

# Tribal Gaming in California:

## A GUIDE TO THE REGULATORY PROCESS

By John Mahoney



### INTRODUCTION

Prior to the proliferation of Riverboat and Tribal gaming, access to the gaming industry, either as a casino operator or a casino vendor (i.e., a gaming machine manufacturer), was very time consuming, costly, and in many ways, very frustrating. The State of Nevada learned the importance of implementing strict governmental oversight of the gaming industry the hard way when it inadvertently allowed organized crime to infiltrate the Nevada gaming industry. This historical fact is well documented, though not the focus of this article.

Nevada learned the lesson well, however: strict governmental oversight is imperative in order to maintain the integrity of the gaming industry. New Jersey also understood this necessity and followed Nevada's lead when it created a comprehensive set of rules to ensure the integrity of its own gaming industry. Thereafter, Mississippi and other state jurisdictions continued to follow the examples of Nevada and New Jersey and implemented strict state governmental oversight of gaming. In most cases, the ability of vendors and casino operators to participate in the gaming industry requires formal regulatory scrutiny prior to entry.<sup>1</sup>

In contrast to traditional gaming regulatory oversight, tribal gaming jurisdictions such as California have provided the opportunity for domestic and international gaming vendors to gain immediate access to this very lucrative gaming market.<sup>2</sup> Many small companies and start up gaming companies cannot afford the "barriers to entry" that state gaming jurisdictions like Nevada and Mississippi have inadvertently created through costly, time consuming investigations. However, the provisions of the 1999 Model California Tribal-State Gaming Compact (the "Compact") allow many gaming companies to use California as a testing ground for their products and have created the opportunity for immediate cash flows, the critical lifeline for any small or start-up gaming company.<sup>3</sup> Therefore, on a comparative basis, the minimal time and expense for tribal regulatory approval is very attractive to many gaming enterprises that wish to enter this very competitive industry. This environment

<sup>1</sup> Formal scrutiny generally requires the filing of an application along with an intensive, time consuming and intrusive investigation into the applicant's background. In Nevada, it is not unusual for an investigation on a multinational applicant to run from six months to one year and can cost in excess of one million dollars.

<sup>2</sup> As of March 2005, there are 54 tribal casinos located within the State of California with approximately 57,238 slot machines.

<sup>3</sup> Sixty-one tribes have entered into the 1999 Model Tribal-State Gaming Compact with the State of California that are currently effective (subsequent amendments have been made to certain individual tribal Compacts since their enactment). Nine of these tribes are presently not operating a casino. Moreover, two tribes have entered into separate Compacts with the State of California in 2003 (collectively, "2003 Compacts") that are currently effective. These two tribes are presently not operating a casino. For purposes of this article, we only cite the 1999 Model California Tribal-State Compact; however, it should be noted the 2003 Compacts contain substantially similar provisions.

might also encourage start-up gaming companies that might not otherwise have the option to enter traditional gaming markets to move forward because the level of risk regarding entry into the California market is much smaller, if not de minimus on a comparative basis to traditional gaming markets.

## ENTERING THE CALIFORNIA TRIBAL GAMING MARKET

This section will focus on the steps necessary for Gaming Resource Suppliers to enter the California tribal gaming market.<sup>4</sup>

### Regulatory Approvals

#### Tribal Gaming Agencies

Each California tribal casino has an independent Tribal Gaming Agency ("TGA"). An important role of each TGA is to oversee the regulatory approval process and determine if a Gaming Resource Supplier should be allowed access to conduct business with the respective tribal casino.<sup>5</sup> Proposed Gaming Resource Suppliers must complete gaming license applications as designated by each respective TGA and submit those applications to the TGA for approval. It should be noted that in contrast to the sixty-six (66) page Multi Jurisdictional Personal History Disclosure Form and corresponding state supplemental forms that are used by traditional gaming jurisdictions such as Nevada and New Jersey, TGA applications are generally less extensive in the amount of information they require and are typically no longer than fifteen (15) to twenty (20) pages. Thereafter the applications will be reviewed and scrutinized in order to assess the suitability of each proposed Gaming Resource Supplier. In most cases, TGAs are very prompt in reviewing and adjudicating such gaming license applications. Based on our experience with various TGA's around California, the approval process from the initial filing of the application to final adjudication can take from as little as two weeks to over two months. This of course depends on the complexity of the application and how complete, accurate and truthful the filed application is.

Many TGAs in California have experienced staff with years of experience as gaming regulators in well-respected jurisdictions such as New Jersey. Incomplete, inaccurate and/or non-truthful applications will lead to delays in the processing and/or denial of the application. Any lack of respect in regards to the regulatory process will not, and cannot, be tolerated. A word of caution to Gaming Resource Suppliers in California: as with any traditional gaming jurisdiction, pay strict attention to accuracy of the documents filed with each respective TGA. TGAs will investigate and verify that the applications submitted to them are complete, accurate and truthful.

A minimal filing fee and timely licensing create enormous opportunities for gaming companies that want to test their products in tribal casinos or are beyond that stage and have products that are well received by the tribal casinos.<sup>6</sup> The approval from the TGA allows the applicant to immediately conduct business with each respective tribal casino where the applicant is licensed. Please note that conducting business with the tribal casino is *not* dependant upon prior approval from the California Gambling Control Commission ("Commission"). In addition, the Gaming Resource Supplier is allowed to conduct business with the tribal casinos pending any suitability investigation from the California Division of Gambling Control, a division of the California Department of Justice ("DOJ").<sup>7</sup>

#### California Division of Gambling Control

Each TGA will send to DOJ the applications and other supporting information that have been filed by the Gaming Resource Suppliers. While the TGA is the primary regulatory body, DOJ has the discretion to review the investigation conducted by the TGA and, if it deems it necessary, to conduct further investigation.<sup>8</sup> Again, it is important to note that pending the DOJ investigation, the Gaming Resource Supplier is allowed to transact business with the tribal casino(s) and participate in revenues derived from such business with the tribal casino(s).

Procedurally, DOJ will review the tribal applications and any investigation conducted by the TGA. Thereafter DOJ, in its discretion *may* formally request the Gaming Resource Supplier to

submit DOJ approved gaming suitability applications to DOJ.

There is a backlog of applications for Gaming Resource Suppliers and so it is difficult to estimate the timing of an investigation by DOJ.<sup>9</sup> A Gaming Resource Supplier with a proven gaming regulatory background (i.e. approvals from jurisdictions such as Nevada or New Jersey) will in all likelihood be waiting longer for a summons from DOJ than those suppliers who are using California as their first point of entry into the gaming market.

The investigation conducted by DOJ is a Nevada-style investigation. The agents and auditors will travel to the applicant's place of business, conduct interviews, review records and thereafter will write an investigative report based on the findings of the investigation. The investigation can take months, even years to complete based on the complexity of the applicant. As with any other gaming regulatory body, DOJ is looking for complete, accurate and truthful applications. DOJ has experienced law enforcement personnel with vast knowledge and extensive resources. The transition from pure law enforcement officers to gaming regulators is in transition.<sup>10</sup> The tolerance level for even minor errors is low. Strict review of all submissions, close attention to detail and erring on the side of providing too much information during the investigative process is imperative and will be well received by agents and auditors.<sup>11</sup>

#### California Gambling Control Commission

Once the suitability investigation is completed by DOJ, there will be a recommendation to the California Gambling Control Commission ("Commission") to either approve or deny the applicant.<sup>12</sup> The Commission may either accept or reject the recommendation made by DOJ. The Commission also has the discretion to conduct further investigation of the applicant independent of DOJ. The Commission has its own staff and is capable of carrying out a further investigation of the Gaming Resource Supplier if deemed necessary.

Ultimately, the Commission has the authority to either approve or deny the Gaming Resource Supplier. The setting and venue for the formal approval by the Commission is a public hearing before the Commission members at the Commission's place of business.

If the investigation conducted by DOJ is very complex and controversial and leads to a recommendation of denial by DOJ, it is possible for the Gaming Resource Supplier to request a hearing before an Administrative Law Judge ("ALJ"). The hearing is conducted pursuant to the Administrative Procedures Act and is similar to a mini-trial with the opportunity to conduct discovery, present a case in full and cross-examine witnesses. Following the hearing, the ALJ will make a non-binding recommendation to the Commission. The strategy of asking for a hearing before an ALJ would

4 Section 2.12 of the California Tribal-State Gaming Compacts defines a Gaming Resource Supplier as one who provides "...any goods or services provided or used in connection with Class III Gaming Activities, whether exclusively or otherwise, including, but not limited to, equipment, furniture, gambling devices and ancillary equipment, implements of gaming activities such as playing cards and dice, furniture designed primarily for Class III gaming activities, maintenance or security equipment and services, and Class III gaming consulting services."

5 Section 6.4.5 of the 1999 California Tribal-State Gaming Compacts states, "Any Gaming Resource Supplier who, directly or indirectly, provides, has provided, or is deemed likely to provide at least twenty-five thousand dollars (\$25,000) in Gaming Resources in any 12-month period, or who has received at least twenty-five thousand dollars (\$25,000) in any consecutive 12-month period within the 24-month period immediately preceding application, shall be licensed by the TGA prior to the sale, lease, or distribution, or further sale, lease, or distribution, of any such Gaming Resources to or in connection with the Tribe's Operation or Facility." It should be understood that the twenty-five thousand dollar (\$25,000) threshold amount cited above is not for the aggregate amount of business conducted with all Tribes, but for the amount of business conducted with each Tribe separately.

6 California TGA Licensing fees generally range from \$1000 to \$5,000.

7 Under Section 6.5.6 of the 1999 California Tribal-State Gaming Compacts, any Gaming Resource Supplier that desires to do business with the Tribes must request a finding of suitability from the Commission to do business with the Tribes. We recommend that the Gaming Resource Supplier copy DOJ on any request to the Commission for a finding of suitability. As a matter of practice, this means that prior to the issuance of any temporary or permanent tribal gaming licenses, the Gaming Resource Supplier is required to send a letter to the Commission stating its desire to conduct business with a Tribe. Subsequent to receipt of this letter, the Division then typically responds with a brief letter requesting basic information from the Gaming Resource Supplier.

8 Section 6.5.6 (b) of The 1999 California Tribal-State Gaming Compacts states "...the State Gaming Agency may conduct a background investigation pursuant to state law to determine whether the applicant would be suitable to be licensed for association with a gambling establishments subject to the jurisdiction of the State Gaming Agency."

9 As a practical matter, our experience with DOJ suggests that Gaming Resource Suppliers that provide traditionally non-gaming equipment (such as a furniture vendor) are not a priority and it is highly unlikely that DOJ would elect to conduct an investigation on such a Gaming Resource Supplier at this time. The current focus of DOJ is on Gaming Resource Suppliers that provide traditional gaming equipment.

10 There is a learning curve and a transition period from conducting criminal investigations to conducting regulatory investigations. It begins with understanding the fact the investigation is not criminal in nature and the goal is not to prosecute the applicant. The applicant is asking to be investigated and is paying for the cost of the investigation. The applicant signs a waiver allowing the regulator access to all personal records. The investigation need not be adversarial but instead should focus on open communication and cooperation between the regulator and applicant.

11 For example, while an applicant by law does not have to disclose any expunged criminal records as part of the applicant's criminal history, in the spirit of full cooperation and transparency, we advise our clients to disclose this type of information on their gaming applications.

12 The Commission is comprised of five (5) members that are appointed by the Governor of California. See Article 2, The Gambling Control Act, Section 19811 (a).

*continued on page 18*

give the Gaming Resource Supplier the opportunity to flush out all issues and afford the Commission the opportunity to review a second recommendation from an impartial body. An additional benefit of pursuing an administrative hearing in this circumstance is that the hearing is recorded and results in a record on which the Gaming Resource Supplier may, in part, base its appeal to the superior court.

It is not unheard of for the Commission, when it finds an application is particularly complex or controversial, to retain its own independent investigator to review and confirm the investigation report submitted by the DOJ. This is an unusual situation, however, and the applicant should not rely on the Commission to pursue this option and should instead request the ALJ hearing.

### Technical Approvals

Product approvals from a recognized gaming testing laboratory in the gaming industry are required for certain Gaming Devices (e.g., slot machines, automatic shufflers, etc.) before such Gaming Devices may be sold to tribal casinos.<sup>13</sup> There are privately owned accredited testing laboratories such as BMM Test Labs ("BMM") or Gaming Laboratories International ("GLI").<sup>14</sup> There are also state run gaming laboratories such as the Nevada Laboratory that are recognized, and such product approvals allow access to tribal casinos. Each Tribe will set forth in its TGA regulations which gaming laboratories it recognizes.

The cost of these approvals in terms of time and dollars depends on the sophistication of the technical submission from the manufacturers. The initial product approvals can take many months and cost thousands of dollars. Careful thought should be given to timing issues between technical and regulatory approvals. For companies new to Gaming Device manufacturing, we recommend obtaining your BMM or GLI approvals prior to filing a Gaming Resource Supplier gaming license application with the California tribes.

13 The Compact requires that no Gaming Device can be offered for play at a California tribal casino unless it has first been tested, approved and certified by an independent gaming test laboratory or governmental gaming test laboratory.

A Gaming Device is defined in Section 2.6 of the Compact as "...a slot machine, including an electronic, electromechanical, electrical, or video device that, for consideration, permits: individual play with or against that device or the participation in any electronic, electromechanical, electrical, or video system to which that device is connected; the playing of games thereon or therewith, including, but not limited to, the playing of facsimiles of games of chance or skill; the possible delivery of, or entitlement by the player to, a prize or something of value as a result of the applicants of an element of chance; and a method for viewing the outcome, prize won, and other information regarding the playing of games thereon or therewith."

14 Tribal casinos in California recognize product approvals from both BMM Test Labs and Gaming Laboratories International. Also, see Compact Section 8.1.14.

15 Class B manufacturers/distributors are exempt from this Chapter so long as they comply with shipment regulations of the TGAs and the Compact. See Regulation 12310.

16 15 U.S.C. 1173 (a) (1) states, "It shall be unlawful for any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way affect interstate or foreign commerce, to manufacture any gambling device during any calendar year, unless, after November 30 of the preceding calendar year, and before the date on which such device is manufactured, such person has registered with the Attorney General under this subsection, regardless of whether such device ever enters interstate or foreign commerce."

Moreover, USC 15 U.S.C. 1174 states, "All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the package may be readily ascertained on an inspection of the outside of the article or package."

## Other Regulatory Issues to Be Considered

### Registration and Shipment

Pursuant to Title 4, California Code of Regulations, 12300-12310, a Gaming Device manufacturer or distributor must register as such with the Commission. The regulations and applicable forms are available on the Commission's website at <http://www.cgcc.ca.gov>. The registration form is a one-page document that provides the Commission with basic information regarding the registrant. If the registrant has no business presence in California and only ships devices to Compacted California Tribes, the registrant is a Class B entity and there is no fee associated with the registration. All other registrations are Class A and require a \$500.00 filing fee.

In order to maintain its registered status, the registrant must, on a quarterly basis, file with the Commission a report on sales and shipments of gambling equipment from or to a location within California. The above-referenced regulations set forth the information to be included in such quarterly reports. Strict compliance with the Commission's registration and shipment regulations is encouraged by fines for violation of the regulations in the sum of \$10,000.00 for a first offense and \$20,000.00 for subsequent offenses.<sup>15</sup>

The shipment of Gaming Devices to or from California tribal gaming facilities is regulated by the respective TGAs and Compact Section 7.4.5. In general, the manufacturer/distributor and the Tribe will agree upon a shipment date and the shipper will provide notice of the shipment to the Tribe. The Tribe will then provide at least ten (10) days notice of the shipment to the Sheriff's Department for the county in which the tribal gaming facility is located. Failure of the Gaming Resource Supplier to ensure compliance with the TGA and state gaming device shipment requirements will subject the Gaming Devices transported off the Tribe's land to seizure by the State.

### The Johnson Act

In 1951, the United States Congress enacted the Transportation of Gambling Devices Act (15 U.S.C. 1171-1178). The Act, commonly referred to as the "Johnson Act," makes it unlawful to knowingly transport a gambling device to a state where such a device is prohibited by law. Under the Johnson Act, each manufacturer and distributor of gaming devices for interstate commerce must register each year with the United States Department of Justice, and the gambling devices must be appropriately marked for shipment.<sup>16</sup>

### CONCLUSION

Tribal gaming in California offers enormous opportunities for both small and large gaming companies. In many ways it creates more of a level playing field for small operators new to the gaming industry because the traditional "barriers to entry" do not exist. Additionally, many tribal casinos in California are managed by experienced casino gaming operators such as Station Casinos, Inc. and Harrah's Entertainment, Inc. The opportunity to show case new and innova-

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tive gaming products with such large casino operators in the California tribal market creates further opportunities in other gaming jurisdictions.

As with traditional gaming jurisdictions, it is important to respect, appreciate and understand the job of the gaming regulators, both tribal and state. On the other hand, qualified gaming regulators understand that minor errors in an application do not equate to intentionally trying to mislead investigators. There will be bumps in the road as tribal gaming in California continues to mature. The goal to be kept in mind is that both Gaming Resource Suppliers and gaming regulators should work together and co-exist in a market place that need not be adversarial.

