for Tribal Expansion into Commercial Casinos*

BY WILLIAM BOGOT AND DONNA MORE

**T**here has been much discussion recently regarding American Indian tribes growing their gaming portfolios beyond Indian Lands.<sup>1</sup> According to a recent article, “as the tribal casino market grows saturated and opportunities for gambling on Indian trust lands become scarce, an increasing number of tribes are acquiring off-reservation casinos and launching commercial gambling ventures.”<sup>2</sup> Commercial gambling in this context refers to state-licensed gaming operations that take place on lands fully within a state’s jurisdiction, and where the Indian Gaming Regulatory Act<sup>3</sup> has no application.

This type of tribal expansion raises the question of whether state commercial gaming regulators have rules and policies in place to facilitate an appropriate investigation and review of an Indian tribe’s application to own or operate a commercial casino or other gaming operation such as a video gaming route. Definitions of ownership and control are at the heart of State regulatory suitability and license investigations. However, applying these definitions to tribal entities often proves difficult for state commercial gaming regulators who are not accustomed to sovereign nations seeking licensure.<sup>4</sup> As such, what are the regulatory concerns in investigating and approving Indian tribes for commercial gaming, and what have tribal applicants done to accommodate these concerns to succeed in qualifying for a commercial casino license?

### GENERAL STRUCTURE OF TRIBAL ENTITIES

American Indian tribes are generally considered “nations within a nation.” “The United States recognizes tribes as independent sovereign nations whose locations within the boundaries of a state do not subject them to the application of state law, yet nevertheless are subject to Congress’s asserted plenary power and bound by the trust relationship between the federal government and tribes.” Rand & Light, *INDIAN GAMING LAW & POLICY*, 2<sup>nd</sup> Ed. at 12. The structure of tribal governance varies, but contemporary tribal governments are generally modeled similar to the federal or state system of three separate branches of governmental power: legislative (composed of an elected tribal council or tribal legislature), executive (which may be comprised of an elected chief, governor, or president), and judicial (which may include a supreme court and lower courts, or a council of elders).<sup>5</sup>

### OVERVIEW OF REGULATIONS FOR GAMING LICENSEE OWNERS

Indian tribes seeking state-issued commercial casino licenses often find it difficult to neatly fit into existing statutory frameworks, which require regulators to “strictly regulate. . . all persons, locations, practices and associations related to the operation of licensed casino enterprises.” *N.J.S.A. 52-1(b)(6)*. While the tribes that have moved into commercial gaming have



done so through wholly owned state-created business entities,<sup>6</sup> such as limited liability companies, the owner of these business entities is ultimately an Indian tribal nation. Generally, state gaming regulators require detailed background investigations and the filing of personal or business entity disclosure forms for all (1) direct or indirect owners of a casino license applicant<sup>7</sup>; (2) for all officers, directors, “key persons” or other persons that may be deemed to have any influence or control over the applicant or the appointment of any board member of a corporate applicant; and (3) for all persons that provide substantial capital to the applicant.<sup>8</sup> Personal disclosure forms are designed for natural persons<sup>9</sup>, and business entity disclosure forms are designed for state or other government incorporated business entities such as partnerships, associations, corporations, or limited liability companies.<sup>10</sup> Tribal nations are none of these entities.

Thus, what is the scope of a background investigation of an Indian tribe or an Indian tribe’s state-created business entity seeking licensure or a finding of suitability by a state gaming regulator? In the case of a tribe’s wholly owned company, of course, the company and its officers and directors will be subject to a background investigation and finding of suitability. But what about, and who are, the “owners” of that company? What persons and entities must submit disclosure forms and be found suitable? In the case of an Indian tribe that ultimately owns the company, the tribe is often comprised of thousands of citizens. None of these citizens is a security holder in the applicant company. The entity is created by the tribe for the benefit of the citizens. Should these citizens – the composition of which changes weekly depending on the lifecycle of births and deaths – be treated as “owners” or “shareholders” subject to a background investigation and finding of suitability?<sup>11</sup> Fortunately, no state has required such a finding of suitability of these tribal citizens. What about the persons or tribal leaders who have the authority and power to appoint the tribal company’s directors or otherwise control the gaming operation? In many cases, this will be the tribe’s elected legislature or executive, a position that changes and is in flux every few years as the leaders are up for election. Where these leaders do have authority to appoint the tribal gaming company’s directors, state gaming regulators *have* required that these leaders be subject to background investigations and findings of suitability. However, for tribal entities and leaders to subject themselves to the jurisdiction of the state regulators, the regulators may also require a full or limited waiver of the tribe’s sovereign immunity.<sup>12</sup> Generally, this is something that Indian nations prefer not to do.

As such, to avoid subjecting the tribe’s elected leaders to requisite findings of suitability and general waivers of sovereign immunity, Indian tribes that have moved into state licensed commercial casinos have done so through various corporate structures that have limited the background investigation to the tribe’s wholly owned state-incorporated gaming applicant or parent company and to limit the scope of any waiver of sovereign immunity.

## BUILDING “WALLS” FOR SUCCESS

In 2006, the Pennsylvania Gaming Control Board determined that the Mohegan Tribe and its Tribal Council Members were required to be found qualified in connection with the casino license of Downs Racing, LP d/b/a Pocono Downs. In that case, the Mohegan Tribe owned the Mohegan Tribal Gaming Authority, which in turn wholly owned Downs Racing, LP.<sup>13</sup> Both the Mohegan Tribal Gaming Authority and the Mohegan Tribe were licensed as affiliates of Downs Racing, LP.<sup>14</sup> Tribal Council Members also had to submit to qualification as principals of the affiliated entities.<sup>15</sup> The basis for the regulatory decision was that the Tribal Council Members maintained control and active involvement in the proposed gaming operations, and the Chairman of the Tribal Council even testified at the licensing hearing.<sup>16</sup> Of course, the tribe provided a limited waiver of sovereign immunity.<sup>17</sup>

As more tribes applied for commercial casino licenses, they structured their transactions to accommodate state regulatory requirements. In particular, ownership was structured to narrow the scope of tribal influence and control and thus limit the scope of the state’s suitability investigations. For example, in 2013, the Massachusetts Gaming Commission found Foxwoods Massachusetts, LLC (“Foxwoods”), an entity owned by the Mashantucket Pequot Tribe, suitable for licensure in connection with a commercial casino application.<sup>18</sup> While the Commission had some reservations regarding the criminal histories of several elected members of the tribal council, the Commission held that the applicant was organized such that there was a “wall” between the applicant’s proposed gaming operations and the tribal council. According to the Commission,

[i]t is important to recognize that by virtue of the “wall,” members of the Tribal Council are not Applicant qualifiers and accordingly are not subject to the Commission’s comprehensive background investigation. As such, it is critical that the “wall” is not illusory.<sup>19</sup>

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## Mohegan Sun Pocono



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In that case, the Commission held that the “wall” was not illusory because the Foxwoods operating agreement and the tribal resolution authorizing the creation of the company specified that the company was governed by a Board of Managers that was provided with *irrevocable* authority to take any and all actions necessary to manage the affairs of Foxwoods. As such, the Commission deemed that only the members of the board were individual qualifiers - not the members of tribal council - because only the board members had been provided any decision-making authority or ability to influence or effect the affairs of Foxwoods or the proposed commercial casino project.<sup>20</sup> Still, the Commission did require that “Applicant must agree in writing to a complete waiver of its sovereign nation status in all activities it conducts under the authority of its Category 1 gaming license.”<sup>21</sup>

Similarly, on February 6, 2014, the New Jersey Director



of Gaming Enforcement entered an order granting a waiver of qualification to the Seminole Tribe of Florida (“Seminole Tribe”) and its individual

**Artist rendering of the Hard Rock Atlantic City project.**

<sup>1</sup> “Indian Lands” means “(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.” 25 U.S.C. § 2703(4).

<sup>2</sup> Dave Palermo, *Above & Beyond*, GLOBAL GAMING BUS. MAG., July 25, 2017, <https://ggbmagazine.com/article/above-beyond-2/>.

<sup>3</sup> 25 U.S.C. §§ 2701 *et seq.*, P.L. 100-497, 102 Stat. 2467.

<sup>4</sup> States should welcome Indian tribal investment in commercial casinos, as such generally satisfies state mandates encouraging increased participation by minority persons, including American Indians, in casino ownership. *See e.g.*, Illinois Riverboat Gambling Act, 230 ILCS 10/7(b)(4); 30 ILCS 575/2(A)(1).

<sup>5</sup> BIA.gov, Frequently Asked Questions, <https://www.bia.gov/frequently-asked-questions> (follow “How are tribal governments organized?” hyperlink) (last visited Aug. 25, 2017); Chickasaw.net, Government, <https://www.chickasaw.net/Our-Nation/Government.aspx> (last visited Aug. 25, 2017); Mohegan.nsn.us, Our Government, <https://www.mohegan.nsn.us/explore/government/our-government> (last visited Aug. 25, 2017).

<sup>6</sup> Murray Evans, *Tribal Subsidiary Wants to Buy Lone Star Park*, USA TODAY, Sept. 15, 2009, [http://usatoday30.usatoday.com/sports/horses/2009-09-15-561062966\\_x.htm](http://usatoday30.usatoday.com/sports/horses/2009-09-15-561062966_x.htm).

<sup>7</sup> Depending upon the jurisdiction, this may be limited to owners of 1% or 5% or more of the applicant.

<sup>8</sup> *See* 86 Ill. Admin. Code 3000.225; N.J.S.A 5:12-26.

<sup>9</sup> IAGR.org, Multi Jurisdictional Personal History Disclosure Form, <https://iagr.org/sites/default/files/Multi%20Jurisdictional%20Application.pdf> (last visited Aug. 25, 2017).

<sup>10</sup> IAGR.org, Multi-Jurisdictional Business Form, [https://iagr.org/sites/default/files/MJBF\\_v1.2%20%28October%202016%20web%29.pdf](https://iagr.org/sites/default/files/MJBF_v1.2%20%28October%202016%20web%29.pdf) (last visited Aug. 25, 2017).

<sup>11</sup> In one state’s application for a video gaming route operator, the state requires the applicant to create a flowchart that reflects the “fully diluted” direct and indirect ownership interests of the applicant so that all shares or ownership interests are ultimately held by only natural persons and not intermediary entities. *See* Igbillinois.gov, Video Gaming Terminal Operator License Application 14, <https://www.igb.illinois.gov/FilesVideoForms/TerminalOperatorLicenseApplication.pdf> (last visited Aug. 25, 2017).



## “ As tribal gaming operations mature, states reap the benefit of having well-run, well-financed Tribal operators for their commercial casinos. Thus, if a Tribal management structure can peacefully exist within state gaming regulations, both the tribes and states win. ”

members who were seeking to enter the Atlantic City casino market through HR Atlantic City, LLC.<sup>22</sup> Thereafter, on January 29, 2015, the Seminole Tribe's company was found qualified to hold a commercial casino license in New Jersey, with the New Jersey Casino Control Commission finding that the tribe's several thousand individual members had no individual ability to control or influence the proposed casino operations, and that they were each "akin to public shareholders."<sup>23</sup> The New Jersey Casino Control Commission arrived at this conclusion because the Seminole Tribe had set up the company so that the tribe had no authority to manage the company's day-to-day business.<sup>24</sup> Rather, the tribe's members only had involvement in the company for certain "extraordinary events" such as bankruptcy or sale of the company.<sup>25</sup> As such, qualification or suitability was only required for the company, its intermediary business entities, and the individual members, directors and officers of those entities, but not the tribe itself or its elected officials. The Seminole Tribe was not required to waive sovereign immunity.

In summary, submitting a Tribal application to own or operate a commercial gaming operation can be a highly complex affair. It requires an intimate knowledge of the specific state regulations in which a tribe seeks licensure and an understanding of the types of corporate structures that have been approved by state regulatory bodies. Having proper legal counsel to assist in the drafting of the application and shepherding it through the regulatory process is essential. However, the

effort is not without reward. As tribal gaming operations mature, states reap the benefit of having well-run, well-financed Tribal operators for their commercial casinos. Thus, if a Tribal management structure can peacefully exist within state gaming regulations, both the tribes and states win. ✨

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<sup>12</sup> Of course, there is no sovereign immunity for the tribe's state incorporated entity to waive.

<sup>13</sup> PENNSYLVANIA GAMING CONTROL BOARD, SUITABILITY HEARINGS, IN RE: DOWNS RACING, L.P. MOHEGAN SUN AT POCONO DOWNS 42 (Sept. 11, 2006), [http://www.pgcb.state.pa.us/files/hearings/transcripts/Downs\\_Racing\\_09-11-06.pdf](http://www.pgcb.state.pa.us/files/hearings/transcripts/Downs_Racing_09-11-06.pdf).

<sup>14</sup> [gamingcontrolboard.pa.gov](http://gamingcontrolboard.pa.gov), Pennsylvania Gaming Control Board Application Status Report As of August 22, 2017, [http://gamingcontrolboard.pa.gov/files/licensure/reports/Application\\_Status\\_Facilities.pdf](http://gamingcontrolboard.pa.gov/files/licensure/reports/Application_Status_Facilities.pdf) (last visited Aug. 25, 2017).

<sup>15</sup> *Id.* at 12.

<sup>16</sup> PENNSYLVANIA GAMING CONTROL BOARD, SUITABILITY HEARINGS, IN RE: DOWNS RACING, L.P. MOHEGAN SUN AT POCONO DOWNS 39 (Sept. 11, 2006), [http://www.pgcb.state.pa.us/files/hearings/transcripts/Downs\\_Racing\\_09-11-06.pdf](http://www.pgcb.state.pa.us/files/hearings/transcripts/Downs_Racing_09-11-06.pdf)

<sup>17</sup> *Id.* at 79-80.

<sup>18</sup> MASSACHUSETTS GAMING COMMISSION, IN THE MATTER OF: CROSSROADS MASSACHUSETTS, LLC, PHASE I SUITABILITY DECISION (Nov. 15, 2013), <http://massgaming.com/wp-content/uploads/Crossroads-Massachusetts-LLC-suitability-decision.pdf>

<sup>19</sup> *Id.* at 8.

<sup>20</sup> MASSACHUSETTS GAMING COMMISSION, CROSSROADS MASSACHUSETTS, LLC APPLICANT FOR A CATEGORY 1 GAMING LICENSE, REPORT OF SUITABILITY OF APPLICANT ENTITIES AND INDIVIDUAL QUALIFIERS 31-32 (Oct. 30, 2013), <http://massgaming.com/wp-content/uploads/Crossroads-MA-LLC-Background-Investigation.pdf>

<sup>21</sup> MASSACHUSETTS GAMING COMMISSION, IN THE MATTER OF: CROSSROADS MASSACHUSETTS, LLC, PHASE I SUITABILITY DECISION 9 (Nov. 15, 2013), <http://massgaming.com/wp-content/uploads/Crossroads-Massachusetts-LLC-suitability-decision.pdf>

<sup>22</sup> NEW JERSEY CASINO CONTROL COMMISSION, RESOLUTION NO. 15-01-29 (Jan. 29, 2015), <http://www.nj.gov/casinos/services/meetings/resolutions/2015/15-01-29%20Resolution%20-%20HR%20Atlantic%20City.pdf>

<sup>23</sup> NEW JERSEY CASINO CONTROL COMMISSION, SPECIAL PUBLIC MEETING NO. 15-01-29 82-83 (Jan. 29, 2015), <http://www.nj.gov/casinos/services/meetings/transcripts/2015/012915-%20HR%20Atlantic%20City.pdf>

<sup>24</sup> *Id.* at 46.

<sup>25</sup> *Id.*