



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 09 2015

The Honorable Harold Frank
Chairman, Forest County Potawatomi Community
P.O. Box 340
Crandon, Wisconsin 54520

Dear Chairman Frank:

On November 26, 2014, the Department of the Interior (Interior) received the November 2014 Amendment to the Forest County Potawatomi Community of Wisconsin (Potawatomi) and the State of Wisconsin (State) Class III Gaming Compact (Compact). The 2014 Amendment was selected by an arbitration tribunal convened by the State and the Potawatomi pursuant to the Potawatomi's existing Compact, as amended, and submitted to the Department by the Potawatomi for approval under the Indian Gaming Regulatory Act (IGRA).¹

SUMMARY OF DECISION

In 1990, the Potawatomi became the first tribe in history to use the provision in IGRA that allows a tribe to develop an off-reservation casino with the concurrence of the Governor of a state. The Potawatomi reached a gaming compact with the state that allowed them to develop what has been a very successful gaming operation, an operation that has provided tremendous financial support to the Potawatomi Tribe and each of its 1400 members. As explained in greater detail below, the Potawatomi gaming compact with Wisconsin was amended several times over the years, sometimes with Interior's explicit approval and sometimes without. In two of these amendments, the Potawatomi sought to protect themselves from the risk that another tribe would follow the same path as the Potawatomi and develop an off-reservation casino within the same general area. The Potawatomi have, so far, been successful in preventing any other tribe from encroaching in this market.

One of the compact amendments that the Potawatomi obtained required the Governor to arbitrate with the Potawatomi over these economic issues if he approved any new Indian gaming within 50 miles of the Potawatomi casino. Last year, this office sent to the Governor a request for his concurrence that the Menominee Indian Tribe of Wisconsin (Menominee) be allowed to follow the Potawatomi path and develop a casino in Kenosha, Wisconsin, less than 50 miles from the Potawatomi casino. At the time, this office expressed the hope that the 8700 members of the Menominee Tribe, one of the poorest communities in Wisconsin, would be able to follow in the

¹ Under our regulations published in 2008 at 25 C.F.R. Part 293, all compacts and amendments, including technical amendments, must be submitted for review and approval by the Secretary under IGRA. *See* 25 C.F.R. § 293.4. IGRA provides no authority for a compact or amendment to bypass Secretarial review – regardless of how the agreement was developed – because a compact or amendment becomes effective only upon publication of our notice of approval in the Federal Register. 25 U.S.C. § 2710 (d)(3)(B).

very successful path of the Potawatomi. Our action prompted an arbitration between the Governor and the Potawatomi pursuant to the gaming compact amendment mentioned above. The 2014 Amendment, which we review, today reflects the outcome of that arbitration.

The 2014 Amendment seeks to protect Potawatomi revenues fully by anticipating that the Menominee will bear the burden of making the Potawatomi whole, if competition from the proposed Menominee casino causes any loss of revenues to the Potawatomi casino. Though their interests were involved, the Menominee were not at the table for this negotiation.

As we noted at the time we asked for the Governor's concurrence in the Menominee decision, "it is our general obligation as trustee to serve all tribes" and we find it agonizing to try to mediate "haves" and "have-nots" among tribes. Our decision for the Menominee Tribe created a modest, but not insignificant financial risk to the Potawatomi gaming operation. We found evidence that Potawatomi revenues might be modestly affected in the short term before likely rebounding over the mid- and long-term. This, of course, is the kind of risk that nearly every business faces in light of ordinary competition.

We do not blame Potawatomi for trying to preserve its financial advantage, but we are troubled that the 2014 Amendment seeks to guarantee its profits by shifting the costs of any impact to the Menominee. The Potawatomi were granted a tremendous benefit in 1990 when this Department and the Governor authorized the Potawatomi to open an off-reservation casino in Milwaukee, and they have now had the benefit of having the only Indian gaming operation in that area for 25 years. But the Potawatomi were not promised an absolute monopoly in perpetuity. In the face of potential competition, the Potawatomi have attempted to shift to the Menominee the significant financial burden of preserving all of the Potawatomi monopoly profits. We note that the Potawatomi's proposed compact amendment goes further than simply obtaining financial guarantees from the State. It seeks to impose a substantial financial burden on the Menominee community, which has among the highest unemployment rates, the highest poverty, and the lowest health indicators of any community in Wisconsin.

For reasons expressed in greater detail below, we have concluded that IGRA does not allow one tribe to use the state compact process to impose upon another tribe the obligation to guarantee the tribe's gaming and other profits when the other tribe was not even at the negotiation table and has not consented to this arrangement. We did not reach this decision without a good deal of thought. In light of our obligations under IGRA, we cannot approve the 2014 Amendment in good conscience. Accordingly, the 2014 Amendment is disapproved.

BACKGROUND

On July 10, 1990, the Assistant Secretary – Indian Affairs issued a two-part determination under Section 20 of IGRA finding that acquisition of land in the Menomonee Valley in Milwaukee, Wisconsin, in trust status on behalf of the Potawatomi would be in the best interest of the Potawatomi and not detrimental to the surrounding community.² By letter dated July 20, 1990,

² See *Forest County Potawatomi Community v. Doyle*, 803 F.Supp. 1526, 1529 (W.D. Wis. 1992), further proceedings at *Forest County Potawatomi Community v. Norquist*, 828 F.Supp. 1401 (W.D. Wis. 1993), *aff'd* 45 F.3d 1079 (7th Cir. 1995). Since the Milwaukee location was acquired in trust after October 17, 1988, gaming on the

then Wisconsin Governor Tommy Thompson informed the Assistant Secretary that he concurred with the Secretary's determination to approve the Potawatomi's trust status application for the Menomonee Valley land.³ The Governor acknowledged the Potawatomi's plans for a "high stakes bingo and casino operation" on the Menomonee Valley site.⁴

The Potawatomi's original Compact was approved on August 4, 1992,⁵ which, in part, authorized limited Class III gaming "on the land known as the "Menomonee Valley land," in Milwaukee (hereinafter "Milwaukee casino").⁶ The Compact was subsequently amended in January of 1999,⁷ April of 2003 (2003 Amendment),⁸ September of 2003 (2003 Technical Amendment),⁹ and October of 2005 (2005 Amendment).¹⁰

During Interior's review of the 2003 Amendment, as submitted, the Secretary advised the Potawatomi that she was prepared to disapprove the agreement unless the Potawatomi and State removed a "poison pill," anti-competitive provision.¹¹ The Potawatomi and the State addressed the Secretary's objections by submitting an Addendum to the 2003 Amendment that deleted the anti-competitive provision. In a letter notifying the Potawatomi and the State that the Department had allowed the 2003 Amendment to go into effect by operation of law, the Department noted that the stricken provision was "anathema to the basic notions of fairness in competition and inconsistent with the goals of IGRA."¹²

Under the 2005 Amendment, with one exception, the Governor was prohibited from concurring in any future positive two-part Secretarial Determination under IGRA allowing gaming on lands acquired after October 17, 1988, for a gaming facility within 30 miles of the Milwaukee casino without the Potawatomi's consent.¹³ The exception covered lands for which the Menominee had an application pending before the Bureau of Indian Affairs (BIA) for acquisition in trust for gaming purposes.¹⁴ Additionally, the 2005 Amendment established a dispute resolution process that included binding arbitration, in the event a positive two-part determination was issued for lands within 50 miles of the Milwaukee casino.¹⁵ The Secretary declined to issue an approval of

land would have been prohibited without a favorable two-part determination under Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(A).

³ *Id.*

⁴ *Id.*

⁵ 57 Fed. Reg. 35742 (August 10, 1992).

⁶ *Forest County Potawatomi Community v. Doyle*, 803 F.Supp. at 1531. *See also*, Compact Section III.G.2. and Section XV.H.

⁷ 64 Fed. Reg. 4890 (February 1, 1999).

⁸ 68 Fed. Reg. 24754 (May 8, 2003).

⁹ 68 Fed. Reg. 52953 (September 8, 2003).

¹⁰ 71 Fed. Reg. 5068 (Jan. 31, 2006).

¹¹ *See* 2003 Amendment, Paragraph 15, adding Section XXXI.B.3, which sought to relieve the Potawatomi of its revenue sharing payments to the State, and required refund of the Potawatomi's lump-sum payments due in 2004 and 2005 of over \$70 million, "[i]f the State enters into or authorizes an agreement permitting Class III gaming under the Act within 50 miles of the Potawatomi Bingo and Casino on the Menomonee Valley Land."

¹² *See* Letter to Harold "Gus" Frank, Chairman, Forest County Potawatomi Community, from Aurene Martin, Acting Assistant Secretary – Indian Affairs (April 25, 2003).

¹³ 2005 Amendment, Section XXXI.I.

¹⁴ *Id.*

¹⁵ 2005 Amendment, Section XXII.A.11.

the 2005 Amendment, thus allowing it go into effect by operation of law, but only to the extent that it was consistent with IGRA.¹⁶

On August 23, 2013, Interior approved Menominee's two-part determination for gaming on lands located in Kenosha, Wisconsin, approximately 33 miles from the Milwaukee casino.¹⁷ As required by IGRA, Interior requested the concurrence of the Governor of Wisconsin with its determination. The deadline for the Governor to concur is February 19, 2015. If the Governor concurs with the two-part determination, the Department will analyze the proposed trust acquisition for the land on which the casino will be located under the Indian Reorganization Act and its implementing regulations at 25 C.F.R. Part 151. Although the Governor has not yet concurred, the Department's two-part determination triggered the negotiation and dispute resolution process under the 2005 Amendment.

The 2014 Amendment before us now is the result of binding arbitration. The agreement provides that "[t]he Governor may only concur in a Secretary's Determination for [Menominee] after publication in the Federal Register . . . of the notice of the [approval or deemed approval] of this Amendment."¹⁸ It then requires the State, or in the alternative, Menominee to make an annual "Mitigation Payment" to the Potawatomi to compensate the Potawatomi for revenue losses caused by the Menominee Kenosha Casino:

"The State and the [Potawatomi] Tribe anticipate that the State will enter into agreements under which the [Menominee] will agree to pay the Mitigation Payment required in this Section. Timely payment of a Mitigation Payment in full to the [Potawatomi] Tribe by the Applicant [Menominee] satisfies the State's obligation to make that Mitigation Payment."

2014 Amendment, Section XXXVII.E.1.

The 2014 Amendment also requires the State or Menominee to compensate the Potawatomi for revenue losses to "Class II gaming, food and beverage, hotel, and entertainment activity earned at the Milwaukee Facility."¹⁹ The 2014 Amendment includes a "State Alternative Mitigation Payment Mechanism," which provides that the Potawatomi and the Menominee may enter into an agreement obligating "[Menominee] to make some or all of the Mitigation Payments."²⁰

Upon the written request of the State, the [Potawatomi] shall negotiate in good faith to reach an agreement on reasonable terms proposed by the State which would obligate the Applicant or other third party to make some or all of the Mitigation Payments

¹⁶ Fn. 10, *supra*.

¹⁷ Menominee Indian Tribe of Wisconsin – Two-Part Determination at 50 (August 23, 2013).

¹⁸ Section XXXVII.A. The last sentence of this section also states that, "[t]he gaming establishment proposed in Kenosha, Wisconsin by the Menominee Indian Tribe of Wisconsin ("Menominee") is an Applicant Facility." This, other passages in the 2014 Amendment and the Potawatomi's submissions regarding the 2014 Amendment, together make it clear that the intention of the 2014 Amendment is for the Menominee to be responsible for making the Mitigation Payments.

¹⁹ Section XXXVII.E.1, in conjunction with and XXXVII.D.2, which defines "Milwaukee Net Revenues" as "(a) revenue from class III gaming, *class II gaming, food and beverage, hotel and entertainment activity* earned at the Milwaukee Facility. . . and not including revenue from ancillary activity such as retail activity[.]" (*Emphasis added*).

²⁰ Section XXXVII.F.

(“Alternative Mechanisms”). These proposals for Alternative Mechanisms could include such mechanisms as payments made out of the Lock Box established in the Menominee Compact Section XXXIII(C)(9) and (11) for Menominee Compact payments; establishing an Advance Account for the deposit of casino revenue from the Applicant Facility; requiring the Applicant to provide an Evergreen Letter of Credit that would guarantee some or all of the Mitigation Payments; or assigning the Applicant’s State Compact Payments to the [Potawatomi].

The obligation to make mitigation payments begins upon the commencement of any gaming activity and continues for the duration of the Compact.²¹

ANALYSIS

Under IGRA, the Secretary of the Department of the Interior (Secretary) may approve or disapprove a compact within 45 days of its submission.²² The Secretary may disapprove a compact only if the agreement violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians.²³

We have never been presented with a compact or amendment that goes so far as to attempt to guarantee the continued profitability of one tribe’s casino at the expense of another tribe.²⁴

IGRA limits the subjects that are permissible in a Class III tribal state gaming compact.²⁵ In drafting IGRA, Congress included the tribal-state compact provisions to take into account states’

²¹ Section XXXVII.E.3.

²² 25 U.S.C. § 2710 (d)(8).

²³ 25 U.S.C. § 2710 (d)(8)(B).

²⁴ Referring to the Department’s “August 23, 2013 [two-part] Determination,” for the Menominee, and in particular its finding involving projected impact of Menominee’s Kenosha casino on the Potawatomi’s “governmental revenues,” the Potawatomi states that the “Annual Revenue Loss,” defined by Section XXXVII.D.1., and thus the potential Mitigation Payment, will be less than the Tribe’s revenue sharing payment to the State. “Under those circumstances, the State or the Menominee Tribe would only have an obligation to pay for a few years.” Letter to Honorable Kevin Washburn, Assistant Secretary – Indian Affairs, from Jeffrey A. Crawford, Attorney General – Forest County Potawatomi Community (December 30, 2014), at 16. We are disheartened that while the Potawatomi relies on this finding to persuade us to approve the 2014 Amendment, the Potawatomi could not resolve its differences with Menominee to the mutual benefit of both tribes. In light of the Potawatomi’s statement, it also seems incongruous that the Mitigation Payments in an indeterminate amount contemplated by the 2014 Amendment would continue for the life of the Potawatomi’s Compact, or between 15 and 40 years. See Fn. 33, *infra*.

²⁵ Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

- (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for the licensing and regulation of such activity;
- (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
- (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
- (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
- (v) remedies for breach of contract;
- (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

interests in the regulation and conduct of Class III gaming activities by balancing tribal, state, and Federal interests in regulating gaming on Indian lands. If a compact provision does not explicitly fall within the scope of permissible subjects of negotiation under IGRA, we look to whether it involves a subject that is “directly related to the operation of gaming activities.”²⁶

When we apply this provision of IGRA we do not simply ask, “but for the existence of the Tribe’s Class III gaming operation, would the particular subject regulated under a compact provision exist?”²⁷ If this question were used to provide the standard for determining whether a particular object of regulation was “directly related to the operation of gaming activities,” it would permit states to use tribal-state compacts as a means to regulate a number of tribal activities far beyond that which Congress intended when it originally enacted IGRA.²⁸ Instead, we closely scrutinize whether the regulated activity has a direct connection to the Tribe’s conduct of Class III gaming activities.²⁹

Indeed, the primary reason for IGRA’s requirement of a state-tribal compact is to ensure that state governments have an opportunity to engage with tribes as to legitimate regulatory concerns about the conduct of gaming.³⁰ The 2014 Amendment does not address the regulation or the actual operation of the Potawatomi’s Class III gaming activity at its Milwaukee casino. Rather, its intent is to “protect[] the Potawatomi Hotel & Casino’s revenue stream,”³¹ from any losses due to competition from the proposed Menominee casino at Kenosha. The IGRA identifies in great detail what is allowable for negotiation in a tribal-state Class III compact, but it does not authorize states and tribes to negotiate to shift the burden of loss revenues from existing gaming operations to another tribe without the consent of the other tribe. Although the 2014 Amendment purports to make the State ultimately responsible for collecting the Mitigation Payments, the plain language of the 2014 Amendment and the supporting documents from the Potawatomi and the State demonstrate that, in fact, Menominee would be responsible for making all of the Mitigation Payments intended to protect the Potawatomi’s revenue.³² Had the State alone,

(vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710 (d)(3)(C)(i-vii).

²⁶ *Id.* at (vii).

²⁷ See Letter to Peter S. Yucupicio, Chairman, Pascua Yaqui Tribe, from Paula Hart, Director, Office of Indian Gaming (June 12, 2012).

²⁸ *Id.*

²⁹ See Testimony of Kevin K. Washburn, Assistant Secretary – Indian Affairs, before the Senate Committee on Indian Affairs, July 23, 2014 (*emphasis added*):

“With regard to compacts, IGRA carefully describes the topics to address in a compact. Congress specifically named six subjects related to the operation and regulation of Class III gaming activity that may be addressed in a compact, and also included a limited catchall provision authorizing the inclusion of provisions for “any other subjects that are directly related to the operation of [Class III] gaming activities.” *The Department closely scrutinizes tribal-state gaming compacts and disapproves compacts that do not squarely fall within the topics delineated in IGRA.* For example, Class II gaming is not an authorized subject of negotiation for Class III compacts. The regulation of Class II gaming is reserved for tribal and federal regulation.”

³⁰ COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 12.05, at 889-93 (Nell Jessup Newton ed. 2012).

³¹ Letter to Honorable Kevin Washburn, Assistant Secretary – Indian Affairs, from Jeffrey A. Crawford, Attorney General – Forest County Potawatomi Community (December 30, 2014), at 12.

³² The calculation of the Mitigation Payment is based in part on revenues from Class II gaming, food and beverage, hotel and entertainment activity, none of which are directly related to the Potawatomi’s Class III gaming activity. 2014 Amendment Section XXXVII.D.2. As tribal gaming has matured, many tribes – including the Potawatomi –

without reference to Menominee as the “Applicant”, agreed to a reduction in revenue sharing, for example, rather than the Mitigation Payment as calculated by the 2014 Amendment, our decision might be different.

As noted above, the “State Alternative Mitigation Payment Mechanism” provisions of the 2014 Amendment contemplate that the Potawatomi would negotiate agreements with Menominee under which Menominee would agree to make the Mitigation Payment to the Potawatomi. Under either scenario it is clear that the 2014 Amendment intend to make Menominee responsible for any Mitigation Payments due, which would continue for the life of the Potawatomi’s Compact.³³

The Mitigation Payments envisioned by the 2014 Amendment go well beyond a potential reduction in the Potawatomi’s revenue sharing payments that we have permitted in other instances. For example, compact amendments between other tribes and the State of Wisconsin do not specifically call for anything approaching the Mitigation Payments that guarantee the Tribe’s profits by another tribe. Nor do these other compact amendments include Class II gaming and other revenues. Instead, the amendments call for negotiations over potential reductions in revenue sharing to the state or indemnification by the State for either Class III gaming revenues or an undefined “loss of revenue.” Any amendment resulting from such negotiations must nonetheless be submitted for review to determine whether it complies with IGRA.³⁴

Outside of Wisconsin, we have examined the 1993 Michigan Compacts along with provisions in compacts for the Little Traverse Band of Odawa Indians, Seneca Nation of Indians from New York, and the North Fork Rancheria of Mono Indians compact from California. The 1993

have developed businesses or amenities that are ancillary to their gaming activities, such as hotels, conference centers, restaurants, spas, golf courses, recreational vehicle parks, water parks, and marinas. These businesses are often located near or adjacent to tribal gaming facilities. It does not necessarily follow, however, that such ancillary businesses are “directly related to the operation of gaming activities,” and therefore subject to regulation or inclusion under a tribal-state compact. In fact, it appears that the Potawatomi’s new, \$97 million, 360 room hotel, restaurant and conference complex are located beyond the exterior boundaries of the Potawatomi’s trust lands at the Milwaukee casino. <http://www.jsonline.com/business/potawatomi-hotel--casino-a-sure-bet-to-shake-up-lodging-market-b99322719z1-269852771.html> (site last accessed January 7, 2014.)

³³ The Potawatomi’s Compact has a remaining duration of at least 15 years and as much as 40 years, including its maximum allowable extension of 25 years. See Compact, Section XXV. Moreover, the calculation of the Mitigation Payment includes revenues from Class II gaming, and food, beverage, hote,l and entertainment operations, none of which are directly related to the operation of the Potawatomi’s Class III gaming activity.

³⁴ During our review of the 2014 Amendment, the Potawatomi noted its reliance on the 2005 Amendment to support its position that the 2014 Amendment cannot be disapproved. The 2014 Amendment, however, is the only document that is before us today for review under IGRA. The Potawatomi and the State were unable to reach a negotiated agreement, so the 2014 Amendment is the product of a last, best offer binding arbitration process. The arbitration panel was limited to choosing the offer that complied not with IGRA but with one subsection of the 2005 Amendment. Compare 2005 Amendment, Section XXII.11 to 2005 Amendment, Section XXII.10. Unlike the arbitration panel, our duty is to determine whether the 2014 Amendment complies with IGRA and approval of a compact – either by affirmative action or inaction – cannot bind the Secretary to approve a subsequent amendment to that compact where, as here, the terms of the amendment are unlawful. For the lawfulness of this arrangement, the Potawatomi also cited Federal court decisions but those did not reach the merits of the claims because the cases were dismissed on procedural grounds *Lac du Flambeau Band of Lake Superior Chippewa Indians v Norton*, 327 F. Supp.2d 995 (W.D. Wis. 2004), aff’d, 422 F. 3d 490 (7th Cir. 2005).

Michigan Compacts are distinguishable because they were based upon a model agreement and all of the signatories consented to its provisions. The Little Traverse Band of Odawa Indians Compact relieves the tribe of its revenue sharing payments while Seneca's compact does not make another tribe the guarantor of Seneca's profits. Finally, North Fork provides for diversion of 2 percent of North Fork's revenue sharing payment to another tribe, not a profit guaranty and, unlike here, North Fork specifically agreed to the payments.

In sum, these examples are readily distinguishable from the amendment before us today. Most importantly, none of these other compact provisions involved specific guarantees of profitability or revenues for one tribe without the prior consent of another tribe or tribes.³⁵ In addition, none of the examples involve a revenue guarantee for a tribe that is operating gaming on so-called "off-reservation" lands acquired by the Secretary in trust under a two-part determination. Finally, none of the compact provisions define revenue to include Class II gaming, food and beverage, hotel, and entertainment activities, which fall outside the permissible subjects of negotiation under IGRA.

Nothing in IGRA or its legislative history suggests that Congress intended compacts to be used for the purpose of insuring the profitability of a tribe's casino at the expense of another tribe's rights under IGRA or fairness in inter-tribal gaming competition, at least without the consent of the other tribe.³⁶ In addition, contrary to the Potawatomi's arguments that our disapproval of the 2014 Amendment would benefit Menominee at the expense of the Potawatomi, our disapproval of this compact ensures a continued level playing field among all tribal gaming market entrants.³⁷ We therefore conclude that the 2014 Amendment violates IGRA because it includes provisions involving subjects that exceed the permissible scope of a Class III gaming compact.

Given that the 2014 Amendment specifically addresses the Menominee, the parties made it impossible for us to avoid that Tribe's interests. The 2014 Amendment, if approved, would place Menominee in a difficult position. The 2014 Amendment contemplates that the State is ultimately obligated to make mitigation payments to the Potawatomi to reimburse it for any lost revenue experienced by its Milwaukee Casino, but may pass its payment obligation to the Menominee. If Menominee did not consent to make the Mitigation Payments, for example, the Governor may decline to concur in the Secretary's two part-determination for Kenosha. In light of the requirements of IGRA, if this obligation was transferred to Menominee in an amended Menominee gaming compact, we would be hard pressed to approve it. We again underscore that the Menominee are not a party to the 2014 Amendment.

³⁵ The Potawatomi argues that it relied on our deemed approval of the 2005 Amendment. However, the terms of the 2005 Amendment are distinguishable --- the 2005 Amendment provided for a dispute resolution process in the event of a positive two-part determination and did not contemplate a financial burden being imposed on Menominee. In any event, as noted previously, our obligation under IGRA is to review the Amendment before us today.

³⁶ "It is the Committee's intent that the compact requirement for Class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes." S. REP. 100-446, at 13. Here, the Potawatomi are seeking to use the compact process for the purpose of excluding or otherwise impairing competition from another tribe under IGRA, with the effect of imposing a financial burden on the operation of another casino and Menominee's entry into the tribal gaming market.

³⁷ Moreover, we carefully considered the Potawatomi's rights under IGRA in our two-part determination for Menominee.

Beyond the basic contract law problem resulting from the Menominee not being a party to the 2014 Amendment, this provision violates IGRA because it contemplates payments to the State from Menominee for purposes other than defraying the State's cost of regulating Class III gaming activities.

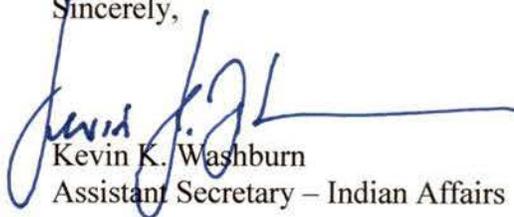
Under the 2014 Amendment's method for calculating the Mitigation Payments, it is unlikely the payments would comply with our long-standing revenue sharing test. Under that test, we first look to whether the state has offered meaningful concessions to the tribe. We view this concept as one where the state concedes something it was not otherwise required to negotiate, such as granting exclusive rights to operate Class III gaming or other benefits sharing a gaming-related nexus. We then examine whether the value of the concessions provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required.

Here, in the absence of a companion agreement between the State and Menominee and in light of the 2014's Amendment method for calculating the Mitigation Payments, we are unable to determine whether the State would be making any concession to the Menominee. At this point, the State would be acting essentially as a collection agent for the Mitigation Payments from the Menominee to the Potawatomi in order to insure that the State is not liable for the payments. Even if we could find a concession by the State in favor of the Menominee, without a companion agreement we are unable to determine whether making the Mitigation Payments results in substantial economic benefits to the Menominee since its only purpose is to guarantee the profitability of the Potawatomi's Milwaukee casino.

CONCLUSION

As discussed above, I find that the 2014 Amendment is in violation of IGRA and disapprove the Compact. I regret that this decision is necessary. A similar letter has been sent to the Honorable Scott Walker, Governor of the State of Wisconsin.

Sincerely,



Kevin K. Washburn
Assistant Secretary – Indian Affairs

**NOVEMBER 2014 AMENDMENT TO THE FOREST COUNTY
POTAWATOMI COMMUNITY OF WISCONSIN AND STATE OF
WISCONSIN
CLASS III GAMING COMPACT**

This November 2014 Amendment to the Forest County Potawatomi Community of Wisconsin and State of Wisconsin Class III Gaming Compact (“Compact”) was selected by the Arbitration Tribunal pursuant to Compact Section XXII.A.11 to determine the rights, duties and obligations of the State and Potawatomi in the event the Governor of Wisconsin concurs in certain favorable determinations of the United States Secretary of the Interior (“Secretary”) pursuant to 25 USC § 2719(b)(1)(A).

WHEREAS, the Forest County Potawatomi Community of Wisconsin (“Tribe”) and the State of Wisconsin (“State”) hereby agree to amend the Compact as follows:

1. **Section XXII.A.11 is deleted in its entirety.**
2. **The Compact is amended by adding a new Section XXXVII as follows:**

XXXVII. PROCEDURES REGARDING A POSITIVE SECRETARIAL DETERMINATION.

- A. **Agreement Regarding Concurrence.** If, after February 17, 2003, a federally recognized Indian tribe, other than the Tribe (“Applicant”), receives a positive determination from the Secretary of the Interior pursuant to 25 U.S.C. § 2719(b)(1)(A) (a “Secretary’s Determination”) regarding a proposed gaming establishment (an “Applicant Facility”) on lands more than 30 miles and within 50 miles of the Tribe’s hotel and casino facility in Milwaukee (the “Milwaukee Facility”), the State, acting through the Governor or otherwise, shall not concur in such a determination except as provided for herein. The gaming establishment proposed in Kenosha, Wisconsin by the Menominee Indian Tribe of Wisconsin (“Menominee”) is an Applicant Facility.
- B. **Procedures Allowing Concurrence.** The Governor may only concur in a Secretary’s Determination for an Applicant Facility after publication in the Federal Register, pursuant to 25 U.S.C. § 2710(d)(8)(D), of the notice of this Amendment.
- C. **Mitigation of Adverse Impact.** If the Governor of Wisconsin concurs in a Secretary’s Determination for an Applicant Facility, then an annual Mitigation Payment to the Tribe equal to the Annual Revenue Loss is required pursuant to the terms and conditions of this section.
- D. **Definitions.**
 1. “Annual Revenue Loss” means the reduction over a Fiscal Year in Milwaukee Net Revenues caused by an Applicant Facility, calculated by

subtracting Milwaukee Net Revenues from Anticipated Baseline Net Revenues. (“Fiscal Year” means the fiscal year established and utilized by the Tribe in relation to the Milwaukee Facility, beginning on October 1 and concluding on September 30.)

2. “Milwaukee Net Revenues” means (a) revenue from Class III gaming, Class II gaming, food and beverage, hotel and entertainment activity, earned at the Milwaukee Facility, but not including Mitigation Payments received by the Tribe and not including any revenue from ancillary activity such as retail activity from other locations outside of the Milwaukee Facility; minus (b) the sum of direct and indirect operating expenses related to the Milwaukee Facility, but not including interest, taxes, depreciation and amortization, consistent with industry standards for comparable facilities and which are in accordance with Generally Accepted Accounting Principles and the most current edition of the “Accounting and Audit Guide—Casinos” published by the American Institute of Certified Public Accountants. The calculation of Milwaukee Net Revenues shall be based upon the audited financial statements of the Milwaukee Facility.
3. “Anticipated Baseline Net Revenues” means the Milwaukee Net Revenues that would have been earned but-for the operation of the Applicant Facility. It is therefore intended that Anticipated Baseline Net Revenues will reflect changes in Milwaukee Net Revenues resulting from other market dynamics, including competition from other jurisdictions. The Anticipated Baseline Net Revenues shall be calculated on the same fiscal year basis and using the same categories of revenue and expenses as applied in the calculation of Milwaukee Net Revenues.
 - a. For the first Fiscal Year during which an Applicant Facility is in operation, Anticipated Baseline Net Revenues shall be the Milwaukee Net Revenues for the immediately preceding Fiscal Year. Thereafter, Anticipated Baseline Net Revenues will be the same from year to year, subject to adjustment as provided below.
 - b. At any time after the first Fiscal Year during which an Applicant Facility is in operation, either the Tribe or the State may propose an adjustment to the Anticipated Baseline Net Revenues, but only during and for the then current and/or next Fiscal Year, to reflect changes in the competitive environment, macroeconomic conditions, or any other dynamic that would affect or may have affected Milwaukee Net Revenues. If the Tribe and the State reach agreement regarding a new Anticipated Baseline Net Revenues, then the agreed upon Anticipated Baseline Net Revenues shall be the new Anticipated Baseline Net Revenues utilized under this Section unless and until further modified pursuant to this subsection. If the Tribe and the State do not reach

agreement, then the party proposing an adjustment may include the adjustment in its estimate of Annual Revenue Loss under Section XXXVII.E. and the disagreement shall be resolved as provided therein.

E. Annual Mitigation Payments.

1. The State and the Tribe anticipate that the State will enter into agreements under which the Applicant will agree to pay the Mitigation Payment required in this Section. Timely payment of a Mitigation Payment in full to the Tribe by the Applicant satisfies the State's obligation to make that Mitigation Payment.
2. A Mitigation Payment is due to the Tribe annually on June 30th equal to the Annual Revenue Loss during the prior Fiscal Year of the Tribe. The first Mitigation Payment will be due on the June 30th following the first Fiscal Year during which gaming activity commences at an Applicant Facility.
3. The State is responsible for ensuring that the Mitigation Payments are paid in a timely manner and in full. This obligation is an obligation arising under a contract with the State and enforceable under this Compact, including section XXIII.E. The obligation of the State to pay the Annual Revenue Loss to the Tribe shall begin upon the commencement of any gaming activity at an Applicant Facility and shall continue for the duration of the Compact.
4. The State and Tribe shall each provide the other with a written good faith estimate of the Annual Revenue Loss anticipated during the Tribe's first two Fiscal Years during which any gaming activity will occur at an Applicant Facility. The written estimates shall be provided no later than 90 days before such gaming activity commences. Thereafter, the State and Tribe shall each provide to the other a written estimate of the Annual Revenue Loss anticipated during the next two Fiscal Years no later than 90 days before the start of the bi-annual Fiscal Year anniversary. Both the Tribe and the State may adjust their estimates at any time up to 30 days prior to the due date of a Mitigation Payment. The Tribe will provide the State with any records regarding the operation of the Milwaukee Facility that may assist the State in estimating the Annual Revenue Loss. Those records are subject to the protection of confidentiality required of other records of the Tribe under the Compact.
5. The Annual Revenue Loss shall be determined by the State annually on June 1 for the prior Fiscal Year, in good faith, based upon the State's choice of the Tribe's estimate or the State's estimate in accordance with the definitions and requirements of Section XXXVII.D.

6. The State's and the Tribe's Annual Revenue Loss estimates must be trueed up on or before the June 1 following the close of each Fiscal Year of the Tribe based on actual financial results as shown in the Tribe's audited financial statements.
7. If the State relies on its own final estimate to determine the Annual Revenue Loss for the annual Mitigation Payment due on June 30 and the estimate understates the actual Annual Revenue Loss by more than 10%, then the State is subject to a 5% penalty. If the State relies on the Tribe's final estimate and that estimate overstates the actual Annual Revenue Loss by more than 10%, then the Tribe is subject to a 5% penalty.
8. Any dispute under this paragraph E, including a dispute over the amount of the true-up, the calculation of the Annual Revenue Loss, or whether a penalty is due is a dispute subject to resolution under section XXII. The Mitigation Payment based on the Annual Revenue Loss determined by the State shall be paid pending the resolution of a dispute under Section XXII. After a dispute has been resolved, any amounts due to the Tribe or the State shall be paid with, or credited against, the next following Mitigation Payment to the Tribe.

F. **State Alternative Mitigation Payment Mechanism.** Upon the written request of the State, the Tribe shall negotiate in good faith to reach an agreement on reasonable terms proposed by the State which would obligate the Applicant or other third party to make some or all of the Mitigation Payments ("Alternative Mechanisms"). These proposals for Alternative Mechanisms could include such mechanisms as payments made out of the Lock Box established in the Menominee Compact Section XXXIII(C)(9) and (11) for Menominee Compact payments; establishing an Advance Account for the deposit of casino revenue from the Applicant Facility; requiring the Applicant to provide an Evergreen Letter of Credit that would guarantee some or all of the Mitigation Payments; or assigning the Applicant's State Compact Payments to the Tribe. Such Alternative Mechanisms do not relieve the State of its obligation, as set forth above, to ensure that the Mitigation Payments are paid in a timely manner and in full. The State agrees that if the Applicant fails to perform any duty required under the Alternative Mechanisms, it will use reasonable efforts to obtain compliance from the Applicant. Notwithstanding the foregoing statement, the State is responsible for ensuring that the Mitigation Payments are paid in a timely manner and in full.

G. **Additional Provisions.**

1. The State and Tribe shall not contest the validity of any provisions of this section XXXVII.
2. **Reservation of Rights.** Except for actions expressly required or prohibited by this section XXXVII of the Compact, the Tribe and the State each

separately reserve all rights to take any or all actions in support of or in opposition to any proposed gaming establishment in Wisconsin, including the right to participate in, to initiate, or to defend against any judicial or administrative proceeding and to assert any and all legal or equitable claims or defenses regarding any proposed gaming establishment in Wisconsin, including challenges to the actions and the authority of government officials to act. This section XXXVII. of the Compact shall not be considered in any proceeding or by any governmental agency as evidence of support for or opposition to any such gaming establishment, including as evidence of mitigation of any economic detriment or other impacts on the Tribe, the State, or on any other private or public interest or party. The execution by the Governor of the 2014 Compact Amendment does not constitute concurrence by the Governor, or an agreement to grant concurrence with a Secretarial Determination.

FOREST COUNTY POTAWATOMI
COMMUNITY OF WISCONSIN

By: Harold Frank
Harold Frank
Chairman

Executed on this 24 day of November, 2014

STATE OF WISCONSIN

By: Scott Walker
Scott Walker
Governor

Executed on this 25 day of Nov., 2014



Forest County Potawatomi Community
P.O. Box 340 • Crandon, Wisconsin 54520

FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN
EXECUTIVE COUNCIL RESOLUTION NO. 076-2014

*Approving Execution of the 2014 Compact Amendment to the Forest County Potawatomi
Community and State of Wisconsin Gaming Compact of 1992*

WHEREAS, the Forest County Potawatomi Community of Wisconsin (“Forest County Potawatomi Community”) is a duly constituted tribal government organized under the provisions of the Forest County Potawatomi Constitution and By-Laws, approved by the Secretary of Interior on February 6, 1937, as amended, and as thereafter superceded by the Constitution adopted on June 5, 1982 pursuant to the Indian Reorganization Act of June 18, 1934; AND

WHEREAS, the Forest County Potawatomi Executive Council is authorized by the Potawatomi Constitution, Art. 5, Sec. 1(a), to negotiate and enter into intergovernmental agreements on behalf of the Forest County Potawatomi Community with other governments including the State of Wisconsin; AND

WHEREAS, the Forest County Potawatomi Community entered into the Forest County Potawatomi Community and State of Wisconsin Gaming Compact of 1992 (“Gaming Compact of 1992”); AND

WHEREAS, Section XXX of the Gaming Compact of 1992 provides that it may be amended upon the written agreement of both parties; AND

WHEREAS, on December 3, 1998, the parties renewed and executed amendments to the Gaming Compact of 1992 (“Amendment #1”); AND

WHEREAS, The Forest County Potawatomi Community and the State of Wisconsin further amended the Gaming Compact of 1992 on February 19, 2003, on April 4, 2003, on May 30, 2003 and September 29, 2005; AND

WHEREAS, Under the 2005 Compact Amendment, the parties agreed to a provision that established a 30-mile “no-fly zone” and required the parties to undertake last best offer arbitration addressing the rights, duties and obligations of the parties in the event of the Governor’s concurrence to a Two-Part Determination allowing another tribe to operate a Class III gaming facility located 30 to 50 miles from the Forest County Potawatomi Community’s Milwaukee casino; AND

WHEREAS, On August 23, 2013, the Secretary issued his finding that gaming on land proposed to be taken into trust in Kenosha, Wisconsin (the “Project”), by the Menominee Indian Tribe of Wisconsin’s (“Menominee”) would be in the best interest of Menominee and not detrimental to the surrounding community (the “Secretary’s Determination”). Pursuant to federal regulations,

25 C.F.R. Part 292, and the Governor of the State of Wisconsin has until February 19, 2015 to determine whether to concur in the Secretary's Determination; AND

WHEREAS, The Project is proposed to be located within 30 to 50 miles of the Potawatomi Bingo Casino in Milwaukee; AND

WHEREAS, Due to the Project's location, the Forest County Potawatomi Community and the State of Wisconsin have engaged in the last best offer arbitration required under the 2005 Amendment; AND

WHEREAS, As part of the last best offer arbitration, the tribunal has now selected an amendment to the Gaming Compact of 1992 with the State of Wisconsin ("2014 Amendment"); AND

WHEREAS, the 2014 Amendment includes a process by which the Forest County Potawatomi Community will be compensated for revenues lost due to the operation of a Class III gaming facility located more than 30 miles and within 50 miles of the Forest County Potawatomi's Class III Gaming facility in Milwaukee.

NOW THEREFORE BE IT RESOLVED, that the Executive Council hereby approves the 2014 Amendment and authorizes and directs the Chairman, or in his absence the Vice Chairman, to execute the 2014 Amendment and to submit the 2014 Amendment to the Secretary of the United States Department of Interior.

CERTIFICATION

I, Lorna Shawano, the undersigned Secretary of the Forest County Potawatomi Executive Council, do hereby certify that the Executive Council was composed of 6 members constituting a quorum at a meeting duly called, convened, and held on the 19th day of November, 2014, and that said resolution was duly adopted by an affirmative majority vote of 4 council members for and 1 council members against, and 0 council members abstaining, and that said resolution has not been rescinded or amended in any way.



Lorna Shawano
Tribal Secretary, Executive Council
Forest County Potawatomi Community