



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

MAR 11 2008

Honorable Frank Ettawageshik  
Chairperson, Little Traverse Bay  
Bands of Odawa Indians  
7500 Odawa Circle  
Harbor Springs, Michigan 49740

Dear Chairperson Ettawageshik:

On January 25, 2008, we received an amendment to the 1998 class III gaming compact between the Little Traverse Bay Bands of Odawa Indians (Tribe) and the State of Michigan (State), executed on January 24, 2008 (Amendment).

Pursuant to Section 11(d)(8)(c) of the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. 2710(d)(8)(C), the Secretary may approve or disapprove the Amendment within 45 days of its submission. If the Secretary neither approves nor disapproves the Amendment within 45 days, IGRA provides that the Amendment is considered to have been approved, "but only to the extent the [Amendment] is consistent with the provisions of [IGRA]. The Amendment takes effect when notice of its approval is published in the Federal Register pursuant to Section 11(d)(3)(B) of IGRA, 25 U.S.C. § 2710(d)(3)(B).

We neither approved nor disapproved the Tribe's Amendment within the 45 day period. Therefore, the Amendment is considered to have been approved pursuant to IGRA. We chose not to affirmatively approve the Amendment because of concerns with amended language included in Section 17 of the Compact as explained below.

## Background

The Amendment is the result of a negotiated settlement of litigation between the Tribe and the State over the obligation of the Tribe to continue making revenue-sharing payments of 8% of net win from electronic games of chance to the State under its existing compact notwithstanding the State's decision to operate Club Keno. The U.S. District Court for the Western District of Michigan, in *Little River Band of Ottawa Indians and Little Traverse Bay Bands of Odawa Indians v. Michigan*, held that the State, as a party to the compact, was not an "other person" within the meaning of the compact's exclusivity language and its operation of Club Keno, therefore, did not terminate the Tribe's revenue-sharing payment obligation.

Under the Amendment, the revenue-sharing payment is reduced to 6% of net win, and the exclusivity provision will apply to state-run gaming operations as well as to other commercial gaming operations. However, the exclusivity zone is no longer state wide,

but limited to ten counties included in the Tribe's "competitive market area." If a commercial or state-run gaming facility is authorized in the competitive market area, the payments cease immediately, and only resume at a lower rate of 4% of net win if net win from the Tribe's gaming facility climbs to 110% of what it was before the exclusivity breach. However, the term "gaming facility " does not include a facility that operates fewer than 85 electronic gaming devices. The Amendment also provides for a reduction in payment should the profits of the Tribe decrease below the average of the previous three years. In addition, should the Tribe open a second gaming establishment, the payment to the State for that facility would be 6% of net win as compared to the current compact payment of 10% to 12% of net win.

### Analytical framework

Our analysis of this revenue sharing agreement begins with section 25 U.S.C. § 2710(d)(4). This section provides that "nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge or other assessment upon an Indian tribe ...to engage in Class III gaming activity." As a result, the Department of the Interior has sharply limited the circumstances under which Indian tribes can make direct payments to a state for purposes other than defraying the costs of regulating Class III gaming activities.

As our previous compact decision letters have stated, in order to determine whether revenue sharing violates 25 U.S.C. § 2710(d)(4), we first look to whether the State has offered meaningful concessions. We have traditionally viewed this concept as one where the State concedes something that it was otherwise not required to negotiate and it provides a benefit to the Tribe, i.e. exclusivity or some other benefit. In other words, we examine whether the State has made meaningful and significant concessions in exchange for receiving revenue sharing.

The next step in our analysis is to determine whether these concessions result in a substantial economic benefit to the Tribe. The payment to the state must be appropriate in light of the value of the economic benefit conferred on the Tribe. This analysis (meaningful concessions by the State and substantial economic benefit conferred on the tribe) allows us to ascertain that revenue-sharing payments are the product of arms-length negotiations, and not tantamount to the imposition of a tax, fee, charge or other assessment prohibited under 25 U.S.C. § 2710(d)(4).

### Conclusion

There is no question that the Tribe has provided sufficient documentation to show that it is in a far better position under the terms of the Amendment than it would be under the terms of the existing compact as interpreted by the U.S. District Court for the Western District of Michigan. For that reason, we do not believe that the Amendment should be disapproved. However, we are sufficiently troubled by the reduction in the exclusivity zone, the 85 gaming-device exemption within that zone, and the contingent 4% net win continued payment to be unable to determine with certainty that new Section 17 of the

Compact meets the two-prong test articulated in the analytical framework section of this letter so as to warrant an affirmative approval of the Amendment. This Amendment is entered into in connection with the settlement of pending litigation, and thus presents a set of unique circumstances resulting in our decision to neither approve nor disapprove the Amendment within the 45-day statutory time frame.

We wish the Tribe and the State success in their economic venture. An identical letter is being sent to the Governor of the State of Michigan.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Skibine", with a stylized flourish extending to the right.

George T. Skibine  
Acting Deputy Assistant Secretary -  
Policy and Economic Development

**SECOND AMENDMENT TO  
A COMPACT BETWEEN  
THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS  
AND  
THE STATE OF MICHIGAN  
PROVIDING FOR THE CONDUCT OF TRIBAL CLASS III GAMING  
BY THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS**

The Compact made and entered on the 3<sup>rd</sup> day of December, 1998 by and between the LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS (hereinafter referred to as “Tribe”) and the STATE OF MICHIGAN (hereinafter referred to as “State”), as amended, approved by the Secretary of the Interior by publication in the Federal Register on February 18, 1999 at 64 Fed. Reg. 8111 and December 10, 2003 at 68 Fed. Reg. 68944, is hereby amended in accordance with Section 16 of the Compact. All provisions of the Compact not explicitly added or amended herein shall remain in full force and effect.

**Section 3 (Authorized Class III Games) is amended by adding the following new language as subsection A(9):**

(9) Lotteries, raffles, and similar games offered on the premises of the casino as a promotional activity designed to attract additional customers to the premises.

**Section 4(M)(5) is amended to read as follows:**

(5) The Tribe shall make an annual payment in the amount of \$50,000 or .05% of the annual Net Win at the Tribe’s Class III gaming facility, whichever amount is greater, to the Michigan Gaming Control Board, or to its successor as determined by law, to be applied by the State toward the costs it incurs in carrying out functions authorized by the terms of this Compact. Such payments shall be based on a twelve month fiscal period beginning on January 1 and ending on December 31. Any payment due and owing for that fiscal period shall be made within 45 days of the end of that fiscal period.

**Section 12 (A) and 12 (B) is amended to read as follows:**

(A) This Compact shall be binding upon the State and the Tribe until October 31, 2028 unless modified or terminated by written agreement of both parties.

(B) At least one year prior to the expiration of this Compact, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate this Compact. The parties agree that 25 U.S.C. §2710(d)(3) through (8), or any successor provisions of law, apply to successor Compacts.

**Section 17 is amended to read as follows:**

Section 17. Economic Incentive Payments to State

(A) The State and the Tribe have determined that it is in their mutual best interests to maximize the economic benefits of Class III gaming for the Tribe and to work cooperatively toward that end. The Tribe has further determined that it is in the best interests of the Tribe to provide the State with an economic incentive intended to encourage the State to promote economic policies and activities that are beneficial to the Tribe's Class III gaming business and to discourage the State from authorizing adverse competition or other economic policies or activities that are harmful to the Tribe's Class III gaming business.

(B) In consideration of the agreements contained in the Stipulation Settling Lawsuit and Distributing Funds Held in Escrow entered into by the parties on January 24, 2008 in *Little River Band of Ottawa Indians et al v State of Michigan et al*, 6<sup>th</sup> Cir. No 07-1913 (W.D. Mich. No. 5:05CV0095), and in furtherance of the determinations described in subsection (A) of this section, the Tribe agrees that it shall make annual payments to the Michigan Strategic Fund, or its successor as determined by State law, as follows:

(1) For any fiscal period during which the Tribe continues to operate only the Petoskey Site, the Tribe shall make a payment equal to 6% of the Net Win at that site. Commencing with the first fiscal period during which the Tribe begins to operate its Second Site, as defined in Section 2(F) of this Compact, the Tribe shall instead calculate its payment on the following graduated scale based on the combined Net Win at both facilities: 6% of combined annual Net Win of up to \$100 million; 8% of combined Net Win over \$100 million but less than \$150 million; and 10% of combined Net Win of \$150 million or more. For example, if the combined Net Win at both facilities totaled \$160 million, the Tribal payment would be 6% of \$100 million (\$6 million), 8% of \$50 million (\$4 million), and 10% of \$10 million (\$1 million) for a payment of \$11 million.

(2) Prior to making any payment under this subsection, the Tribe shall calculate the average annual Net Win for the three fiscal periods

immediately preceding the fiscal period for which payment is due. If the Net Win for the period for which payment is due (the "Payment Period") is equal to or greater than the average annual Net Win for the three fiscal periods that preceded the Payment Period, the Tribe shall make payment in full at the rate specified by this section. However, if the Net Win for the Payment Period is less than the average annual Net Win for the three fiscal periods that preceded it, the Tribe may reduce its payment as follows:

The Tribe shall subtract the Net Win for the Payment Period from the average annual Net Win for the three fiscal periods that preceded the Payment Period to determine the difference, shall calculate the ratio of that difference to the average annual Net Win for the three fiscal periods that preceded the Payment Period to determine the percentage of that reduction, and may reduce the payment otherwise due by twice that percentage.

By way of example, if the annual average Net Win for the three fiscal periods that preceded the Payment Period is \$100 million and the Net Win for the current Payment Period falls to \$90 million, the difference would be \$10 million, the percentage difference would be 10%, and the Tribe would therefore be entitled to reduce the payment otherwise due by twice that rate or 20%.

(3) If the State authorizes or consents to the opening of a new Commercial Gaming Facility within the Tribe's Competitive Market Area by any person or entity, or fails to take action to challenge or prohibit the opening of a new Commercial Gaming Facility in violation of state law within the Tribe's Competitive Market Area by any person or entity, the Tribe's payment obligation shall be suspended for the fiscal period in which such new facility opens to the public and shall remain suspended indefinitely thereafter until the first fiscal period during which the Tribe's Net Win equals or exceeds 110% of the Net Win for the fiscal period immediately preceding the period in which the payment was suspended at which time the Tribe's payment obligation will be reinstated at the rate of 4% of Net Win for the Petoskey facility alone. If the Tribe is operating its Second Site at the time it reaches the 110% of Net Win mark, or commencing with the first fiscal period thereafter during which the Tribe begins to operate its Second Site, the Tribe shall instead calculate its payment on the following graduated scale based on the combined Net Win at both facilities: 4% of combined annual Net Win of up to \$100 million; 6% of combined Net Win over

\$100 million but less than \$150 million; and 8% of combined Net Win of \$150 million or more. This subsection may be invoked by the Tribe only once during the term of this Compact; thereafter, payments shall continue at the reduced rates specified in this subsection but shall continue to be subject to the provisions of section 17(B)(2).

(4) Payments under this subsection shall be based on a twelve month fiscal period beginning on January 1 and ending on December 31. Any payment due and owing for that fiscal period shall be made within 45 days of the end of that fiscal period.

(C) As used in this subsection:

(1) “Net Win” means the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at such machines.

(2) “Commercial Gaming Facility” means a facility operated by any person or entity including the State that contains 85 or more electronic wagering devices that are electronic games of chance as defined in Section 3(A)(5) of this Compact or other similar electronic devices designed and intended to closely simulate an electronic game of chance, regardless of how a device is categorized under IGRA or whether the device operates independently or through any type of common server, including video lottery terminals, stand alone keno devices, and other similar devices. “Commercial Gaming Facility” shall also include multiple facilities that are adjoining or located in close walking distance to each other if they participate in a coordinated marketing arrangement that represents them collectively as a single gaming district or destination. “Commercial Gaming Facility” does not include:

(a) charitable gaming conducted under the provisions of the Traxler-McCauley-Law-Bowman Bingo Act, MCL 432.101 et seq, or

(b) a Class III gaming facility operated by a federally-recognized or acknowledged Indian Tribe (other than the Little Traverse Bay Bands of Odawa Indians) unless:

(i) the facility is operated by such tribe pursuant to IGRA with the approval of the State under a compact or compact amendment with the State;  
and

(ii) the compact or amendment permits that tribe to conduct gaming simultaneously in more than one location; and


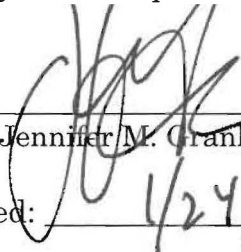
(iii) the facility is such tribe's second or subsequent simultaneous location; and

(iv) the facility is located within the "Competitive Market Area" defined by subsection (3) below; and

(v) The Little Traverse Bay Bands of Odawa Indians have not consented in writing to the opening of that tribe's second or subsequent site within its "Competitive Market Area."

(3) "Competitive Market Area" means the counties of Emmet, Cheboygan, Charlevoix, Antrim, Otsego, Crawford, Kalkaska, Presque Isle, Montmorency, and Oscoda.

IN WITNESS WHEREOF, the Tribal Chairman acting for the Little Traverse Bay Bands of Odawa Indians and the Governor acting for the State of Michigan have signified their approval by their respective signatures.

By:  By:   
Frank Ettawageshik, Tribal Chairman Jennifer M. Granholm, Governor  
Dated: 1-24-2008 Dated: 1/24/08

**Deemed Approved**

**MAR 11 2008**