



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

**AUG 23 2013**

Honorable Scott Walker  
Governor of Wisconsin  
115 East Capitol  
Madison, Wisconsin 53702

Dear Governor Walker:

On July 6, 2004, the Menominee Indian Tribe of Wisconsin (Tribe or Menominee Tribe) submitted a request to the Bureau of Indian Affairs (BIA) to acquire in trust approximately 228 acres of land known as the "Dairyland Greyhound Park" (Site) in the City of Kenosha, Kenosha County, Wisconsin, for the purpose of establishing a Class III gaming facility (Kenosha Project or Project) pursuant to Section 465 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465. The Tribe is seeking to conduct gaming at the Site pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

Section 20 of IGRA generally prohibits Indian gaming on lands acquired in trust after October 17, 1988, subject to several exceptions. One exception permits a tribe to conduct gaming on lands acquired in trust for an Indian tribe after October 17, 1988, if the Secretary of the Interior (Secretary), after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that:

- 1) A gaming establishment on the trust lands would be in the best interest of the tribe and its members; and
- 2) The Secretary also determines that gaming on the trust lands would not be detrimental to the surrounding community.

Under this exception, the Governor of the State in which the gaming activity is to be conducted must concur in the Secretary's "two-part determination" before the applicant tribe may operate gaming on the proposed site.

The Secretary has delegated the responsibilities under this section to our office. We have completed our review of the Tribe's application and have determined, subject only to your concurrence and the remaining action of taking the land into trust, that the Menominee Tribe has established, as required by law, that its project would be in the best interest of the Tribe and its members and would not be detrimental to the surrounding community.

Our decision is based on the analysis set forth in the pages that follow. As you will see from our analysis, despite its restoration in 1973, the Menominee Tribe has never fully recovered from the devastating effects of Federal Termination in the 1950s. The Menominee Tribe is a large community with more than 8,700 members and a high poverty rate. The Menominee people are the overwhelming majority of the residents of Menominee County, which is the poorest county



in the state, with the highest rate of unemployment. Poverty often means tragedy in the day to day lives of ordinary people. This fact is borne out in Menominee by the fact that it has worst health indicators of any county in the state.

We believe that the Kenosha project would help to lift some of the tribe's members out of poverty by providing jobs, not just in Kenosha, but in Northeast Wisconsin, where gaming revenues would provide governmental jobs and services for Menominee people. It is also noteworthy that the Tribe has assured us that gaming revenues would be used for governmental operations and services rather than distributed as per capita payments.

We also note that much of the gaming revenue would come from the good citizens of Illinois, a state where no federally-recognized Indian tribes remain headquartered. Given that so many Indians from Wisconsin tribes were resettled to Chicago during the BIA relocation program of the 1950s, beginning a large Menominee population there, it is not inappropriate for the Menominee to reach toward Chicago.

A decision like this one is in some ways very difficult for us, just as it may be for you. The Forest County Potawatomi Community, which we respect greatly, is opposed to the Menominee proposal for fear that it would harm the Potawatomi gaming operation in Milwaukee. While our regulations do not formally require us to consider the Potawatomi views, it is our general obligation as trustee to serve all tribes and we do not turn away tribal leaders who ask for meetings. As a result, we have heard from the Potawatomi. The Potawatomi have been generous to Milwaukee and, as a result, we have also heard from their influential friends in State, county and municipal government. In a political environment in which some tribal governments remain marginalized, it is heartwarming to see that the Forest County Potawatomi have developed such strong influence in State and local politics in Wisconsin.

That said, when tribes oppose one another in direct competition for resources, it creates agony for the federal trustee. Thus, we feel compelled to discuss the Forest County Potawatomi Community and the example they provide. The Potawatomi successfully navigated the same process in the same state in 1990. While some commentators have been troubled by the 160-mile distance from the Menominee reservation to Kenosha, we note that the Potawatomi headquarters in Forest County is more than 200 miles from Milwaukee. Decisions like this one are made on a case-by-case basis based on a variety of factors. Admittedly, allowing an off-reservation casino located more than 150 miles from a reservation headquarters might not be appropriate in any other state, but the Forest County determination of 1990 is a very specific precedent for such an action in Wisconsin.

Even more compelling is the Potawatomi success during the past 23 years. Indeed, although the Forest County Potawatomi's words convey opposition to the Menominee, their actions constitute a strong argument for approving the Menominee proposal and creating similar opportunities for an even larger tribe.

Forest County Potawatomi is a community of perhaps 1,400 people. Although it once struggled, it has experienced a renaissance, in large measure, because of its very successful economic

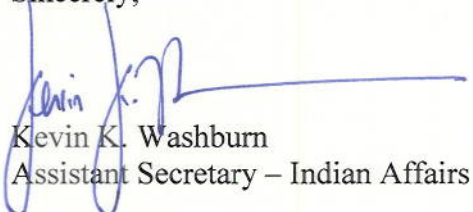
development in Milwaukee. We anticipate that the Menominee Kenosha project would have some modest economic effects on the Potawatomi gaming operation in Milwaukee, but we are confident that the Potawatomi will continue to thrive. As the Federal trustee for Indian nations, our hearts would sing to see more than 8,700 Menominee Indians follow in the successful footsteps of 1,400 Potawatomi.

We realize that major economic developments can be controversial. As to this application, it has been our responsibility to determine whether a tribal casino on the outskirts of Chicagoland is in the best interest of the Menominee tribe. As the following analysis demonstrates, our decision is driven in part by our commitment to creating jobs. We believe that such a casino would create gaming jobs in Kenosha and tribal public service jobs in Northeastern Wisconsin on the Menominee reservation, much of them created by revenues brought to Wisconsin from Illinois.

As Federal resources shrink, tribes must necessarily become more self-sufficient to sustain their communities. As a result, economic development for Indian tribes is one of our top priorities. As you will see from the following analysis, we have given this action careful thought. We believe that this proposal is in the best interest of the Tribe and is not detrimental to the surrounding community.

We request your concurrence with the determination pursuant to 25 U.S.C. § 2719(b)(1)(A). Thank you for your consideration.

Sincerely,



Kevin K. Washburn  
Assistant Secretary – Indian Affairs

Enclosure

cc: Craig Corn, Chairman  
Menominee Tribe of Wisconsin



**Menominee Indian Tribe of Wisconsin  
Section 20 Determination  
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## I. Background

### a. *Proposed Project*

The Tribe proposes to develop a destination casino resort on the Site, located approximately 160 miles south of the Tribe's Reservation. The Site for the planned development is just east of Interstate 94 and immediately south of Kenosha Regional Airport. The Site consists of a former greyhound dog racing track, Dairyland Greyhound Park, which closed in 2009. The Project anticipates a phased development. Phase I of the Project will include a casino featuring gaming machines, table games, and multiple restaurants and lounges, along with a multi-purpose events hall, retail space, and parking to accommodate customers' vehicles. Phase II of the Project will include an expanded gaming floor with additional gaming machines and table games, construction of a full-service hotel with meeting space, a spa, a health club, a salon, a business center, and an indoor pool. Phase II will also include the addition of a coffee shop and conversion of floor space to a quick service restaurant, a night club, a childcare center, and an arcade, as well as expanded parking.<sup>1</sup>

### b. *Procedural Status of the Tribe's Application*

On July 6, 2004, the Tribe filed an off-Reservation gaming acquisition application with the BIA pursuant to Tribal Resolution No. 04-39, requesting the Department of the Interior (Department) acquire title to the Site in trust for the Tribe under the authority of the IRA for purposes of Class III gaming. On January 19, 2007, the Midwest Regional Director issued a memorandum to the Assistant Secretary – Indian Affairs (Assistant Secretary) recommending approval of a Secretarial Determination in accordance with section 20(b)(1)(A) of IGRA, and on December 18, 2007, the Regional Director recommended approval of the Tribe's application for gaming in accordance with section 465 of the IRA. The Regional Director's recommendation and the Tribe's application were forwarded to the Office of Indian Gaming in Washington, D.C., for review by the Assistant Secretary – Indian Affairs.

On January 7, 2009, the Acting Deputy Assistant Secretary for Policy and Economic Development<sup>2</sup> disapproved the Tribe's application to acquire the Site in trust pursuant to section 465 and its implementing regulations at 25 C.F.R. Part 151.<sup>3</sup> The disapproval was based

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<sup>1</sup>See KlasRobinson Q.E.D., *Planned Kenosha Casino Resort, Kenosha, Wisconsin Feasibility Study*, prepared for Menominee Kenosha Gaming Authority, dated Feb. 12, 2012 (hereinafter KlasRobinson Final Report) (OIG Attachment 1.1).

<sup>2</sup> The Authority for approving or disapproving acquisitions of land for gaming purposes is vested with the Assistant Secretary – Indian Affairs as delegated from the Secretary. 2009 Departmental Manual 8.1. The Acting Deputy Assistant Secretary for Policy and Economic Development is also vested with delegated authority but the Secretary retains the ultimate authority to make land acquisition decisions pursuant to the IRA.

<sup>3</sup> Letter from George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, to Lisa Waukau, Chairperson, Menominee Indian Tribe of Wisconsin, regarding the Secretary of Interior's decision to decline to take Dairyland Greyhound Park into trust for the purpose of operating a Class III gaming facility under IGRA (Jan. 7, 2009) (hereinafter 2009 Denial Letter) BIA Generated Documents Binder IV, Tab 1 (OIG Attachment 2).



on the application's failure to sufficiently document the need for the land as required by section 151.10(b), the potential splintering of the tribal community from casino operations being so far from the Tribe's Reservation, and because the Tribe had not demonstrated why taking land into trust outside a commutable distance was beneficial to the Tribe.<sup>4</sup>

On May 15, 2009, the Tribe filed suit against the Department in federal court challenging the decision as arbitrary and capricious under the Administrative Procedure Act.<sup>5</sup> On August 19, 2011, the Tribe and Department entered into a Settlement Agreement (Agreement) whereby the Department withdrew its January 7, 2009 decision denying the Tribe's application and agreed to reconsider the application in accordance with existing law.<sup>6</sup> The Agreement allowed the Tribe to supplement its application. The Tribe supplemented its original application by providing additional documentation to comply with existing legal requirements and updating outdated information. On June 13, 2011, the commutable distance standard was withdrawn by Assistant Secretary – Indian Affairs Larry Echo Hawk.<sup>7</sup>

The analysis contained in the decision denying the Tribe's request to acquire land in trust was based upon the requirements of 25 C.F.R. Part 151. The Department's regulations at 25 C.F.R. Part 292 implement section 20 of IGRA and became effective on August 25, 2008. The Tribe's previous application did not address the factors in Part 292 because the regulations were promulgated after the Tribe's application was submitted in 2004, and the Department did not include analysis of the Part 292 factors in its 2009 denial of the trust application.

This Secretarial Determination analyzes the Tribe's application pursuant to IGRA and Part 292, but not the IRA and Part 151. Although the Tribe's submissions have addressed many of the issues required by Part 151, the analysis required by Part 151 is not the same analysis required by Part 292. The 151 analysis will be conducted for the trust acquisition.

From time to time throughout this process the Tribe has updated its application. The current application record contains:

- 2004 Original Submission<sup>8</sup>
- 2005 Original Submission Supplement<sup>9</sup>
- 2008 Update, Kenosha Report, Ten Year Budget Resolution<sup>10</sup>

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<sup>4</sup> 2009 Denial Letter (OIG Attachment 2).

<sup>5</sup> See *Menominee Indian Tribe v. United States Department of the Interior*, No. 1:09-C-496 (E.D. Wis., filed May 15, 2009).

<sup>6</sup> Final Settlement Agreement between the Department of the Interior and the Menominee Indian Tribe of Wisconsin, dated Aug. 19, 2011. BIA Generated Documents Binder IV, Tab 2 (OIG Attachment 2.1).

<sup>7</sup> Memorandum from Larry Echo Hawk, Assistant Secretary – Indian Affairs, to all Regional Directors, Bureau of Indian Affairs, regarding Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes (June 13, 2011).

<sup>8</sup> Menominee Kenosha Gaming Authority, Original Submission, Request to Take Land into Trust, Vol. I & II, submitted to BIA, July 2004. (hereinafter Original Submission Vol. I, and Original Submission Vol. II)

<sup>9</sup> Menominee Indian Tribe of Wisconsin Original Submission Supplemental Report Vol. I & Vol. II dated 2005, (hereinafter Supplemental Report Vol. I and Vol. II)



- 2009 Denial Letter<sup>11</sup>
- 2012 Update as per Settlement Agreement<sup>12</sup>
- 2012 KlasRobinson Final Report<sup>13</sup>
- 2013 Financials Update<sup>14</sup>
- 2013 Unmet Needs Update<sup>15</sup>

c. *Background History of the Menominee Tribe*

The Tribe asserts that its members constitute the “oldest continuous inhabitants of . . . the State of Wisconsin.”<sup>16</sup> The Tribe indicates that in addition to an established presence in Wisconsin, the Menominee Tribe has maintained its existence on ancestral lands which include geographic regions encompassing Minnesota, Illinois, Iowa, and the Upper Peninsula of Michigan.<sup>17</sup> The Tribe notes that its oral history verifies Menominee occupation of these areas and that the occupation of these lands going back 13,000 years is recorded in the archeological record.<sup>18</sup> The Tribe’s submission recounts treaties between the Tribe and the United States, beginning in 1817 and proceeding through 1856, resulted in the reduction of the Tribe’s lands from tens of millions of acres to 232,000 acres as the Tribe retreated to its current Reservation.<sup>19</sup>

Prior to Termination in 1954, the Tribe provided its own law enforcement, telephone services, electricity, health care (including a hospital and clinic), and schools. These tribal services were primarily funded through the Tribe’s sawmill business located on its Reservation.<sup>20</sup> In the 1880s

<sup>10</sup> Letter from Lisa Waukau, Tribal Chairperson, to George T. Skibine, Acting Deputy Assistant Secretary, Indian Affairs, regarding response to May 14, 2008 request for further information (July 31, 2008) (hereinafter May 2008 Response). The letter contains a summary response to the Guidance Memorandum issued by the BIA on January 3, 2008. The letter also contained (1) Approval of Ten Year Budget Plan for Kenosha Revenue, Resolution No. 08-34, July 29, 2008 (hereinafter Ten Year Budget Resolution) and (2) Impact of Kenosha on the Menominee Reservation (hereinafter Kenosha Report); *see also* 2012-151 Update, Exhibit K, K.1, K.2 respectively (OIG Attachments 3.1, 3.2, 3.3).

<sup>11</sup> 2009 Denial Letter (OIG Attachment 2).

<sup>12</sup> Menominee Kenosha Gaming Authority, Menominee 2012-292 Update, (hereinafter 2012-292 Update), Menominee 2012-151 Update (hereinafter 2012-151 Update), Menominee 2012 Update, (hereinafter 2012 Update), and Menominee 2012-292 Update, Exhibit “M” Historic Territory of the Menominee Indian Tribe of Wisconsin (hereinafter Historic Territory).

<sup>13</sup> KlasRobinson Final Report (OIG Attachment 1.1).

<sup>14</sup> Menominee Kenosha Gaming Authority, Menominee Kenosha Project, Updated Financial Information, Apr. 15, 2013. (hereinafter 2013 Financials) (OIG Attachment 4).

<sup>15</sup> Letter from Craig Corn, Chairman, Menominee Indian Tribe of Wisconsin, to Troy Woodward, Office of Indian Gaming, regarding unmet needs – Menominee Indian Tribe of Wisconsin (June 19, 2013) (hereinafter 2013 Unmet Needs Update) Menominee Indian Tribe of Wisconsin 2013 Unmet Needs and Housing Update, Tab 1 (OIG Attachment 5.1).

<sup>16</sup> *Overview of Menominee History*, (hereinafter Menominee History) Historic Territory Menominee, 2012-292 Update, Exhibit M, Tab 1 (OIG Attachment 6.1).

<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> *See Damages from Termination*, Supplemental Report Vol. II, February, 2005 (J-O), Exhibit M at 3 (*citing* Kirke Kickingbird & Karen Ducheneaux, *One Hundred Million Acres* (1973)) (OIG Attachment 7).



and 1890s, the logging industry on its Reservation was developed and matured to provide essential employment and a sustainable industry for the Tribe.<sup>21</sup> Revenue from the Tribe's logging industry, referred to as the "logging fund," helped sustain the tribal government and the Tribe's services and programs, including fire protection, schools, health facilities, public utilities, relief, old age pension programs, and a source of loans.<sup>22</sup> The quality of life for tribal members was comparable to that of non-Indians in the surrounding communities due to the leveraging of tribal assets, economic progress, and social institutions.<sup>23</sup> Until the 1950s, the Menominee Tribe was described as "self-supporting" and "nearly self-sufficient."<sup>24</sup> However, Stephen J. Herzberg, an Associate Professor of Law at the University of Wisconsin, noted that the Tribe's prosperity and economic success contributed to the Tribe being selected for Termination by the United States.<sup>25</sup>

In House Concurrent Resolution 108, the Menominee Tribe was one of six tribes expressly mentioned for immediate Termination.<sup>26</sup> The passage of the Menominee Termination Act<sup>27</sup> in 1954 brought about an "immediate, rapid decline in both the success of the [T]ribe's enterprises and the well-being of the individual Menominee."<sup>28</sup> Because the Termination Act made the Tribe's Reservation subject to State regulation and taxation, the Tribe was forced to close its hospital and other health care services, its three electric power plants, and educational services.<sup>29</sup> The Tribe's lumber company, Menominee Enterprises, Inc. (MEI), held 90 percent of the Reservation's taxable property but could not sustain the new State and county tax burdens that

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<sup>21</sup> See Damages from Termination at 6 (OIG Attachment 7).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 3 (citing Gilbert L. Hall, *Duty of Protection: The Federal-Indian Trust Relationship in Legal Curriculum and Training Program of the Institute for the Development of Indian Law*, 26 (1979)) (OIG Attachment 7).

<sup>24</sup> See Damages from Termination, at 6 (citing Nicholas C. Peroff, *Menominee DRUMS: Tribal Termination and Restoration* at 169 (1982)).

<sup>25</sup> Stephen J. Herzberg, *The Menominee Indians: Termination to Restoration*, 6 *American Indian Law Review* 143, 148 (1978) (hereinafter Herzberg), BIA Generated Documents Binder IV, Tab 7 (OIG Attachment 6.2).

<sup>26</sup> H. Con. Res. 108, 67 Stat. B122 (Aug. 1, 1953) reprinted in Charles J. Kappler, 6 *Indian Affairs: Laws and Treaties* 614 (1971), available at [http://digital.library.okstate.edu/kappler/vol6/html\\_files/v6p0614.html#p614a](http://digital.library.okstate.edu/kappler/vol6/html_files/v6p0614.html#p614a).

<sup>27</sup> Menominee Indian Termination Act of 1954, 68 Stat. 250 (1954), as amended, 25 U.S.C. §§ 891-202 (1970) (hereinafter Menominee Termination Act), repealed by Menominee Tribe of Wisconsin: Restoration of Federal Supervision Act, 87 Stat. 770 (1973), 25 U.S.C. §§ 903-903f (2001) (hereinafter Menominee Restoration Act).

<sup>28</sup> Herzberg at 171-172 ("Of all the termination losses suffered by the Menominee, the depletion of the tribe's cash reserve is most easily observed. When the termination act was passed, the government held \$10,437,000 in the Menominee treasury accounts. This apparently secure cash position was an important factor in Congress' decision to withdraw federal support from the tribe. A rapid cash drain began immediately. With little federal support, the Menominee had to pay for expensive pre-termination studies. In addition, with little help, the tribe had to improve its facilities so they would qualify for state licensing. For the first time, the Menominee were forced to use a system of deficit spending. By 1960, they had spent \$12,265,424. In 1961, on the termination day, the tribal accounts contained \$1,750,000; by 1964, they held \$300,000; and in 1972, the reserves were down to \$58,795." (citations omitted)) (OIG Attachment 6.2).

<sup>29</sup> *Id.* at 178.



followed Termination and, as a result, MEI was forced to lay off workers. Under the Termination Act, the former Reservation became Menominee County.<sup>30</sup>

Unemployment within the former Reservation boundaries of the new Menominee County steadily increased until 1972 when it reached 25.7 percent, five times the statewide average of only 5.2 percent.<sup>31</sup> Tribal members turned to welfare assistance for support.<sup>32</sup> One of the results of the high unemployment rate was a migration of tribal members to cities seeking work.<sup>33</sup> Between 1961 and 1970, Menominee County suffered a population decrease of individuals between the ages of 15 and 54 as people relocated from the former Reservation for work and school.<sup>34</sup>

Tribal members who continued to live on the former Reservation were required to either vacate or purchase the lands on which their homes were located, which was previously held communally, when the MEI Board of Directors decided to parcel out and sell the land.<sup>35</sup> Many tribal members were unable to purchase the land and vacated their homes. Of those who were able to purchase, many were unable to repay the debt associated with their land and home purchase and lost their homes to foreclosure.<sup>36</sup> The additional sales of land by MEI eventually resulted in thousands of acres of former Reservation land passing out of Menominee ownership.<sup>37</sup>

Dissatisfaction with the results of Federal Termination led Menominee tribal members to begin efforts to counteract the losses suffered from Termination.<sup>38</sup> These efforts eventually culminated in the Menominee Restoration Act of 1973 (Restoration Act).<sup>39</sup> The Restoration Act resulted in reinstatement of the Menominee Reservation, a restructuring of the Tribe's political institutions, and, eventually, the adoption of a new constitution by the Tribe's membership.<sup>40</sup> Much of the Tribe's former Reservation lands were again placed into trust.<sup>41</sup> The restoration of the Tribe's status as a federally recognized Tribe also helped to reverse the trend of population loss.<sup>42</sup> In

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 179 n. 172.

<sup>32</sup> *Id.* at 179-80.

<sup>33</sup> *Id.* at 180, quoting testimony of Ada Deer before the Committee on Interior and Insular Affairs, *Hearings on S.C.R. 26 Before the Comm. On Interior & Insular Affairs*, 92d Cong., 1<sup>st</sup> Sess 119 (1971); See Damages From Termination at 9 (OIG Attachment 7).

<sup>34</sup> Damages from Termination at 9 (OIG Attachment 7). The BIA sponsored an adult training and relocation program to help Menominee Tribal members find work in the Chicago area. See 3 Wisconsin Legislative Council, Report of the Menominee Indian Study Committee (1965), BIA Generated Documents Binder IV, Tab 9.

<sup>35</sup> Herzberg at 182. The MEI board "ruled that all land that was being used for housing be appraised and offered for sale to its occupants." (OIG Attachment 6.2).

<sup>36</sup> *Id.* at 183.

<sup>37</sup> *Id.* at 184.

<sup>38</sup> See Damages from Termination at 13 (OIG Attachment 7).

<sup>39</sup> Menominee Restoration Act, 87 Stat. 770 (1973), 25 U.S.C. §§ 903-903f (2001).

<sup>40</sup> Damages from Termination at 13 (OIG Exhibit 7).

<sup>41</sup> *Id.* at 19.

<sup>42</sup> *Id.* at 19. The 1970 census found 41 percent of Menominee on the Reservation were under 16 years old and 9 percent were over 60 years old. (OIG Exhibit 7).



1975, the Tribe established a police force and the following year, a tribal court.<sup>43</sup> In 1979, the first Menominee Tribal Legislature was elected under the new Constitution.<sup>44</sup> The Tribe also opened a Menominee Tribal Clinic.<sup>45</sup> The Tribe continued to address the effects of Termination by focusing on employment and economic development. The Tribe entered into a Class III gaming compact with the State of Wisconsin in 1992 that permitted the Tribe to open a casino on its Reservation that provided additional revenues to the Tribe and employment for tribal members.<sup>46</sup> The profits from the Tribe's existing gaming operations are relatively small compared to the unmet needs of the Tribe, and have not eradicated the lingering effects of Termination. Many Menominee families continue to live in poverty.<sup>47</sup>

*d. Description of Other Gaming by the Menominee Tribe*

The Tribe opened the Menominee Nation Casino on its Reservation in Keshena, Wisconsin, in 1992.<sup>48</sup> The Tribe's casino is the oldest in the region and located in a low-density population area, which has limited the revenue and growth of the casino.<sup>49</sup> This casino has 33,000 sq. ft. of casino space housing 850 gaming machines and table games, and a separate 400-seat bingo hall.<sup>50</sup> Gaming operations since 1992 have produced insufficient revenue to satisfy the unmet needs of the Tribe because of its rural location.<sup>51</sup>

*e. Unmet Needs*

The Tribe's application describes the significant unmet needs of the Tribe and tribal members including underfunded tribal government functions and programs, healthcare, community safety, and economic development. The Tribe submitted updated information on its unmet needs in 2013, as discussed below.<sup>52</sup>

*Economic Development*

The exterior boundaries of the Menominee Reservation and the County of Menominee are the same.<sup>53</sup> Therefore statistics regarding Menominee County can be applied equally to the Tribe's Reservation. In May 2008, the unemployment rate in Menominee County was 10 percent, which was the highest unemployment rate in the State, and more than double the statewide unemployment rate of 4.4 percent at that time.<sup>54</sup> In 2011, Menominee County's per capita

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<sup>43</sup> *Id.* at 15.

<sup>44</sup> *Id.* at 15 (OIG Exhibit 7).

<sup>45</sup> *Id.* at 15 (OIG Exhibit 7).

<sup>46</sup> 57 Fed. Reg. 35744 (Aug. 10, 1992).

<sup>47</sup> Damages from Termination at 16, 20 (Table 4, Menominee Poverty Trends 1970-2000, family poverty at 32 percent in 2000) (OIG Exhibit 7).

<sup>48</sup> See Request for Two Part Determination: Part One and Part Two Questions (hereinafter Request for Two-Part Determination), Original Submission, Vol. I, Exhibit 2.1 at 3 (July 2004) (OIG Attachment 8.1).

<sup>49</sup> *Id.*

<sup>50</sup> Menominee Casino Resort, <http://www.menomineecasinoresort.com/Casino.aspx> (last visited Aug. 6, 2013).

<sup>51</sup> See Request for Two-Part Determination at 3 (OIG Attachment 8.1).

<sup>52</sup> 2013 Unmet Needs Update (OIG Attachment 5.1).

<sup>53</sup> Kenosha Report (OIG Attachment 3.1).

<sup>54</sup> See *Id.* at 8.



personal income was \$23,417, a significantly lower figure than both the State and the United States.<sup>55</sup> In August 2012, the Menominee County unemployment rate had risen to 21.9 percent.<sup>56</sup> This was 11.3 percent higher than the second highest local unemployment rate of 10.6 percent.<sup>57</sup> By February 2013, Menominee County had the highest unemployment rate in the State, at 15 percent, compared to the average State unemployment rate of 8.2 percent.<sup>58</sup>

Roughly 10 percent of Menominee Tribal members, approximately 868 individuals, now live in the Kenosha area.<sup>59</sup> This community is the result of a combination of BIA sponsored relocation and economic migration.<sup>60</sup> A Harvard University study documented that Tribal members who relocated to the Kenosha area are underemployed and in need of employment resources.<sup>61</sup> The Tribe's application also establishes the Tribe's need for additional land for economic development to address the unmet needs of the Tribe and its members.<sup>62</sup> There is a need to repurchase fee lands on the Reservation, as discussed below.<sup>63</sup>

### *Healthcare*

The Tribal Clinic has been chronically underfunded, resulting in an ongoing cycle of preventable negative health behaviors.<sup>64</sup> Menominee County, and therefore the Menominee Reservation, has been ranked the worst in the State for community health indicators for the last 9 years.<sup>65</sup> The County Health Rankings uses a combination of health outcomes and health factors. These include detrimental behaviors, access to health care, socioeconomic factors including education and employment, and the physical environment of the community.<sup>66</sup> The Tribal premature death

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<sup>55</sup> See Menominee County Workforce Profile 2011 (hereinafter Menominee Workforce Profile), State of Wisconsin, Department of Workforce Development – Office of Economic Development, 2011, available online at [http://worknet.wisconsin.gov/worknet\\_info/Downloads/CP/menominee\\_profile.pdf](http://worknet.wisconsin.gov/worknet_info/Downloads/CP/menominee_profile.pdf) (OIG Attachment 9.1).

<sup>56</sup> See Wisconsin Local Employment & Unemployment Estimates Released, State of Wisconsin, Department of Workforce Development News Release, Sep. 26, 2012, available at [http://dwd.wisconsin.gov/dwd/newsreleases/2012/unemployment/120926\\_august\\_local.pdf](http://dwd.wisconsin.gov/dwd/newsreleases/2012/unemployment/120926_august_local.pdf) (OIG Attachment 9.2).

<sup>57</sup> Menominee Workforce Profile (OIG Attachment 9.1).

<sup>58</sup> See Wisconsin County Unemployment Rates, April 2013, State of Wisconsin, Department of Workforce Development, See [http://worknet.wisconsin.gov/worknet/worknetinfo.aspx?htm=map\\_uRatesCo&menuselection=gp](http://worknet.wisconsin.gov/worknet/worknetinfo.aspx?htm=map_uRatesCo&menuselection=gp) (OIG Attachment 9.3).

<sup>59</sup> Kenosha Report at 12. The relocation of Menominee tribal members to the greater Kenosha area, which includes Milwaukee and Chicago, began during termination but tribal members continue to relocate to the area due high unemployment on the Reservation. (OIG Attachment 3.1).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (OIG Attachment 3.1).

<sup>62</sup> *Id.*, at 16-18 (OIG Attachment 3.1).

<sup>63</sup> *Id.*, at 16-18 (OIG Attachment 3.1).

<sup>64</sup> Menominee Tribal Clinic Impact Statement, 2013 Unmet Needs Update, Exhibit 3 (OIG Attachment 5.1).

<sup>65</sup> 2013 Unmet Needs Update at 1. The community healthcare rank is compiled by the Population Health Institute of the University of Wisconsin – Madison annually. The 2013 report can be found as Exhibit 1 to the 2013 Unmet Needs Update. (OIG Attachment 5.1).

<sup>66</sup> County Health Rankings and Roadmaps, 2013 Rankings, Population Health Institute of the University of Wisconsin – Madison, 2013 Unmet Needs Update, Exhibit 1. (OIG Attachment 5.1).



rate on the Reservation is three times the national benchmark.<sup>67</sup> Menominee County has the highest rate of negative health behaviors in the State, including tobacco use, binge drinking, teen births, sexually transmitted diseases, motor vehicle crash deaths, smoking during pregnancy, divorce, and obesity.<sup>68</sup>

### *Policing*

The Menominee Tribal Police Department (MTPD) faces a combination of decreasing budgets and increasing crime reports. Over the last 4 years, the MTPD has seen a 10 percent increase in calls, a 47 percent increase in cases referred for prosecution and a 17 percent increase in arrests.<sup>69</sup> The average daily inmate population in the Menominee Tribal Detention Facility was 52 in 2009 and 53 in 2010, and exceeds the Tribal Detention Facility's bed capacity of 45.<sup>70</sup> The MTPD has been able to offset some of the tribal budget deficits though several year-to-year grants but this funding is not secure.<sup>71</sup>

### *Governmental Functions*

The Tribe has faced budget shortages that have resulted in across-the-board cuts to governmental programs and services.<sup>72</sup> These budget cuts have forced hiring freezes, reductions in hours, and an overall reduction in services.<sup>73</sup> The MTPD and the Tribal Clinic, as discussed above, are two examples of reductions in services resulting from tribal government budget shortfalls.

Beyond the critical needs faced at the Reservation, the Tribe also notes a need for expanded services for its off-Reservation communities. The Tribe has an established history of providing government functions and services for its tribal communities beyond the borders of its Reservation. The Menominee Indian Tribe's constitution reserves two of its nine legislative seats for members who reside outside the boundaries of the Reservation.<sup>74</sup> Off-Reservation members may vote by absentee ballot and off-Reservation members sit on committees and commissions of the Tribal Legislature.<sup>75</sup> The Tribe recognizes its tribal communities in Milwaukee and Chicago and tribal legislators routinely visit these communities. The Tribe also has governmental offices in the City of Milwaukee, which is 31.3 miles from the Site and a Community Center in Chicago, which is 45 miles from the Site.<sup>76</sup> The Tribe officially

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<sup>67</sup> The premature death rate measures the years of potential life lost due to deaths before age 75. County Health Rankings and Roadmaps, 2013 Rankings, Menominee County, Population Health Institute of the University of Wisconsin – Madison, 2013 Unmet Needs Update, Exhibits 2 (OIG Attachment 5.1).

<sup>68</sup> Menominee Tribal Clinic Impact Statement, 2013 Unmet Needs Update, Exhibit 3. (OIG Attachment 5.1)

<sup>69</sup> 2013 Unmet Needs Update at 2 (OIG Attachment 5.1).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Exhibits 6 & 7.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.*

<sup>74</sup> See Menominee Tribal Legislature: Legislative Rules of Procedure, LRP 5.03 (E), 2012-151 Update, Exhibit N.

<sup>75</sup> *Id.*

<sup>76</sup> See Distance to Dairyland Greyhound Park Map (hereinafter Distance Map), 2012-151 Update, Exhibit I.1, see also 2012-292 Update, Exhibit B. The distance is measured in a straight line, driving distances are also in this exhibit. (OIG Attachment 11).



recognized the community center and opened its office in Chicago in 1996.<sup>77</sup> The Tribe maintains tribal offices in Milwaukee and Chicago that provide services to tribal members such as identification cards, enrollment and enrollment related issues, transit, financial and educational assistance, burial assistance, office space for Indian Child Welfare Act workers, and space for community meetings.<sup>78</sup> A portion of the Site will be used as a third off-Reservation tribal community center and will house additional governmental offices because it is centrally located for the tribal members living near the Site.<sup>79</sup>

The application shows that the Tribe and the communities it serves, both tribal and non-Indian, are among the poorest in Wisconsin. Its community health and healthcare rank the worst in the state. The tribally-run jail faces chronic overcrowding. The Reservation faces high unemployment and needs significant economic development. The Tribe's governmental budget has shrunk over the last few years to the point that critical governmental functions including caring for its member's health and safety have been forced to seek alternate funding or cut services. The Tribe has significant unmet needs that would be addressed by revenues from the Project.

## **II. Review of the Tribe's Application Pursuant to IGRA and Part 292, Subpart C**

The Secretarial Determination exception found in 25 U.S.C. § 2719 permits gaming on lands acquired in trust after October 17, 1988 if the Secretary determines that: (1) gaming on the newly acquired lands would be in the best interest of the tribe and its members; (2) would not be detrimental to the surrounding community; and (3) only if the Governor of the State in which the gaming activity is to be located concurs in the Secretarial Determination.<sup>80</sup>

The Department's regulations at 25 C.F.R. Part 292 implement 25 U.S.C. § 2719 of IGRA and became effective on August 25, 2008. These regulations articulate the standards the Department uses to evaluate applications from tribes seeking to game on lands acquired after October 17, 1988. Subpart C of Part 292 governs Secretarial Determinations.

### **Subpart C – Secretarial Determination**

Sections 292.13 through 292.15 identify the conditions under which a tribe may conduct gaming.

Sections 292.16 through 292.18 identify the information that must be included in a tribe's request for a Secretarial Determination.

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<sup>77</sup> Ben Heraghty, *The Menominee Community Center of Chicago: Creating an Innovative Partnership Between Urban and Reservation Communities* 16 (February 2005).

<sup>78</sup> See 25 C.F.R. Part 151 Supplement to Menominee Tribes Application, (hereinafter Response to 151), 2012-151 Update at 13 (OIG Attachment 10.2).

<sup>79</sup> Kenosha Trust Land Regulation, Tribal Ordinance No. 04-44, as amended Feb. 3, 2005 (hereinafter Tribal Land Regulation), 2012-151 Update, Exhibit E (OIG Attachment 12.1); see also Gaming Code, Ordinance 93-30 The Menominee Indian Tribe of Wisconsin, *Amendment to Ordinance No. 93-30, Gaming Code*, approved March 23, 1998, Original Submission, Vol. II, Tab 14 C (OIG Attachment 12.2).

<sup>80</sup> 25 U.S.C. § 2719 (b)(1)(A).

Section 292.17 pertains to an evaluation of whether the gaming establishment would be in the best interest of the tribe and its members.

Section 292.18 pertains to an evaluation of whether there is detriment to the surrounding community.

**A. Application Contents:**

**Section 292.16 states that a tribe's application requesting a Secretarial Determination under section 292.13 must include the following information:**

*a. The full name, address, and telephone number of the tribe submitting the application.*

Menominee Indian Tribe of Wisconsin  
P.O. Box 910  
W2908 Tribal Office Loop Road  
Keshena, Wisconsin 54135  
(715) 799-5114

*b. A description of the location of the land, including a legal description supported by a survey or other document.*

The Site is described as follows:<sup>81</sup>

Part of the Southeast and Southwest Quarters of Section 31, Town 2 North, Range 22 East of the Fourth Principal Meridian, lying and being in the City of Kenosha, County of Kenosha and State of Wisconsin and more particularly described as follows: Beginning at a point on the North line of the Southeast Quarter of Section 31, 1008.56 feet South 89°05'33" West from the Northeast corner thereof; thence South 2°13'18" East parallel with the West line of the East one-half of said quarter Section, 741.77 feet; thence North 89°17'37" East parallel with the South line of said Quarter Section, 1004.77 feet to the East line of said Quarter Section; thence South 1°55'25" East along said East line, 1916.77 feet to the Southeast corner of said Quarter Section; thence South 89°17'37" West along the South line of said Quarter Section, 2649.63 feet to the Southeast corner of the Southwest Quarter of Section 31; thence South 89°18'10" West along the

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<sup>81</sup> The legal descriptions in other parts of the record contained minor typographic errors including Resolution Exhibit 04-"A" to Tribal Resolution No. 04-39, Request to put Land into Trust for Gaming, (hereinafter Land into Trust Resolution No. 04-39), adopted by the Menominee Tribal Legislature July 6, 2004, Original Submission Vol. I, Tab 3. (OIG Attachment 8.2) We are relying on the most updated and certified Legal Description used in the July 6, 2012 Preliminary Title Opinion and July 16, 2012 Land Description Review Certificate signed by BLM Indian Land Surveyor for the BIA Midwest Region, Kenneth D. Roy, and Chief Cadastral Surveyor, BLM Eastern States Office, Dominica Van Koten, using First American Title Insurance Company ALTA Owners Policy (06-17-06) Schedule A Legal Description dated March 27, 2012, BIA Generated Documents Binder I, Tab 10.



South line of said Quarter Section, 809.40 feet; thence North 2°31'15" West parallel with the East line of said Quarter Section, 365.00 feet; thence South 89°18'10" West parallel with the South line of said Quarter Section, 415.00 feet; thence South 2°31'15" East parallel with the East line of said Quarter Section, 365.00 feet; to the South line of said Quarter Section; thence South 89°18'10" West along South line, 441.65 feet; thence North 1°48'30" West 861.73 feet; thence South 89°18'10" West parallel with the South line of said Quarter Section, 395.51 feet to the East right-of-way line of Interstate Highway "I-94"; thence North 3°30'56" East along said East right-of-way line, 307.79 feet to an angle point in said East right-of-way line; thence continue along said East right-of-way line, North 2°55'21" West 169.15 feet; thence North 87°04'39" East normal to the said East right-of-way line, 739.87 feet; thence North 2°55'21" West parallel with the said East right-of-way line, 1280.05 feet to the North line of the Southwest Quarter of Section 31; thence North 89°00'29" East along said North line, 1288.02 feet; to the Northwest corner of the Southeast Quarter of said Section 31; thence North 89°05'33" East along said North line, 1668.56 feet to the point of beginning.

EXCEPTING THEREFROM THOSE LANDS conveyed in Quit Claim Deed recorded in the Office of the Register of Deeds for Kenosha County, Wisconsin, on April 17, 1990 in Volume 1390 of Records, page 511, as Document No. 840533.

FURTHER EXCEPTING THEREFROM THOSE lands conveyed in Quit Claim Deed recorded in said Register's office on June 6, 1990 in Volume 1397 of Records, page 868, as Document No. 844070.

ALSO FURTHER EXCEPTING THEREFROM THOSE lands conveyed in Quit Claim Deed recorded in the said Register's office on November 2, 1994 as Document No. 977098

Property Address: 5522 104<sup>th</sup> Avenue

Tax Key No. 08-222-31-401-001

*c. Proof of identity of present ownership and title status of the land.*

The Menominee Kenosha Gaming Authority (Tribal Gaming Authority), an instrumentality of the Tribe, entered into an Option Agreement, most recently amended by the Eleventh Amendment to Option Agreement (Option Agreement) on March 12, 2013, which gives the Tribal Gaming Authority the right to purchase the Site until March 31, 2015.<sup>82</sup> On July 6, 2012, the Twin Cities Field Solicitor issued a Preliminary Title Opinion (PTO) on the commitment for title insurance prepared by First American Title Insurance Company dated March 27, 2012, for

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<sup>82</sup> See Eleventh Amendment to Option Agreement, March 12, 2013 (hereinafter Eleventh Option Agreement), BIA Generated Documents Binder IV, Tab 4 at 2 (OIG Attachment 13).

the Site.<sup>83</sup> The lands are to be conveyed to the United States in trust for the Tribe, subject to the instructions provided in the PTO. The Site will not be accepted in trust until all of the identified exceptions in the PTO have been addressed. The title estate is currently owned by Dairyland Greyhound Park, Inc.<sup>84</sup>

*d. Distance of the land from the Tribe's reservation or trust lands, if any, and Tribal government headquarters.*

The Site is located approximately 160.5 miles from the southern border of the Tribe's Reservation, and 162.3 miles from its tribal headquarters.<sup>85</sup>

*e. Information required by section 292.17 to assist the Secretary in determining whether the proposed gaming establishment will be in the best interest of the tribe and its members.*

As discussed more fully below under section 292.17, the Tribe has submitted the required information.

*f. Information required by section 292.18 to assist the Secretary in determining whether the proposed gaming establishment will not be detrimental to the surrounding community.*

As discussed more fully below under section 292.18, the Tribe has submitted the required information.

*g. The authorizing resolution from the tribe submitting the application.*

On July 6, 2004, the Tribe enacted Tribal Resolution No. 04-39, petitioning the Secretary:<sup>86</sup>

- 1) To determine that the Project would be in the best interest of the Tribe and its members and would not be detrimental to the surrounding community and to request that the Governor of Wisconsin concur in the Secretary's determination; and
- 2) Pursuant to the authority granted by Section 5 of the Act of June at, 1934 [IRA] as amended, 25 U.S.C. § 465 (made applicable to the Tribe by Section 3(a) of the Menominee Restoration Act, 25 U.S.C. § 903(a) (a) [sic]), to accept legal title to the Site described in Exhibit "A" in the name of the United States in trust for the benefit of the Tribe....

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<sup>83</sup> See 2012-292 Update, Exhibits I, J, K.

<sup>84</sup> See Title Report by Landmark Title Corporation (hereinafter Title Report), 2012-292 Update, Exhibit A; see also 2012-292 Update, Exhibits I-L.

<sup>85</sup> See Distance Map, The distance is measured in a straight line, driving distances are also in this exhibit. (OIG Attachment 11).

<sup>86</sup> See Land into Trust Resolution No. 04-39 (OIG Attachment 8.2).



*h. The Tribe's gaming ordinance or resolution approved by the National Indian Gaming Commission in accordance with 25 U.S.C. § 2710, if any.*

The Tribe's Gaming Ordinance was approved by the National Indian Gaming Commission (NIGC) on May 29, 2008.<sup>87</sup>

*i. The Tribe's organic documents, if any.*

The Tribe is governed by a Constitution and Bylaws enacted pursuant to the Menominee Restoration Act, 25 U.S.C. §§ 903, 903f, which made provisions of the IRA applicable to the Tribe.<sup>88</sup>

*j. The Tribe's Class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated.*

The Tribal-State Compact (Compact) was first approved by the Department in 1992.<sup>89</sup> An amendment to the Compact in 2000 includes the Site.<sup>90</sup> The Compact was amended in 2003 and approval of that amendment was published the same year. Another amendment that, in part, changed the duration of the Compact to 25 years, was approved and published on January 3, 2011. As amended, the Compact will renew automatically unless either party files a notice to renegotiate.<sup>91</sup>

*k. If the tribe has not negotiated a Class III gaming compact with the State where the gaming establishment is to be located, the tribe's proposed scope of gaming, including the size of the proposed gaming establishment.*

This subsection is not applicable to the Tribe because it has negotiated a Class III gaming compact with the State.

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<sup>87</sup> See Letter from Philip Hogen, Chairman, National Indian Gaming Commission, to Lisa Waukau, Chairperson, Menominee Indian Tribe, regarding Menominee Tribe amended and newly enacted gaming ordinances (May 29, 2008) (hereinafter NIGC Authorization of Gaming Ordinance), BIA Generated Documents, Binder I, Tab 13. In the letter the NIGC approved the 2008 amendment to *Gaming Code Ordinance No. 93-30* and *Authorization of Gaming Ordinance No. 07-39*.

<sup>88</sup> See Constitution and Bylaws of the Menominee Indian Tribe of Wisconsin (hereinafter Constitution and Bylaws), Original Submission, Vol. II, Tab 14(a).

<sup>89</sup> 68 Fed. Reg. 43366 (Jul.22, 2003).

<sup>90</sup> The Menominee Indian Tribe of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended Aug. 18, 2000, Original Submission Vol. II, Tab 14.E.

<sup>91</sup> See The Menominee Indian Tribe of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended Nov. 1, 2010, 76 Fed. Reg. 165 (Jan. 3, 2012) (hereinafter Menominee Compact), 2012 Update, Exhibit H.



- l. A copy of the existing or proposed management contract required to be approved by the National Indian Gaming Commission under 25 U.S.C. § 2711 and 25 C.F.R. Part 533, if any.*

The Tribe intends to hire experienced gaming professionals to operate the gaming facility.<sup>92</sup> The Tribe has stated that there is no existing management contract and that the previously submitted proposed management contract is no longer in force.<sup>93</sup>

## **B. Analysis of Best Interest of the Tribe and Its Members**

### **Section 292.17 states that an application must contain:**

- a. Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe.*

When considering whether a proposed gaming project is in the best interest of the Tribe and its members, we examine the income statement, which projects income and expenses in accordance with generally accepted accounting principles. An income statement is considered the best tool to determine the profitability of a proposed gaming project.

We also review the balance sheet, which lists assets, liabilities, and capital. From the balance sheet we can identify various ratios to determine if a proposed gaming project will grow and whether it will have the resources to pay obligations in the short term and long term. It also allows us to review the ownership composition of the proposed gaming project.

A cash flow statement projects the distribution to the various stakeholders, such as debt holders and owners. It projects how earnings and assets will flow into and out of a proposed gaming project. It also projects what ongoing investments will be made, what debt will be incurred or repaid, and the projected utilization of non-cash expenses, such as depreciation and amortization. We review cash flow statements to determine the amounts that will go to the manager/developer, the debt holders, the State and its political subdivisions, and the Tribe. From cash flow statements, we can generally determine whether the Tribe will be the primary beneficiary of the proposed gaming project.

Because the financial documents are based on projections rather than actual performance, we examine the financial information to determine whether they are reasonable. This permits us to conclude that the proposed gaming project will likely perform according to the projections. In this case, we conclude that the financial projections are reasonable and lend support to an expectation that the proposed gaming project will perform as projected.

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<sup>92</sup> See Menominee Indian Tribe's Responses to Part 292 (hereinafter Response to 292), 2012-292 Update at 1 (OIG Attachment 10.1).

<sup>93</sup> Menominee Indian Tribe's Response to Other Issues not Addressed in Part 292 or 151 of the 2012 Update, 2012 Update at 1 & 2 (OIG Attachment 10.3).



### *The Tribe's Submissions*

The Tribe submitted information to meet these criteria.<sup>94</sup> The Tribe retained PricewaterhouseCoopers (PWC) in 2004 to prepare an analysis of the economic impacts and a market assessment of the Project.<sup>95</sup> The PWC projected that the Project will stabilize by year three of Phase II with annual revenue of about \$440 million.<sup>96</sup> On July 31, 2008, the Tribe submitted additional information for its gaming acquisition application demonstrating how the Kenosha acquisition will meet the regulatory requirements in section 292.17(a).<sup>97</sup>

In order to determine the viability of the previously submitted revenue projections, the Tribe retained KlasRobinson, QED, to review and analyze the current projected economics of the Project.<sup>98</sup> In 2012, the Tribe submitted a preliminary report from KlasRobinson (KlasRobinson Preliminary Report) dated February 9, 2012, that provides an updated analysis of the gaming market and concludes that the PWC analysis and conclusions remain valid and explains the anticipated economic benefits should the Site be accepted in trust for Class III gaming.<sup>99</sup> On April 4, 2013, the Tribe submitted the final report from KlasRobinson (KlasRobinson Final Report) that provides an updated feasibility study and a more recent market survey and financial projections based on the current gaming market in Kenosha and in the surrounding areas.<sup>100</sup> KlasRobinson also estimated the Project will stabilize in year 3 of Phase II with annual revenue of about \$554 million.<sup>101</sup> Both the PWC analysis and the KlasRobinson Final Report conclude that the Project is financially viable.

#### *2004 PricewaterhouseCoopers analysis*

The Tribe submitted information with its original application from PWC. As required in the regulations, the 2004 PWC analysis includes: an Income Statement, Balance Sheet, Cash Flow Statement, and Sources and Uses of Funds. The PWC analysis was based on the Kenosha Project with a Phase I facility consisting of 101,000 sq. ft. of gaming space, consisting of 2,700 slot machines and 100 table games, with six restaurants, 49,400 sq. ft. of retail space and a 5,000 seat multi-purpose events hall. Phase I will also include an entertainment lounge with 316 seats,

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<sup>94</sup> See generally, Original Submission, Vol. I & II, see also 2013 Financials (OIG Attachment 4).

<sup>95</sup> See Regional Impact of Proposed Kenosha Facility, Original Submission Vol. II, Tab 11, also in Menominee 2012-151 Update, Exhibit L.

<sup>96</sup> PricewaterhouseCoopers LLP, Market Assessment Executive Summary, prepared for Kenosha Gaming Development, LLC, dated June 14, 2004 (hereinafter PWC Market Assessment), Original Submission Vol. I, Tab 5 and 5.A (OIG Attachments 14). PWC estimates are in 2004 dollars.

<sup>97</sup> See May 2008 Response. The letter contains a summary response to the Guidance Memorandum issued by the BIA on January 3, 2008. The letter also contained (1) Approval of Ten Year Budget Plan for Kenosha Revenue, Resolution No. 08-34, July 29, 2008, (hereinafter Ten Year Budget Resolution) and (2) Kenosha Report; see also 2012-151 Update, Exhibit K, K.1, K.2 respectively (OIG Attachment 3.3).

<sup>98</sup> See KlasRobinson, Q.E.D., Planned Kenosha Casino Resort, Kenosha, Wisconsin Preliminary Feasibility Study Feb. 9, 2012 (hereinafter KlasRobinson Preliminary Report), 2012-151 Update, Exhibit F, at 21; see also KlasRobinson Final Report (OIG Attachments 1.1).

<sup>99</sup> See KlasRobinson Preliminary Report.

<sup>100</sup> KlasRobinson Final Report (OIG Attachment 1.1).

<sup>101</sup> *Id.* at 8 (in 2012 dollars).



a restaurant lounge with 50 seats, a sports bar with 50 seats, and a VIP lounge with 14 seats. Phase I will include a parking structure with spaces for 7,000 cars. Phase II will include incremental additions to the Phase I facilities, consisting of an additional 15,400 sq. ft. of gaming space (for a total of 116,400) with 400 additional slot machines and 16 additional table games. Phase II will include a new 275 seat coffee shop and a high-quality, full-service hotel consisting of 400 guestrooms and 45,300 sq. ft. of meeting space, a business center, spa, indoor pool, salon, and health club. Phase II will also include a 6,900 sq. ft. night club and an additional 1,500 parking spaces.

The Tribe's original application includes the Project Description,<sup>102</sup> a Market Assessment,<sup>103</sup> and a Summary of Projected Revenue and Expenses.<sup>104</sup> The PWC Market Assessment notes that the location of the Project has a number of important advantages, including: high visibility; easy access from Interstate 94; the availability of acreage sufficient for a sizeable gaming facility; and proximity to nearby residential areas in Kenosha, and the cities of Chicago and Milwaukee. The PWC noted that one of the primary disadvantages of the location is the lack of other significant visitor draws, besides Dairyland Greyhound Park, in the immediate vicinity of the Site. However, the KlasRobinson Final Report lists numerous local and regional attractions in Kenosha and the surrounding area that were not noted by PWC.<sup>105</sup>

The market area in the PWC Market Assessment included areas within a 100-mile radius which is typically most important to the market potential of small-scale casinos. By 2006, the market area surrounding the Site was expected to consist of 14.8 million adults, of whom 1.7 million were expected to live within a 40 minute drive. The PWC Market Assessment notes that a number of other casinos already operate in the region and would be competitors of the Kenosha Project, specifically, the Potawatomi Bingo Casino in Milwaukee, Wisconsin; the Grand Victoria Casino in Elgin, Illinois; the Hollywood Casino in Aurora, Illinois; and the Ho-Chunk Casino in Baraboo, Wisconsin. The PWC Market Assessment addressed the impact of a proposed casino in Rosemont, Illinois. The PWC Market Assessment projected that 580,000 adults are expected to live closer to the Kenosha project than other competitive casinos.<sup>106</sup>

The PWC Market Assessment projected that the Kenosha Project is expected to stabilize in its third year of operation of the Phase II facility and to thus attract around 4.9 million visitors annually while generating annual net win of approximately \$440 million in 2004 dollars. The revenues generated could be higher, according to the PWC Market Assessment.<sup>107</sup>

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<sup>102</sup> See Project Description: Space Allocations, Original Submission, Vol. I, Tab 4.1 (A), (B) and (C).

<sup>103</sup> See PWC Market Assessment (OIG Attachment 14).

<sup>104</sup> See Summary of Projected Revenue and Expense, Forecasted Income Statement, Balance Sheet, Cash Flow Statement, and Sources and Uses of Funds, Original Submission Vol. I, Tab 6.1, 6.1 (A) - (D).

<sup>105</sup> KlasRobinson Final Report at 30-33 (regional attractions include Civil War Museum, Dinosaur Discovery Museum, Kenosha Public Museum, etc.) (OIG Attachment 1.1).

<sup>106</sup> See PWC Market Assessment at 9 (OIG Attachment 14).

<sup>107</sup> See *Id.* at 13.



### *Kenosha Report and Ten Year Budget Resolution*

In 2008, the Tribe responded to a request for more information by submitting Tribal Resolution No. 08-34, *Approval of The Ten Year Budget Plan for Kenosha Revenue* (Ten Year Budget Resolution) and *Impact of Kenosha on the Menominee Reservation* (Kenosha Report).<sup>108</sup> The Ten Year Budget Resolution included a detailed list of tribal initiatives that are unfunded or underfunded that the Tribe identified as critical. The Tribe enacted legislation adopting a revenue use plan that dedicates the Kenosha Project revenues to these initiatives.<sup>109</sup> The Kenosha Report provided an assessment of the Tribes unmet needs, as of 2008, and the projected impacts of the Ten Year Budget Resolution on the Tribe and its members.<sup>110</sup>

### *2012 KlasRobinson Preliminary Report*

The KlasRobinson Preliminary Report concludes that the financial projections for the Tribe's Kenosha Project are substantially similar to those provided by PWC.<sup>111</sup> KlasRobinson analyzed the market conditions for gaming and concluded that there are over 1.2 million people living within a 25 mile radius of the Site and more that 6.2 million people living within a 50 mile radius of the Site.<sup>112</sup> The KlasRobinson Preliminary Report analyzes 2,700 slot machines in Phase I with 75-100 table games. The KlasRobinson Preliminary Report predicts that the gross revenue for Phase I of the facility will be approximately \$820 million in the first 2 full years of operation. The first 5 years of Phase II operations includes additional slot machines and table games and projected gross revenue of \$2.745 billion. These figures are generally consistent with PWC's figures.

The KlasRobinson Preliminary Report contains utilization estimates and financial projections for the planned Kenosha Project. The KlasRobinson Preliminary Report provides a detailed 10 year projected cash flow from operations for Phases I and II of the Project. The KlasRobinson Preliminary Report projects total first year revenue of \$398,955,000 and total cash flow from operation before debt service and compact fees of \$170,265,000. Projected total revenue in the tenth year is \$587,991,000 and a total cash flow from operations before debt service and compact fees of \$261,036,000.<sup>113</sup>

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<sup>108</sup> May 2008 Response (OIG Attachments 3.3).

<sup>109</sup> Ten Year Budget Resolution (OIG Attachment 3.2).

<sup>110</sup> Kenosha Report (OIG Attachment 3.1).

<sup>111</sup> KlasRobinson has provided Market & Feasibility studies for more than 95 Indian economic development projects. We note the firm has provided the Forest County Band of Potawatomi Indians' Economic impact analysis for the Tribe's proposed Potawatomi Bingo Casino in downtown Milwaukee and a market/feasibility study on behalf of the Forest County Band of Potawatomi Indians for a proposed hotel and ancillary development at Potawatomi Bingo Casino. See <http://www.klasrobinsonqed.com/archives/555>.

<sup>112</sup> See KlasRobinson Preliminary Report at 2.

<sup>113</sup> See *Id.* at 10-11.



Table 1 Proposed Kenosha Casino Resort - Projected Cash Flow and Operations before Debt Service and Compact Fees

Phase I			Phase II		
Year	Projected Total Revenue	Projected Total Cash Flow	Year	Projected Total Revenue	Projected Total Cash Flow
1	\$398,955,000	\$170,265,000	6	\$497,829,000	\$215,731,000
2	\$427,735,000	\$185,772,000	7	\$533,942,000	\$235,190,000
3	\$443,285,000	\$192,805,000	8	\$554,234,000	\$244,502,000
4	\$456,582,000	\$199,244,000	9	\$570,856,000	\$252,644,000
5	\$470,729,000	\$205,882,000	10	\$587,991,000	\$261,036,000

*2013 Updated Financial Information and KlasRobinson Final Report*

On April 15, 2013, the Tribe submitted updated financial information (2013 Financials) to more accurately reflect the current state of the Project and updated market conditions.<sup>114</sup> The 2013 Financials include a Summary of Operating Income, Balance Sheet, Statement of Cash Flows, Depreciation and Amortization Schedule, Capital Budget and other information.<sup>115</sup> The revenue projections reflect win per gaming position of \$288 for years 1 and 2, \$310 for year 3, \$320 for year 4 and \$324 for year 5, with an assumed 3 percent growth rate for years 6 and beyond.<sup>116</sup> As discussed below, the 2013 Financials meet the requirements of this subsection.<sup>117</sup>

The Tribe’s 2013 Financials are generally consistent with the KlasRobinson Final Report which projects a win per gaming position of \$400 in year 3 for Phase I and \$385 in year 3 of Phase II.<sup>118</sup> The KlasRobinson Final Report win per gaming position projections are generally consistent with the conclusions from the reports submitted by the Tribe in 2004, 2008 and 2012, and is based on the most recent market conditions and an updated feasibility study.<sup>119</sup>

The 2013 Financials also include a projected management fee of 13.4 percent of Net Revenue.<sup>120</sup> While the projection for the management fee is lower than the statutory maximum of 30 percent of net revenues, it is within the Tribe’s capability to negotiate that rate.<sup>121</sup>

<sup>114</sup> 2013 Financials (model based on assumptions including current market conditions, bank financing, projected contractual development fees, projected management fee and projected governmental mitigation payments) (OIG Attachment 4).

<sup>115</sup> *Id.* at 6.

<sup>116</sup> *Id.* at 4.

<sup>117</sup> The Tribe submitted two sets of financial documents, Model B and Model C. The significant difference between the two is that Model C assumes the Tribe develops the project on its own and pays no development fee while Model B assumes the Tribe contracts with a developer and pays a 12.6 percent development fee. *See* 2013 Financials at 1 (no. 31 blank in Model C but no. 31 in Model B is for developer fee schedule) (OIG Attachment 4).

<sup>118</sup> KlasRobinson Final Report at 66. (KlasRobinson uses the same Project descriptions as the PWC analysis.) (OIG Attachment 1.1).

<sup>119</sup> *Id.*

<sup>120</sup> 2013 Financials at 3 (OIG Attachment 4).



The 2013 Financials assume the funding for the purchase of the land and the construction of the temporary casino will be in the form of a \$90,000,000 bridge loan bearing interest at 10 percent.<sup>122</sup> The Phase I financing for the Project will consist of \$613,000,000 total financing comprised of 85 percent Coupon Senior Notes at an interest rate of 10 percent and 15 percent Coupon Subordinated Notes at an interest rate of 15 percent.<sup>123</sup> Phase II financing consists of \$200,000,000 comprised of 100 percent Bank Credit Facility financing at 6.5 percent. We note that the Balance Sheet indicates that the senior notes do not decrease during the term of the projections.<sup>124</sup> We recognize that the Tribe has not yet secured this financing. However, we will defer to the business judgment of the Tribe regarding the proposed financing mechanisms. Several gaming Tribes refinanced debt during 2012 with bonds.<sup>125</sup>

The 2013 Financials summarize the revenue amounts that will be paid to the Tribe, the State, and the local governments.<sup>126</sup> The Tribe has agreed to make payments to the local governments in the amount of 3 percent of net win through 2021, 3.58 percent of net win in 2022 and 4 percent of net win in 2023-2036.<sup>127</sup> The Tribe has also agreed to make an annual payment of \$1,500,000 for the Kenosha Unified School District and an annual minimum payment of \$1,000,000 with an annual adjustment of 2.5 percent.<sup>128</sup> The Tribe has agreed to make an annual payment of \$150,000 to the County to mitigate problem gambling and a one-time “public purpose” payment to the City of \$5,000,000.<sup>129</sup> Additionally, the Tribe has agreed to provide revenue sharing to the State of 7.5 percent of net win.<sup>130</sup> Over time, the Tribe’s distribution from revenues will increase as it reduces its debt.<sup>131</sup> Over the initial 10 year period of operation, the cash distributions to the Tribe will amount to \$302,044,000.<sup>132</sup> Based on the 2013 financial projections, we conclude that the Tribe will benefit from the Project. The amounts that will be paid to the gaming management, the State, the local governments, and the Tribe are reasonable. Based on this information we find that gaming on the land will be in the best interest of the Tribe and its members.<sup>133</sup>

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<sup>121</sup> See 25 U.S.C. § 2711(c)(1) (management contract fee may be approved if it is reasonable in light of surrounding circumstances but such fee shall not exceed 30 percent of net revenues).

<sup>122</sup> 2013 Financials at 2 (facility assumptions) (OIG Attachment 4).

<sup>123</sup> *Id.* at 2.

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., Recession has Tribal Gaming Companies Restructuring Debt, Las Vegas Review-Journal (Feb. 12, 2012), available at <http://www.reviewjournal.com/business/casinos-gaming/recession-has-tribal-gaming-companies-restructuring-debt>. (The Mohegan Tribe and the Mashantucket Pequot Tribe both used bonds to refinance their gaming operations.)

<sup>126</sup> 2013 Financials at 24, 29 (OIG Attachment 4).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 9.

<sup>132</sup> *Id.*

<sup>133</sup> 2013 Financials at 6 (OIG Attachment 4).



### *Additional financial considerations*

The Tribe's original application includes a development agreement listing KMD Development, LLC (KMD) as its developer for the Project. We have been notified by the Tribe in a follow up letter dated June 21, 2012, that as of May 15, 2012, the development agreement between the Tribe and KMD has been terminated.<sup>134</sup> The Tribe further explained that any new developer will be compensated in a similar manner as KMD, receiving a development fee of up to 13.4 percent of net revenue of the Kenosha Project, but the selection of the new developer will not change the overall economics of the project.<sup>135</sup> The development agreement between the Tribe and KMD called for KMD to supply pre-development funds for the legal expenses of the application and the environmental studies, but not permanent financing for the Kenosha Project.<sup>136</sup>

### *Competitive Environment*

The KlasRobinson Final Report assesses and analyzes the regional gaming market and its likely impact on the Kenosha Project.<sup>137</sup> The report notes that Wisconsin has 27 Indian casinos and satellite Class III gaming facilities offering more than 17,400 slot and video machines and approximately 400 table games.<sup>138</sup> According to the Final Report, Indian gaming in Wisconsin produced revenues of approximately \$1.16 billion for the 2010-2011 Fiscal Year ending June 30, 2011.<sup>139</sup>

The Illinois gaming market is substantial, with 10 casinos offering 11,030 electronic gaming devices with gross gaming receipts of \$1.639 billion for the 2012 calendar year.<sup>140</sup> In July 2009, the Governor of Illinois signed legislation that approved adding from 25,000 to 50,000 gaming machines in various locations for liquor establishments, truck stops, and fraternal/veterans clubs.<sup>141</sup> However, during the summer of 2012 and in January 2013, the Governor of Illinois vetoed gambling legislation that would have approved another expansion of gaming in Illinois.<sup>142</sup> The KlasRobinson Final Report notes that further attempts to expand gaming in Illinois are likely.<sup>143</sup>

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<sup>134</sup> Letter from Rory Dilweg, Special Counsel to Menominee Indian Tribe at Tilden McCoy + Dilweg LLP, to Kayla Danks, BIA Midwest Regional Office, Regarding Menominee Indian Tribe of Wisconsin – Development Agreement with KMD Development, LLC (June 21, 2012). BIA Binder IV, Tab 5.

<sup>135</sup> Email from Menominee Tribal Attorney, to Troy Woodward, Office of Indian Gaming, Regarding Menominee Compact (Feb. 19, 2013). BIA Generated Documents Binder IV, Tab 8.

<sup>136</sup> The Tribe submitted its Development Agreement to NIGC. By letter dated March 16, 2004, NIGC notified the attorney for the Tribe that the agreement is not a management contract and does not require approval by the Chairman of the NIGC. See Letter from NIGC Deputy General Counsel, Supplemental Report Vol. II, Exhibit J (following Development Agreement).

<sup>137</sup> See KlasRobinson Final Report (This is the most updated market analysis) (OIG Attachment 1.1).

<sup>138</sup> *Id.* at 40.

<sup>139</sup> *Id.* The revenues are based on information from the Wisconsin Division of Gaming - Office of Indian Gaming and Regulatory Compliance. (OIG Attachment 1.1).

<sup>140</sup> *Id.* at 41.

<sup>141</sup> *Id.* at 42.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*



The KlasRobinson Final Report identifies three existing casinos located within a 50 mile radius of the Site: the Potawatomi Bingo Casino in Milwaukee, the Grand Victoria Casino in Elgin, Illinois and the Rivers Casino in Des Plaines, Illinois, near Chicago O'Hare International Airport. These 3 gaming facilities combined have more than 5,300 slot machines and more than 200 table games.<sup>144</sup> The KlasRobinson Final Report anticipates new development of as many as 4,000 gaming positions within a 50 mile radius of the Site and 3,000 gaming positions within a 60 mile drive of the Site. The KlasRobinson Final Report considers the expansion of available gaming in its assessment of the viability of the Kenosha Project.<sup>145</sup> The Final Report concludes that using comparisons based either on actual gaming win statistics or the factors driving market performance, results in a projected future market performance of \$400 per gaming position for Phase I and \$385 per gaming position for Phase II of the Kenosha Project.<sup>146</sup>

According to studies conducted by PWC and KlasRobinson, the Kenosha Project remains economically viable in the current market.<sup>147</sup>

*b. Projected tribal employment, job training, and career development*

The Tribe's application addresses the projected employment, job training and career development.<sup>148</sup> As of 2012, the Tribe had 8,750 enrolled members, with 3,930 members residing on the Reservation and 4,820 members living off-reservation.<sup>149</sup> Ten percent of the tribal population resides in the greater Kenosha area.<sup>150</sup>

*tribal employment*

The Kenosha Project is projected to create new employment opportunities for this population, and the Tribe anticipates that it will employ more than 3,000 people at the Kenosha Project.<sup>151</sup> Tribal preference laws will be applicable to the Kenosha Project, which gives qualified tribal members preference in employment.<sup>152</sup> This will include members who are hired immediately in construction jobs as well as those who begin work at the facility.

The Kenosha Project, while creating new employment opportunities for Kenosha and its surrounding communities, is also projected to increase benefits to the on-Reservation community. The on-Reservation benefits are listed in detail in the 2008 report titled, Impact of

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<sup>144</sup> *Id.* at 47.

<sup>145</sup> *Id.* at 60.

<sup>146</sup> *Id.* at 66.

<sup>147</sup> The Tribe's application states that the architectural firm of Jeter, Cook, & Jepson (Hartford, Connecticut) was procured to develop a master space allocation program that details the concept and all site and building components necessary to accomplish the business plan for this project. *See* Overview of A Proposed Kenosha, Wisconsin, Casino Gaming and Regional Destination Entertainment Center, Original Submission, Vol. II Tab 11.2, at 19.

<sup>148</sup> *See* Response to 292 at 3 (OIG Attachment 10.1).

<sup>149</sup> *See* 2012 Tribal Enrollment Certification, 2012-151 Update, Exhibit M.

<sup>150</sup> *See* Menominee Tribal Population Density Maps, 2012-292 Update, Exhibit V. (OIG Attachment 15).

<sup>151</sup> *See* Response to 292 at 5 (OIG Attachment 10.1); *See also* FEIS at 4.7 (estimates a total of 3,337 Non-Management jobs at the completion of Phase II).

<sup>152</sup> *See* Response to 292 at 5 (OIG Attachment 10.1).

Kenosha on the Menominee Reservation.<sup>153</sup> The Tribe passed an ordinance designed to allocate revenues from the Kenosha Project to specific tribal initiatives which will create jobs on the Reservation.<sup>154</sup> The Tribe projects increased employment benefits from jobs created as it invests the gaming revenue in the Reservation economy.<sup>155</sup> The Tribe projects that 197 full-time positions and approximately 315 construction jobs will be created on the Reservation.<sup>156</sup>

Table 2 Employment Projections

Project / Initiative	On Reservation Full-time	On Reservation Construction
Health and Family	73	175
Housing	6	48
Enforcement and Resource Protection	45	92
Tribal Government	43	
Community Development	11	
Labor, Education and Training	13	
Land Acquisition	6	
Unfunded Initiatives <sup>157</sup>	22	92
<b>Total</b>	197(funded), 22(unfunded)	315(funded), 92(unfunded)

In summary, the Tribe anticipates that the Kenosha Project will create significant employment opportunities for its members on and off the Reservation. The Tribe has committed to funding initiatives that will create more than 197 full-time jobs and approximately 315 on-Reservation construction jobs over a 10 year period.<sup>158</sup> The Tribe projects that additional on-Reservation jobs for its members will be created by using gaming revenue from the Kenosha Project to renovate its existing casino and to fund tribal programs that have been unfunded or

<sup>153</sup> See Kenosha Report (OIG Attachment 3.1).

<sup>154</sup> Ten Year Budget Resolution (OIG Attachment 3.2).

<sup>155</sup> Kenosha Report (OIG Attachment 3.1).

<sup>156</sup> *Id.*

<sup>157</sup> The Tribe lists a number of governmental initiatives that are currently underfunded and will remain unfunded at projected Project revenue levels. These are initiatives that the Tribe would fund if the budget allows. See Kenosha Report at 34-37. (OIG Attachment 3.1).

<sup>158</sup> See generally, Kenosha Report (OIG Attachment 3.1).



underfunded.<sup>159</sup> These initiatives will directly improve tribal services such as law enforcement, social services, education, natural resources, culture, health and other tribal programs.<sup>160</sup>

### *Job Training and Career Development*

The Tribe has provided plans to address job training and career development among its members. The Tribe plans to recruit and train its members in and around Kenosha in administration, management, facilities engineering, finance and other key positions.<sup>161</sup> Tribal members living in and around Kenosha will also have access to increased and advanced employment afforded by the Kenosha Project.<sup>162</sup> Using Kenosha Project revenue, the Tribe intends to develop a skilled workforce that will then provide increased support to the Tribal government and fill newly created jobs on the Reservation.<sup>163</sup>

The Tribe will use the Kenosha Project revenue to enhance job training and development.<sup>164</sup> The Tribe intends to fund its Education Department with \$2 million annually for 10 years with revenue from the Kenosha Project. The funds will be used to create 350 scholarships per year, for tuition, room and board, books and fees, personal expenses, transportation, and child care.<sup>165</sup>

As part of its plan to develop a more skilled workforce, the Tribe plans to develop training programs for members through partnerships with the College of the Menominee Nation and Gateway Technical College.<sup>166</sup> The Tribe will collaborate with trade unions and the College of the Menominee Nation to develop apprentice training programs on the Reservation to train an estimated 350 construction workers and craftsmen.<sup>167</sup> These two programs are designed to train tribal members for the construction trades and for permanent jobs at the Project.<sup>168</sup> The Tribe anticipates that these skilled tribal members will bolster the Tribe's overall workforce skill level and be drawn to construction and permanent jobs on the Reservation.<sup>169</sup> The Tribe further intends to form strategic business relationships with accounting firms, distribution companies, law firms and other employers that will provide internship opportunities for students at the College of the Menominee Nation.<sup>170</sup>

The Tribe intends to employ a flexible approach to career training and development that can be further enhanced as the Tribe plans its future. As evidence of the Tribe's ability to develop and implement such plans, the Tribe cites to its success partnering with the College of the

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<sup>159</sup> Request for Two Part Determination at 5 (OIG Attachment 8.1).

<sup>160</sup> *Id.*

<sup>161</sup> See Ten Year Budget at 13 (OIG Attachment 3.2); See also Request for Two Part Determination at 5 (OIG Attachment 8.1).

<sup>162</sup> Request for Two Part Determination at 5 (OIG Attachment 8.1).

<sup>163</sup> *Id.*

<sup>164</sup> See Response to 292 at 4 (OIG Attachment 10.1).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 5.

<sup>167</sup> See *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Kenosha Report at 13 (OIG Attachment 3.1).

<sup>170</sup> *Id.*



Menominee Nation to develop a skilled workforce of tribal members to manage the Tribe's forests on a sustained-yield basis.<sup>171</sup> In an informal survey conducted by the Tribe in 2008, roughly 13 percent of tribal respondents living on the Reservation indicated a desire to explore opportunities to develop their careers by relocating temporarily to Kenosha.<sup>172</sup> The Tribe anticipates that when members relocate temporarily to Kenosha for employment and training, the jobs they leave at the Reservation will become available to those who do not relocate.<sup>173</sup>

As part of its plan to open the Kenosha Project, the Tribal Gaming Authority has agreed to draft and implement a minority recruitment and retention plan to ensure that minority recruitment and retention at the Kenosha Project, including tribal members, is healthy. The Tribal Gaming Authority and the facility will each adhere to Tribal preference laws in employment.<sup>174</sup>

*c. Projected benefits to the tribe and its members from tourism.*

The Tribe has identified benefits that will inure to the benefit of the Tribe and its members from tourism. The Tribe notes that the proposed Kenosha Project is intended to be a regional destination attraction and is designed to draw more visitors for an extended period of time to enhance tourism to Kenosha and southeastern Wisconsin. The Kenosha Project will provide a destination where year-round entertainment is available instead of the seasonal entertainment currently available.<sup>175</sup> The KlasRobinson Final Report details that Kenosha and the surrounding area feature numerous regional attractions.<sup>176</sup> The report finds that there are more than 1.2 million people within a 25 mile radius of the site and more than 6.2 million within a 50 mile radius.<sup>177</sup> The Tribe intends to cross-market the proposed Kenosha Project with its existing on-reservation gaming facility, the Menominee Nation Casino, which will be enhanced and upgraded in order to draw additional visitors to the Tribe's Reservation. The application shows that the Kenosha Project will increase year-round tourism to Kenosha and to the existing Reservation.<sup>178</sup>

*d. Projected benefits to the Tribe and its members from the proposed uses of the increased tribal income.*

The Tribe projects that over a 10 year period, just over \$300 million in net profits will be transferred to the Tribe from the Kenosha Project.<sup>179</sup> The Tribe has enacted legislation that

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 14.

<sup>173</sup> *See Id.* at 13 (OIG Attachment 3.1); *See also* Request for Two Part Determination at 5 (OIG Attachment 8.1).

<sup>174</sup> Resolution No. 04-62, Approval of Intergovernmental Agreement (IGA) between Menominee Indian Tribe, Menominee Kenosha Gaming Authority, City of Kenosha & County of Kenosha, (hereinafter IGA) Menominee 2012-292 Update, Exhibit D, at p 19 (OIG Attachment 16).

<sup>175</sup> Request for Two Part Determination at 5-6 (OIG Attachment 8.1).

<sup>176</sup> KlasRobinson Final Report at 30 (OIG Attachment 1.1).

<sup>177</sup> *Id.* at 33.

<sup>178</sup> Request for Two Part Determination at 6 (OIG Attachment 8.1).

<sup>179</sup> Kenosha Report (OIG Attachment 3.1).



mandates how the revenues will be used.<sup>180</sup> The legislation authorizing the use of funds divides the revenue into a 10 year Operating Budget and a 10 year Capital Budget.

The Kenosha Project is projected to create significant financial benefits for the Tribe and its members from uses of the increased income. During the first 10 years of the Project's operation, the Tribe has determined that it will allocate \$149.823 million of the projected \$302 million in net profits to its Operating Budget. Additionally, the Tribe will allocate \$151.11 million during the first 10 years to its Capital Budget, which will be invested in land acquisition, health care, utilities, housing, schools, historic preservation, business development, language and culture, community centers, police, green space, information technology and social services.<sup>181</sup>

The Tribe has allocated \$149.823 million to its Operating Budget, consisting of:

- \$65.22 million to fund health and family services
- \$5.174 million to fund housing
- \$17.53 million for enforcement and resource protection
- \$14.915 million to fund its government
- \$14.192 million for community development
- \$20.881 million for labor, education, and training
- \$8.411 million for land acquisition
- \$3.5 million for business development

The Tribe has allocated \$151.64 million to its Capital Budget. Over the 10 year period after opening, the Tribe intends to invest:

- \$18.801 million in land acquisition
- \$29.364 million to build a Menominee health clinic
- \$28.575 million in utility development;
- \$28.909 million in tribal housing (\$15.08 million on apartment complexes and \$13.829 million on single family homes)
- \$10.57 million in a tribal school
- \$10.50 million in historic preservation
- \$8.55 million in Menominee Tribal Enterprises (MTE)
- \$3.5 million in language cultural commission
- \$2.5 million in building 4 community centers
- \$2.5 million in a Menominee business development office
- \$2 million in a juvenile detention center
- \$1.891 million in recreation (parks and green space)
- \$1.423 million in information technology
- \$1.2 million in a grocery store
- \$500,000 in Tribal police training and equipment

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<sup>180</sup> Ten Year Budget Resolution (OIG Attachment 3.2).

<sup>181</sup> *Id.*



- \$277,000 in social services/child support
- \$580,000 in aging services

The revenues will be used to fund the tribal government and to address the unmet social and economic needs of tribal members, on and off the Reservation. Revenues will be invested to conserve and develop tribal land and resources, promote economic development and to otherwise mitigate the damages caused to the Tribe by Termination and Relocation. The Tribe's proposed use of revenue to fund its government shows a commitment to sustainable economic development, self-sufficiency, and strong tribal governance.

Although the Tribe's Reservation consists of 232,000 acres, 97 percent is dedicated to sustained-yield forestry and cannot be used for other purposes.<sup>182</sup> Of the remaining 8,138 acres, most of it has been developed; for example, the towns of Keshena and Neopit have been fully developed, rendering them virtually closed to new or expanded development.<sup>183</sup> Other lands within the Reservation boundaries are undevelopable and underperforming because of disputes over land use and regulation.<sup>184</sup> The Tribe plans to re-acquire about 3,000 acres that were lost as a result of Termination.<sup>185</sup> Re-acquiring this land will clarify land use and regulation issues and spur economic development, housing, and improved services on the Reservation.<sup>186</sup>

Menominee County's population in 2010 was about 4,232, of which 3,930 were tribal members. Between the years 2007-2011, nearly 30 percent of the population was below the poverty line.<sup>187</sup> The Tribe has a significant need for Tribal housing. As of 2008, the Tribe reports that there were 131 members seeking homeownership and up to 178 seeking reservation rentals.<sup>188</sup> The Tribe reports that those needs have remained relatively steady through 2010.<sup>189</sup> The Menominee Tribal Housing Authority (MTHA) provides rentals support to members on and off the Reservation.<sup>190</sup> The MTHA provides 285 units for on-Reservation housing.<sup>191</sup> The MTHA's rentals assistance budget is \$50,000 annually, which represents available assistance for 15 families.<sup>192</sup> Currently an additional 19 families are on a waiting list for assistance.<sup>193</sup> The Tribe operates an emergency housing shelter with a recommended capacity of 25 persons but because of the high demand, they often exceed that figure.<sup>194</sup> There are 15 families on the waiting list for the shelter.<sup>195</sup> In

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<sup>182</sup> See Trust and Management Agreement Between The Menominee Indian Tribe of Wisconsin and the Secretary of The Interior, dated April 22, 1975, BIA Generated Documents Binder I, Tab 5 (OIG Exhibit 17).

<sup>183</sup> Kenosha Report at 18 (OIG Attachment 3.1).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 17.

<sup>186</sup> *Id.* at 18.

<sup>187</sup> 2010 Census State & County Quick facts: Menominee County WI. 2013 Unmet Needs Housing Update, Attachment 2 (OIG Attachment 5.2).

<sup>188</sup> Kenosha Report at 15 (OIG Attachment 3.1).

<sup>189</sup> 2013 Unmet Needs Housing Update (OIG Attachment 5.2).

<sup>190</sup> 2013 Unmet Needs Housing Update (OIG Attachment 5.2).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*



2012, the MTHA's waiting list for its various programs included 115 low rent applications, 63 rental assistance applicants, 49 applicants for 515-program apartments, 39 home ownership applicants, 8 applicants for low-rent elderly apartments, and 4 applicants for 202-program elderly apartments.<sup>196</sup> The MTHA's waiting list demonstrates the combined need for more developable residential lots as well as a need for more available housing, rental units, and low income housing.

Housing development on the Reservation since the Tribe was restored in the early 1970s has resulted in the return of tribal members.<sup>197</sup> The Tribe projects that at least 500 tribal members will relocate to the Reservation upon completion of new units, but additional housing could draw up to 1,140 members.<sup>198</sup> The Tribe has committed to dedicating revenues from Kenosha to increased housing development.<sup>199</sup>

The Tribe's proposed allocation of anticipated revenue demonstrates a clear commitment to strengthening its government and self-sufficiency as intended by IGRA.<sup>200</sup> The Tribe's intended use of revenue shows a clear relationship between the Kenosha Project and a stronger, more self-sufficient tribal government. The Tribe's intent to use the gaming revenue to address unmet social and economic needs of its members shows that the Kenosha Project is in the best interest of the Tribe and its members.

*e. Projected benefits to the relationship between the tribe and non-Indian communities.*

In 2005, the Tribe and the Tribal Gaming Authority entered into an Intergovernmental Agreement (IGA) with the City of Kenosha and the County of Kenosha.<sup>201</sup> The IGA calls for steps to mitigate the social, economic and other impacts from the Project by providing the terms, conditions, and financial compensation for locally provided services.<sup>202</sup> The IGA establishes long-term communications between the Tribe, the Tribal Gaming Authority and the local governments.<sup>203</sup> In its March 8, 2012, letter to the Regional Director, the County of Kenosha states that it:

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<sup>196</sup> *Id.*

<sup>197</sup> Kenosha Report at 14-15 (OIG Attachment 3.1).

<sup>198</sup> *Id.* at 16.

<sup>199</sup> 2013 Financials at 26 (OIG Attachment 4).

<sup>200</sup> See 25 U.S.C. § 2703(1).

<sup>201</sup> IGA, 2012-292 Update, Exhibit D. (OIG Attachment 16); see also Letter from Mark Molinaro, Jr., County Board Chairman, Kenosha County to Diane Rosen, Midwest Regional Director, BIA, regarding Kenosha County's support for the Proposed Menominee Indian Tribe of Wisconsin's Off-Reservation Casino (March 8, 2012) (hereinafter Kenosha County Letter) with attached IGA, and 2011 Intergovernmental Agreement Extension Agreement (hereinafter 2011 IGA Extension Agreement), BIA Generated Documents Binder I, Tab 2 (OIG Attachment 16.2). The IGA was adopted by the Tribe on Feb. 17, 2005. The Tribe, the Tribal Gaming Authority, the City and the County have amended and renewed the IGA over the years. The most recent update was signed March 27, 2013. A 1998 city-wide referendum and 2004 a county-wide referendum approved Class III Indian gaming.

<sup>202</sup> IGA at 8 (OIG Attachment 16).

<sup>203</sup> IGA at 7 (OIG Attachment 16).



... strongly supports the Tribe’s proposal and believes that the proposed development could provide substantial benefits to the Tribe and the surrounding community, *provided that* the enclosed [IGA] entered into by the City of Kenosha, County and Tribe remains in full force and effect.<sup>204</sup>

The letter from the County explains that “the IGA was developed after several years of planning, negotiations and confirmation of public approval via 1998 and 2004 referenda.”<sup>205</sup> The letter further states that the Tribe, the City and the County have developed a “cooperative relationship” and that “the relationship between the City, County and the Tribe has been a model of cooperation – one that BIA should hold up as an example regarding the benefits of the two-part determination process when an IGA has been developed.”<sup>206</sup>

The IGA provides a framework for the parties to contribute to the orderly and appropriate development of the Kenosha Project. The Tribe agreed to adopt specific building codes and other ordinances,<sup>207</sup> and the City and the County will provide specific services to the Kenosha Project.<sup>208</sup>

The IGA provides for a mayoral appointment of a tribal representative to the Kenosha Area Tourism Corporation and a commitment to work toward creating an additional board seat for a tribal designee on the Corporation’s Board of Directors.<sup>209</sup>

The Tribe has agreed to make payments to the local governments in the amount of 3 percent of net win through 2021, 3.58 percent of net win in 2022, and 4 percent of net win in 2023-2036.<sup>210</sup> The Tribe has also agreed to make an annual payment of \$1.5 million for the Kenosha Unified School District and an annual minimum payment of \$1 million with an annual adjustment of 2.5 percent.<sup>211</sup> The Tribe has agreed to make an annual payment of \$150,000 to mitigate problem gambling and a one-time “public purpose” payment of \$5 million.<sup>212</sup> Additionally, the Tribe has agreed to provide revenue sharing to the State of 7.5 percent of net win.<sup>213</sup> The Tribe agreed that the Tribal Gaming Authority will make contributions to charities and cultural organizations in Kenosha County, to support museums and to help the homeless in the City.<sup>214</sup>

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<sup>204</sup> Kenosha County Letter, at 1 (OIG Attachment 16.2).

<sup>205</sup> *Id.* at 1 (OIG Attachment 16).

<sup>206</sup> *Id.* at 1, 3 (OIG Attachment 16).

<sup>207</sup> IGA at 21 (OIG Attachment 16); *see also* Tribal Land Regulation (OIG Attachment 12.1).

<sup>208</sup> The specific services which will be provided include law enforcement, fire protection, traffic controls, emergency medical service, bus service, sewer and water service, storm water control, street and highway maintenance and plowing, social services, alcohol beverage licenses, public safety dispatch services, an airport for transportation to the Site and a train station for transportation to the Site. IGA at 5 (OIG Attachment 16).

<sup>209</sup> IGA at 7 (OIG Attachment 16).

<sup>210</sup> 2013 Financials at 24 (OIG Attachment 4).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> IGA at 8-11 (OIG Attachment 16).



Based on the documents in the record, the Tribal-State Compact, the IGA, and statements by the Tribe, the City of Kenosha, and the County of Kenosha, we agree that significant benefits will flow to each from the Project and will benefit the relationship among the three governments. The parties have stated that the relationship has been strengthened during the course of developing the Project, and we agree. We find that the evidence in the record strongly supports the assertion that the relationship between the Tribe, the Kenosha area tribal members, and non-Indian communities has benefited as a result of the Kenosha Project.

*f. Possible adverse impacts on the tribe and its members and plans for addressing those impacts.*

The documentation in the record explains the Tribe's response to the possibility of adverse impacts on the Tribe and its members, and its plans for addressing those impacts. The record submitted in the Tribe's application provides significant evidence of the benefits to the Tribe that are projected to result from the Project.

The Tribe's application addresses the possible adverse impacts of problem gambling on its members and its plan for addressing them. The Tribe believes that problem gambling will have an impact on some tribal members.<sup>215</sup> The Tribe has created a plan for addressing this adverse impact through its Responsible Gaming Program, which is part of the Intergovernmental Agreement.<sup>216</sup>

The Tribe's application further explains that another potential adverse impact could result from large per capita payments to its members. Therefore, the Tribe will not distribute per capita payments. Instead, the entire amount of the projected revenue generated by the Project will be used to support the tribal government and provide services to its members.

*g. Distance of the land from the location where the tribe maintains core governmental functions.*

The Site is located approximately 160 miles from the southern border of the Menominee Reservation, and approximately 162 miles from the Tribe's Governmental Office in Keshena.<sup>217</sup> The Tribe also has governmental offices in the City of Milwaukee, which is 31.3 miles from the Site, and a Community Center in Chicago, which is 45 miles from the Site.<sup>218</sup>

*h. Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred from a third party to the tribe or directly to the United States.*

The Tribal Gaming Authority entered into an Eleventh Amendment to Option Agreement on March 12, 2013, which gives it the right to purchase the Site until March 31, 2015.<sup>219</sup> On July 6,

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<sup>215</sup> Response to 292, at 7 (OIG Attachment 10.1).

<sup>216</sup> See IGA, Section 2(C), Responsible Gaming Program (OIG Attachment 16).

<sup>217</sup> See Distance Map. The distance is measured in a straight line, driving distances are also on this exhibit. (OIG Attachment 11).

<sup>218</sup> *Id.*

<sup>219</sup> See Eleventh Option Agreement at 2 (OIG Attachment 13).



2012, the Twin Cities Field Solicitor issued a Preliminary Title Opinion (PTO) on the commitment for title insurance, prepared by First American Title Insurance Company, dated March 27, 2012, for the Site.<sup>220</sup> The lands are to be conveyed to the United States in trust for the Tribe, subject to the instructions provided in the PTO. The Site will not be accepted in trust until all of the identified exceptions in the PTO have been addressed. The title estate is currently owned by Dairyland Greyhound Park, Inc.<sup>221</sup>

*i. Evidence of significant historical connections, if any, to the land.*

This section of the Part 292 regulations does not require a significant historical connection to the subject land to make a best interest determination. Nevertheless, the Tribe has submitted tribal history, academic historical research, maps and other evidence of its significant historical connection to the Kenosha area.<sup>222</sup> While the Tribe asserts a significant historical connection with the Kenosha area, we need not reach the issue to find that the acquisition of the Site is in the best interest of the Tribe.

Menominee oral traditions and histories extend to the origins of their people, not with a migration story but rather a creation story originating at Green Bay.<sup>223</sup> The Menominee's oral history includes moving with the seasons, climate changes, and resources, like many other Native people.<sup>224</sup> These movements covered much of Wisconsin and all along the shores of Lake Michigan, especially from Green Bay to Chicago.

During the 17<sup>th</sup> Century, other tribes, including the Potawatomi, migrated west into the Menominee's traditional range as they were pushed out of their former homelands further east.<sup>225</sup> These migrations were the result of both European settlement and the aggressive behavior of the Iroquois.<sup>226</sup> Initially the Menominee negotiated traditional land and resource sharing agreements with these Tribes, but the Menominee continued to claim and use the area along the west shore of Lake Michigan.<sup>227</sup> One scholar asserts that it was through these traditional land sharing agreements that the United States mistakenly drew the Menominee's southern territorial border at Milwaukee River.<sup>228</sup> As more tribes and Europeans moved into the Menominee's territory,

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<sup>220</sup> See 2012-292 Update, Exhibits I, J, K.

<sup>221</sup> See Title Report; see also 2012-292 Update, Exhibits I-L.

<sup>222</sup> The Tribe's historical documentation can be found in Menominee 2012-292 Update Exhibit "M" which includes: *Overview of the Menominee History* by the Menominee Indian Tribe (OIG Attachment 6.1), *The Mero Complex and the Menominee Tribe: Prospects for a Territorial Ethnicity* by David Overstreet (OIG Attachment 6.3), Maps of the Mero Complex and the historic range of the Menominee (OIG Attachment 6.4), and *The Traditional Relationship of the Menominee Indian Tribe of Wisconsin to the City of Kenosha and the Southeastern Region of Menominee Country*, by David R.M. Beck (OIG Attachment 6.5)

<sup>223</sup> Overview of Menominee History at 1 (OIG Attachment 6.1).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 9-10.

<sup>226</sup> *Id.* at 9-10.

<sup>227</sup> *Id.* at 12.

<sup>228</sup> David R.M. Beck, *The Traditional Relationship of the Menominee Indian Tribe of Wisconsin to the City of Kenosha and the Southeastern Region of Menominee Country* 2 (OIG Attachment 6.5).



they withdrew to their current location.<sup>229</sup> Between 1817 and 1856 several treaties between the United States and the Menominee resulted in the loss of much of the Menominee's former territory.<sup>230</sup>

*j. Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of consulting agreements, financial and loan agreements and other agreements.*

*Consulting agreements relating to the proposed gaming establishment*

The Tribe's original application includes a development agreement listing KMD as its developer for the Project. We have been notified by the Tribe in a follow up letter dated June 21, 2012, that as of May 15, 2012, the development agreement between the Tribe and KMD has been terminated. The Tribe intends to hire a qualified developer to replace KMD on similar terms. The development agreement between the Tribe and KMD called for KMD to supply pre-development funds for the legal expenses of the application and the environmental studies, but not permanent financing for the Kenosha Project. Since the termination of the KMD agreement the Tribe has carried the pre-development costs of the project.

The Tribe has stated that currently there is no existing management contract, and that the previously submitted proposed management contract is no longer in force.<sup>231</sup> However, the Tribe intends to hire a highly qualified and experienced management contractor who will be compensated at the same rate as the developer.<sup>232</sup>

Under the provisions of IGRA, management contractors may receive up to 30 percent of net revenues. Under the scenario outlined by the Tribe, the development contract and the management contract together will result in total compensation of 26.8 percent of net revenues, assuming the agreements obtain all required approvals.

*Financial and loan agreements relating to the proposed gaming establishment*

The Tribe is seeking financing options and is in discussions with another developer. The Tribe intends to finance the project with a combination of bonds and bank lending. We note that several gaming tribes have recently refinanced debt during 2012 with bonds.<sup>233</sup> At this early

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<sup>229</sup> Because the Menominee remained in their traditional territory, their history includes several mass migrations from east to west of other native peoples. This started in the 15<sup>th</sup> Century. However, during the 17<sup>th</sup> Century, the Potawatomi, the Huron, the Ottawa, the Fox, the Sauk, the Kickapoo, and others were forced out of their homelands as a combined result of European settlement and tribal warfare. In the 19<sup>th</sup> Century, the United States moved the Stockbridge-Munsee and the Oneidas from their traditional homelands in New York State to Wisconsin. See Overview of Menominee History at 9-13 (OIG Attachment 6.1).

<sup>230</sup> Overview of Menominee History at 3 (OIG Attachment 6.1).

<sup>231</sup> Menominee Indian Tribe's Response to Other Issues not Addressed in Part 292 or 151 of the 2012 Update, Menominee 2012 Update at 1-2 (OIG Attachment 10.3).

<sup>232</sup> *Id.*

<sup>233</sup> See, e.g., Recession has Tribal Gaming Companies Restructuring Debt, Las Vegas Review-Journal (Feb. 12, 2012), available at <http://www.reviewjournal.com/business/casinos-gaming/recession-has-tribal-gaming-companies->



stage in the development process, we recognize that the Tribe has not yet secured financing and thus no financial or loan agreements are in place. However, we will defer to the business judgment of the Tribe regarding the proposed financing mechanism. The financial projections submitted by the Tribe anticipate that over a ten year period, just over \$300 million will be distributed to the Tribe from the Project, which will facilitate the Tribe's efforts to address unmet needs and strengthen the Tribe's government.

*Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming establishment, or the acquisition of the land where the gaming establishment will be located.*

The Tribe has an Option Agreement to purchase the Site for \$40 million. As part of this Option Agreement, the Tribe has been making periodic payments to Dairyland Greyhound Park Inc. The Option Agreement provides for these payments to be taken as a credit against the final purchase price.<sup>234</sup> The application states that the architectural firm of Jeter, Cook, & Jepson of Hartford, Connecticut was procured to develop a master space allocation program which details the concept and all site and building components necessary to accomplish the business plan for this Kenosha Project.<sup>235</sup> The Tribe's Projected Expenditures and Anticipated Capital Structure projects the facility budget to be \$90 million in the Temporary Phase, \$518 million in the Phase I, and, \$200 million in Phase II.<sup>236</sup>

*k. Best Interest of Tribe and its Members Conclusion*

The Tribe has submitted the required financial projections under 25 C.F.R. § 292.17(a). Our analysis of the financial projections indicates that the proposed gaming project has the potential to perform as projected. The application outlines reasonable payments for gaming development and management, to the State, to the local governments under the IGA, and to the Tribe.

The Tribe has submitted the required information under 25 C.F.R. § 292.17(b) regarding tribal employment and job training, and career development. The Tribe's application shows that the Project will create significant employment opportunities for tribal members at the Site and on the Reservation.

The Tribe has submitted the required information under 25 C.F.R. § 292.17(c) regarding benefits to the Tribe and its members from tourism. The application shows that the Tribe's plans to cross-market the proposed Kenosha Project with its upgraded gaming facility on the Reservation will draw additional visitors to the Tribe's Reservation. The application shows that the Kenosha Project will increase tourism year-round.

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restructuring-debt. (The Mohegan Tribe and the Mashantucket Pequot Tribe both used bonds to refinance their gaming operations).

<sup>234</sup> Summary of Credits against Purchase Price of Kenosha Property, 2013 Financials Tab 7.

<sup>235</sup> Project Description, Original Submission Vol. I, Section 4, at 1.

<sup>236</sup> See Overview of A Proposed Kenosha, Wisconsin, Casino Gaming and Regional Destination Entertainment Center, Original Submission, Vol. II, Tab 11.2, at 19. (in 2004 dollars).



The Tribe has submitted the required information under 25 C.F.R. § 292.17(d) regarding projected benefits to the Tribe and its members from the uses of the increased tribal income. The Tribe's allocation of anticipated revenue demonstrates a clear commitment to strengthening its government and self-sufficiency as intended by IGRA. The Tribe's plan for the use of revenue shows a clear relationship between the Kenosha Project and a stronger, more self-sufficient tribal government. The Tribe's intent to use the gaming revenue to address significant unmet social and economic needs of its members shows that the Kenosha Project is in the best interest of the Tribe and its members.

The Tribe has submitted the required information under 25 C.F.R. § 292.17(e) regarding projected benefits to the relationship between the Tribe and non-Indian communities. The application demonstrates that the relationship with local non-Indian communities has been strengthened during the course of developing the Project.

The Tribe has submitted the required information under 25 C.F.R. § 292.17(f) regarding possible adverse impacts on the Tribe and its members and plans for addressing those impacts. The Tribe identified problem gambling as a possible adverse impact and plans to address this impact through a responsible gaming program. The Tribe also identified large per capita payments to tribal members as a possible adverse impact. The Tribe has adopted the Ten Year Budget Resolution that allocates all projected revenue but does not include per capita payments.

The Tribe has submitted the required information under 25 C.F.R. § 292.17(g) regarding the distance of the land from the location where the Tribe maintains core governmental functions. The Site is 162.5 miles from the Tribe's government headquarters.

The Tribe has submitted the required information under 25 C.F.R. § 292.17(h) regarding evidence that the Tribe holds an option to acquire the land at the sole discretion of the Tribe. The Tribe's application includes an Eleventh Amendment to Option Agreement dated March 12, 2013, which gives the Tribal Gaming Authority the right to purchase the Site until March 31, 2015.

The Tribe has submitted the required information under 25 C.F.R. § 292.17(i) regarding evidence of significant historical connections. The Tribe has submitted evidence of a significant historical connection to the Site.

The Tribe has submitted the information under 25 C.F.R. § 292.17(j) regarding other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the Tribe and its members. The Tribe's application provides an example development agreement that will serve as a model for a future development agreement. Likewise, though the Tribe has not entered into a management contract, the Tribe has outlined the compensation percentage that it anticipates will be included in a management contract. The Tribe has provided an Option Agreement that secures its right to purchase the land along with a master space allocation program conceptualized by an architectural firm that details the Site and building components necessary to accomplish the business plan for the Kenosha Project.

The Tribe has shown that development of the proposed Kenosha Project will be in the best interest of the tribe and its members from the perspective of creating jobs and reducing tribal unemployment. The evidence submitted by the Tribe indicates tribal members living in the greater Kenosha area will have access to jobs in construction and at the facility once it opens.



Further, the Tribe has laid out a detailed scenario whereby revenues from the Kenosha Project will be coupled with tribal planning to directly create jobs on the Reservation. The Tribe's plan of action to invest directly in tribal infrastructure and tribal programs that are currently unfunded or underfunded will benefit the Tribe and the tribal members. The Tribe's application demonstrates that gaming at the Site will address the significant unmet needs of the Tribe and is therefore in the best interest of the Tribe and its members.

### C. Analysis of Detriment to the Surrounding Community

**Section 292.18 states that to satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:**

- a. *Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA)*

The issuance of a Secretarial Determination is a major Federal action affecting the quality of the human environment for purposes of NEPA, and an EIS was developed to analyze the impact of the Secretarial Determination. A Draft Environmental Impact Statement (DEIS) was issued for public review on September 23, 2005,<sup>237</sup> and the Final EIS (FEIS) was issued for public review on June 29, 2012.<sup>238</sup> Prior to its release, the analysis contained in the FEIS was evaluated and updated, if warranted, by the BIA using data from 2011.<sup>239</sup>

Both the DEIS and the FEIS considered reasonable alternatives addressing the purpose and need for the proposed Federal action and analyzing potential impacts. The FEIS found that the preferred alternative (Alternative A) consisting of the acquisition of the Site in trust, the issuance of a Secretarial Determination, and the development of the Kenosha Project, did not significantly affect the quality of the human environment as defined by NEPA. The Record of Decision (ROD) for this Secretarial Determination concludes that the Kenosha Project will not be detrimental to the surrounding community.

#### *Environmental considerations*

Surface Water, Drainage and Flooding:<sup>240</sup> Under Alternative A, runoff from additional areas of impervious surfaces may increase stream volumes, velocities, and peak discharges, possibly overwhelming storm drain systems and causing flooding, and decreasing groundwater contributions to stream base-flows during non-precipitation periods. The FEIS identified

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<sup>237</sup> 70 Fed. Reg. 55835 (Sept. 23, 2005).

<sup>238</sup> 77 Fed. Reg. 38822 (June 29, 2012).

<sup>239</sup> See e.g., Final Environmental Impact Statement, Menominee Casino-Hotel, 223-Acre Fee-to-Trust Transfer and Casino Project, dated April 2012 (hereinafter FEIS) at § 4.2, p. 4.2-1 (OIG Attachment 18).

<sup>240</sup> FEIS at § 4.3.1 (OIG Attachment 18).



mitigation measures to ensure that no significant adverse effects would result from the development.<sup>241</sup>

Water Quality:<sup>242</sup> Under Alternative A, ground disturbance could lead to erosion which in turn could increase sediment discharge to surface waters during storm events. Project construction may potentially discharge other construction related materials onto the ground and then into nearby surface waters during storm events. Construction would also involve the use of diesel-powered equipment and would likely involve the temporary storage of fuel and oil on-site. Discharge of pollutants to surface waters from construction activities and accidents are a potential adverse effect. Runoff from Project facilities, especially surface parking lots, could flush trash, debris, oil, sediments, and grease into area surface waters, impacting water quality. Fertilizers and other chemicals used in landscaping areas could also result in impacts to water quality if allowed to enter nearby surface waters. The FEIS identified mitigation measures to be included in a Storm Water Pollution Protection Plan to ensure that no significant adverse effects would result from Alternative A.<sup>243</sup>

Air Quality:<sup>244</sup> Alternative A would generate Volatile Organic Compounds and Nitrogen Oxide emissions directly during construction and indirectly during the operation of the proposed facilities. Alternative A has the potential to increase short-term fugitive dust in the air during construction activities. The FEIS identified mitigation measures to ensure that no significant adverse effects would result from development of these alternatives.<sup>245</sup>

Biological Resources:<sup>246</sup> Alternative A could have potentially significant adverse effects to wildlife habitats through clearing, grading, and construction. The FEIS identified mitigation measures to ensure that no adverse effects would result from development of Alternative A. Also, Alternative A has the potential to encroach on jurisdictional waters of the United States. The FEIS identified mitigation measures to ensure that no significant adverse effects would result from development of Alternative A.<sup>247</sup>

Cultural Resources:<sup>248</sup> Alternative A would not adversely impact previously identified cultural resources. The State Historic Preservation Officer and the Menominee Tribal Historic Preservation Officer have reviewed and concurred with findings of no adverse effects to cultural resources as a result of any of the development alternatives. Since ground-disturbing activities have the potential to disturb unidentified subsurface cultural resources, the FEIS identified mitigation measures to ensure no adverse effects would result from the development of Alternative A.<sup>249</sup>

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<sup>241</sup> *Id.* § 5.32.3.

<sup>242</sup> *Id.* at § 4.3.1.

<sup>243</sup> *Id.* at § 5.2.3.

<sup>244</sup> *Id.* at § 4.4.

<sup>245</sup> *Id.* at § 5.52.4.

<sup>246</sup> *Id.* at § 4.5.

<sup>247</sup> *Id.* at § 5.25.

<sup>248</sup> *Id.* at § 4.6.

<sup>249</sup> *Id.* at § 5.2.6.



Transportation:<sup>250</sup> During construction, Alternative A has the potential to cause temporary traffic-related construction impacts that may include traffic delays, one-way traffic control, temporary road closures, and traffic detours. In addition, Alternative A could obstruct emergency services during construction. Alternative A has the potential to result in unacceptable levels of service at certain intersections as a result of increased traffic demand once the facilities are operational. The FEIS identified mitigation measures to ensure that no adverse effects would result from development of Alternative A.<sup>251</sup>

Noise:<sup>252</sup> Construction, traffic, and operational equipment associated with each of the alternatives were identified as a potential nuisance. The FEIS identified mitigation measures to ensure that no adverse effects would result from development of Alternative A.<sup>253</sup>

Hazardous Materials:<sup>254</sup> The Site has no hazardous materials contamination. During construction, there exists the potential for dripping of fuels, oil, and grease from construction equipment. Additionally, accidental spillage may occur during handling and transfer of hazardous materials from one container to another. The FEIS identified mitigation measures to ensure that no adverse effects would result from development of Alternative A.<sup>255</sup>

Visual Resources:<sup>256</sup> Alternative A would have no adverse impacts on visual resources. Notwithstanding, the FEIS identified mitigation measures to further minimize potential effects from Alternative A.<sup>257</sup>

Indirect Effects from Off-Site Traffic Mitigation:<sup>258</sup> Implementation of off-site traffic mitigation may indirectly affect the environment. However, off-site activities would be required to comply with federal, state, and local laws, policies, and ordinances, resulting in less than significant impacts. The Tribe, Wisconsin Department of Transportation, and Kenosha County have agreed to a cost sharing plan to mitigate the costs of improving access roads to accommodate increased traffic to the Project.<sup>259</sup>

Growth-Inducing Effects:<sup>260</sup> The housing demand generated by Alternative A would be met by available and already planned housing developments and no housing growth would occur as a result of implementing Alternative A. No significant off-site commercial growth would likely occur either from visitors to the Kenosha Project or from new residents. No mitigation measures were proposed.

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<sup>250</sup> *Id.* at § 4.8.

<sup>251</sup> *Id.* at § 5.2.8.

<sup>252</sup> *Id.* at § 4.10.1.

<sup>253</sup> *Id.* at § 5.2.10.

<sup>254</sup> *Id.* at § 4.10.1.

<sup>255</sup> *Id.* at § 5.2.10.

<sup>256</sup> *Id.* at § 4.10.1.

<sup>257</sup> *Id.* at § 5.2.10.

<sup>258</sup> *Id.* at § 4.14.2.

<sup>259</sup> *Id.* at § 5.2.8.

<sup>260</sup> *Id.* at § 4.12.



The Tribe will obtain local water and wastewater services, and any water/wastewater pipeline extensions would be sized solely to serve the Kenosha Project. Any other utility improvements, such as improvements to electrical facilities, would be minor and tailored specifically for the Kenosha Project. Thus, no growth would be induced by the extension of infrastructure or the expansion of utilities resulting from Alternative A, and a less than significant impact would occur.

Cumulative Impacts:<sup>261</sup> Alternative A, when added to past, present, and reasonably foreseeable future actions would not result in significant cumulative impacts to land resources, water resources, biological resources, socioeconomic impacts, land use, agriculture, public services, noise, hazardous materials, and visual resources.

Potentially significant impacts to air quality would occur from future operational emissions under Alternative A.<sup>262</sup> The FEIS identified mitigation measures to ensure a less than significant cumulative impact to air quality.<sup>263</sup> Significant cumulative cultural resource impacts could occur if unknown cultural resources are discovered during construction. The FEIS identified mitigation measures to ensure a less than significant cumulative impact to cultural resources.<sup>264</sup> Alternative A would cause certain roadway segments and intersections in the vicinity of the Project to operate at an unacceptable Level of Service (LOS) during future cumulative conditions.<sup>265</sup> The FEIS identified mitigation measures for the roadway segments and project intersections showing unacceptable LOS during operation.<sup>266</sup> With the incorporation of project mitigation measures, impacts to project roadways would be reduced to a less than significant level.

b. *Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community.*

*Impacts on the social structure*

The Spilde Analysis of the potential social impacts of the Project included a review of a number of sources, including Federal Indian gaming policy, preliminary analysis by PWC, relevant research by third-party researchers, and compact provisions in the Tribal-State gaming compact.<sup>267</sup> The Spilde Analysis projected that the Tribal-State gaming compact and the restrictions on how gaming revenue can be spent, results in significant benefits for the city and the county of Kenosha, the State of Wisconsin and the Menominee Tribe.<sup>268</sup>

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<sup>261</sup> *Id.* at § 4.13.

<sup>262</sup> *Id.* at § 4.13.

<sup>263</sup> *Id.* at § 4.13.

<sup>264</sup> *Id.* at § 5.2.6.

<sup>265</sup> *Id.* at § 4.13.

<sup>266</sup> *Id.* at § 5.2.8.

<sup>267</sup> An Analysis of the Potential Social Impacts of An Indian Casino in Kenosha, WI, prepared by Spilde Research Strategies, (hereinafter Spilde), Original Application Vol. II, Tab 11.3, at 2.

<sup>268</sup> Spilde at 20. The Spilde Analysis notes that a report submitted to the BIA by Catherine Tenuta, which claims that revenues from a Menominee casino at Kenosha will not benefit the local community, is unsupported by documentation and overlooks the requirements in the tribal-state gaming compact and IGRA, both of which dictates



We note that the majority of the comments received from local governments within a 25 miles radius are favorable. In 2005, the Tribe and the Tribal Gaming Authority entered into an IGA with the City of Kenosha (City) and the County of Kenosha (County).<sup>269</sup> The IGA mitigates the social, economic and other impacts from the Project by providing the terms, conditions, and financial compensation for locally provided services.<sup>270</sup> The IGA establishes long-term communications between the Tribe, the Tribal Gaming Authority and the local governments.<sup>271</sup> The IGA addresses the loss of taxable property and development in the City and the County. As noted by the Tribe, it has sought to “create a true partnership with the City, the County and the community as a whole.”<sup>272</sup>

#### *Impacts on infrastructure*

The FEIS projects that during construction, Alternative A could create temporary traffic-related construction impacts that may include traffic delays, one-way traffic control, temporary road closures, and traffic detours.<sup>273</sup> In addition, during construction it could obstruct emergency services. Alternative A could result in unacceptable levels of service at certain intersections as a result of increased traffic.<sup>274</sup> The FEIS identified mitigation measures to ensure that no adverse effects would result from the development of Alternative A.<sup>275</sup>

The water supply for the Kenosha Project would continue to be provided by the City through the existing on-site system.<sup>276</sup> Wastewater treatment and disposal service would continue to be provided through the existing system served by the Kenosha Water Utility.<sup>277</sup>

#### *Impacts on services*

The City and the County have agreed to provide services to the Project as typically provided to other commercial enterprises.<sup>278</sup> These services include but would not be limited to: law enforcement; fire protection; traffic controls; emergency medical service; bus service; sewer and water service; storm water control; street and highway maintenance and plowing; social services;

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gaming revenues must be invested in specific ways. As support for the assertion that the restricted spending benefits the local community, Spilde notes instances where Indian gaming revenue paid to the State of Wisconsin pursuant to tribal-state compacts resulted in a \$5 million grant to the City of Milwaukee for infrastructure improvements, as well as \$1.5 million invested in the State’s environmental fund. Spilde at 22, n. 77 and 78.

<sup>269</sup> IGA (OIG Attachment 16); *see also* Kenosha County Letter (OIG Attachment 16.2). The IGA was adopted by the Tribe on Feb. 17, 2005. The Tribe, the Tribal Gaming Authority, the City and the County have amended and renewed the IGA over the years. The most recent update was signed March 27, 2013. A 1998 city-wide referendum in Kenosha and 2004 a county-wide referendum approved Class III Indian gaming.

<sup>270</sup> *Id.* at 8.

<sup>271</sup> *Id.* at 7.

<sup>272</sup> Original Submission Vol. II, Tab 11, June 5, 2004, Letter from the Tribe to the City and the County at 1.

<sup>273</sup> FEIS at § 5.2.8 (OIG Attachment 18).

<sup>274</sup> *Id.* at § 5.2.8.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at § 2.2.1.

<sup>277</sup> *Id.*

<sup>278</sup> IGA at § 5 (OIG Attachment 16).



alcohol beverage licenses; public safety dispatch services; an airport providing an additional transportation mode to the Project; a train station providing service from the greater Chicago area to the Project; and other supporting services.<sup>279</sup>

Through the IGA, the Tribe has agreed to implement a number of policies and procedures designed to limit the impacts of Alternative A on the local community.<sup>280</sup> The Tribe has agreed to make payments to the local governments in the amount of 3 percent of net win through 2021, 3.58 percent of net win in 2022, and 4 percent of net win in 2023-2036, to offset costs associated with potential increases in public service and infrastructure demands, and for proposed mitigation measures that would ensure that no adverse effects would result from the development of Alternative A.<sup>281</sup> The Tribe has also agreed to make an annual payment of \$1,500,000 to the Kenosha Unified School District and an annual minimum payment of \$1,000,000 with an annual adjustment of 2.5 percent to local governments.<sup>282</sup> With respect to schools, Alternative A would provide for substantial payments to local schools, and these payments are considered a beneficial effect.<sup>283</sup> No mitigation measures were proposed.<sup>284</sup>

#### *Impacts on housing*

The housing demand generated by Alternative A would be met by available and already-planned housing developments and no housing growth would occur as a result of implementing Alternative A.<sup>285</sup> No mitigation measures were proposed.

#### *Impacts to community character*

The Site previously housed Dairyland Greyhound Park, a dog track used for gambling that included amenities to support dog racing. From 1990 through 2009, the site was used for live dog racing and pari-mutuel betting.<sup>286</sup> Gambling on dog races occurred at the Site for approximately 20 years. The presence of an upscale casino and hotel is not likely to adversely impact the community character surrounding the Site. Additionally, by means of the IGA, the Tribe has agreed to compensate the City to help improve the quality of life in the community.<sup>287</sup> The IGA includes financial assistance to help the homeless, the local school district, and the cultural preservation of the community.<sup>288</sup> The IGA includes funds for a Responsible Gaming Program to provide services and awareness to the City and County to mitigate problem gambling.<sup>289</sup>

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<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 6.

<sup>281</sup> 2013 Financials at 24 (OIG Attachment 4).

<sup>282</sup> *Id.*

<sup>283</sup> FEIS at § 4.7 (OIG Attachment 18).

<sup>284</sup> *Id.* at § 5.2.1.

<sup>285</sup> *Id.* at § 4.12.

<sup>286</sup> See Walker, Dairyland Greyhound Track to Close, *The Journal Sentinel* (Nov. 10, 2009), available at <http://www.jsonline.com/blogs/business/69672007.html>.

<sup>287</sup> See generally, IGA (OIG Attachment 16).

<sup>288</sup> IGA at 16 (OIG Attachment 16).

<sup>289</sup> *Id.* at 17-18.



*Impact on the land use patterns in the surrounding community*

There are several different zoning districts associated with the Kenosha Project. The majority of the Site is zoned Industrial Park, while other portions of the Site are zoned Floodway District, Floodplain Fringe Overlay District, and Shoreline Overlay District.<sup>290</sup> Project development will only occur in the area zoned Industrial Park. The Tribe has adopted Tribal Ordinance 04-44, which is substantially similar to the current zoning ordinance for the City.<sup>291</sup> This includes plan review and height restrictions responsive to airport districts and runway protection zones. As a result, the Kenosha Project would be consistent with the City's zoning ordinance.<sup>292</sup>

The majority of the Site has also been designated by the City for Large-scale Planned Non-Residential Development or Redevelopment. The City of Kenosha Corridor Land Use Plan defines this classification as an automobile oriented neighborhood for regional business, service, retail, and convenience uses.<sup>293</sup> The Kenosha Project is also consistent with Federal and State plans including FAA/airport zoning and the Wisconsin Coastal Management Program.<sup>294</sup> The Tribe's land use ordinance associated with the Kenosha Project is consistent with existing zoning ordinances and does not conflict with surrounding land use.

*c. Anticipated impacts on the economic development, income, and employment of the surrounding community.*

*Economic Development and Income*

Ancillary services will be provided by private businesses, such as those providing plumbing, heating, air conditioning, electrical, laundry, and food supply services. The volume of such services is likely to sustain local employment that otherwise might be lost due to the declining population.<sup>295</sup>

*Employment*

The Kenosha Project will generate job growth during the construction process as well as during Phases I and II of operation. Upon completion of Phase II renovations, a total of 3,337 non-management jobs will have been created.<sup>296</sup> The total annual compensation for workers in both management and non-management positions is estimated to be \$161,148,000.<sup>297</sup> The FEIS estimates that 80 percent of the Kenosha Project's operating workforce will come from the three-county Kenosha region, and that 20 percent will commute to the project for work from elsewhere

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<sup>290</sup> FEIS at § 4.8 (OIG Attachment 18).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> FEIS at § 4.8.

<sup>295</sup> FEIS at § 4.7.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*



in Wisconsin and northern Illinois.<sup>298</sup> As noted previously, there will be induced employment from spending for goods and services by the employees of the Kenosha Project.

*d. Anticipated costs of impacts to surrounding community and identification of sources of revenue to mitigate them.*

In 2005, the Tribe and the Tribal Gaming Authority entered into an IGA with the City and the County.<sup>299</sup> The IGA mitigates the social, economic and other impacts from the Project by providing the terms, conditions, and financial compensation for locally provided services.<sup>300</sup> The IGA establishes long-term communications between the Tribe, the Tribal Gaming Authority and the local governments.<sup>301</sup> The Solicitor's Office for the Department reviewed the 2005 IGA and determined that it required no Departmental approval under 25 U.S.C. § 81.<sup>302</sup>

The IGA provides payments to support local government operations.<sup>303</sup> The Tribe has agreed to make payments to the local governments in the amount of 3 percent of net win through 2021, 3.58 percent of net win in 2022 and 4 percent of net win in 2023-2036.<sup>304</sup> The Tribe has also agreed to make an annual payment of \$1.5 million for the Kenosha Unified School District and an annual minimum payment of \$1 million with an annual adjustment of 2.5 percent to the local governments.<sup>305</sup> The Tribe has agreed to make an annual payment of \$150,000 to mitigate problem gambling and a one-time "public purpose" payment of \$5 million.<sup>306</sup> Additionally, the Tribe has agreed to provide revenue sharing to the State of 7.5 percent of net win.<sup>307</sup>

*e. Anticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment.*

The parties to the IGA anticipate that there will be costs to the surrounding community for treatment programs for compulsive gambling. Accordingly, the IGA provides that the Tribe will provide financial support for the Wisconsin Council on Problem Gambling and other organizations that provide problem gambling services in the County. The Tribe agrees to match funds appropriated by the County for such treatment up to \$150,000 annually. Additionally, the City will provide \$150,000 to the County for problem gambling in the first year that the County appropriates funds for the assessment and treatment of problem gamblers.<sup>308</sup>

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<sup>298</sup> *Id.*

<sup>299</sup> IGA (OIG Attachment 16); *see also* Kenosha County Letter (OIG Attachment 16.2).

<sup>300</sup> IGA at 8 (OIG Attachment 16).

<sup>301</sup> *Id.* at 7.

<sup>302</sup> Letter from De Springer, Acting Midwest Regional Director, to Karen Washinawatok, Chairperson, Menominee Indian Tribe, regarding the Tribe's request for a 25 U.S.C. § 81 determination on the IGA (Nov. 17, 2005), BIA Generated Documents Binder I, Tab 2.

<sup>303</sup> *See* IGA at 8 (OIG Attachment 16).

<sup>304</sup> 2013 Financials at 24 (OIG Attachment 4).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> *See Id.* at 17-18.



*f. If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land.*

As part of the FEIS, the State Historic Preservation Officer and the Menominee Tribal Historic Preservation Officer reviewed and concurred with findings of no adverse effects to cultural resources as a result of any of the development alternatives. Since ground-disturbing activities have the potential to disturb unidentified subsurface cultural resources, the FEIS identified mitigation measures to ensure no adverse effects would result from the development of the Project.<sup>309</sup>

*g. Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments*

The Tribe's application addresses potential detriment to surrounding communities.<sup>310</sup> In 2005, the Tribe and the Tribal Gaming Authority entered into an IGA with the City and the County.<sup>311</sup> The IGA mitigates the social, economic, and other impacts from the Project by providing the terms, conditions, and financial compensation for locally provided services to the Project.<sup>312</sup> The IGA establishes long-term communications between the Tribe, the Tribal Gaming Authority and the local governments.<sup>313</sup>

The City and the County agree to provide the Project with the services required to operate safely and effectively.<sup>314</sup> As part of the IGA, the Mayor of Kenosha agrees to appoint a tribal designee as one of the City's representatives on the Board of Directors of the Kenosha Area Tourism Corporation. The City will also work to create another board member position for the Tribe. The Tribe has also agreed that at the time of closing on its financing to develop the Kenosha Project, the Tribal Gaming Authority will pay for the City to establish a trust fund to support public museums in the City. Additionally, the Tribe and the Tribal Gaming Authority agree to develop a responsible gaming policy and to work with the State and County authorities to combat problem gambling. Payments by the Tribe and the Authority will provide financial and other support to bolster problem gambling services in the County and in the surrounding communities.<sup>315</sup>

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<sup>309</sup> FEIS at § 5.2.6 (OIG Attachment 18).

<sup>310</sup> The City of Milwaukee and the FCPC each submitted comments regarding potential adverse impacts to the local community. The comments are addressed under Consultation, below.

<sup>311</sup> IGA (OIG Attachment 16); *see also* Kenosha County Letter (OIG Attachment 16.2).

<sup>312</sup> *Id.* at 8.

<sup>313</sup> *Id.* at 7.

<sup>314</sup> *Id.* at 5. Services include law enforcement, fire protection, traffic control, emergency medical, bus service, sewer and water service, storm water control, street and highway maintenance and plowing, social services, alcohol beverage licenses, public safety dispatch services, use of the airport and train station and supporting services.

<sup>315</sup> *Id.* at 17.



The Tribe and the Tribal Gaming Authority have agreed to apportion criminal jurisdiction for offenses occurring on the premises.<sup>316</sup> Likewise, the IGA obligates the Tribe and the Tribal Gaming Authority to establish public health and safety standards consistent with State standards.<sup>317</sup>

In addition to the IGA, the Tribe and the Tribal Gaming Authority entered into a tax allocation agreement with the County, whereby the Tribe and the Tribal Gaming Authority will collect a tribal sales tax at the Site and will share a percentage of the tribal sales tax revenue with the County.<sup>318</sup> The tax revenue will defray the County's costs of road and road infrastructure building and maintenance.<sup>319</sup> The Tribe also adopted an ordinance, the Kenosha Land Use Regulations, to govern the use of the trust land and to facilitate cooperation with the County in land use decisions.<sup>320</sup>

The execution of the above described agreements by the Tribe and the Tribal Gaming Authority with the City and County of Kenosha demonstrates a spirit of mutual cooperation between the Tribe and the local governments that will provide for an orderly and well-planned development that adequately protects the health and safety of nearby residents while providing for infrastructure improvements and maintenance. The referenda, the agreements, and the cooperative relationship between the Tribe and the local governments all support a finding that gaming on trust land in this location is not detrimental to the surrounding community.

*h. Detriment to Surrounding Community Conclusion*

The Tribe has submitted the required information under 25 C.F.R. § 292.18(a) regarding environmental impacts, including an FEIS. Both the DEIS and the FEIS considered reasonable alternatives addressing the purpose and need for the proposed Federal action and analyzing potential impacts. The FEIS found that the preferred alternative consisting of the acquisition of the Site in trust, the issuance of a Secretarial Determination, and the development of the Kenosha Project, did not significantly affect the quality of the human environment within the meaning of NEPA.

The Tribe has submitted the required information under 25 C.F.R. § 292.18(b) regarding anticipated impacts on the social structure, infrastructure, services, housing, community character and land use patterns of the surrounding community. The IGA between the Tribe, the City and the County mitigates the social, economic and other impacts from the Project by providing the terms, conditions, and financial compensation for locally provided services to the Project. The IGA establishes a means for ongoing communication between the Tribe, the Tribal Gaming Authority and the local governments and addresses the loss of taxable property and

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<sup>316</sup> *Id.* at 20.

<sup>317</sup> *Id.*

<sup>318</sup> Agreement Regarding Sales Tax between the Menominee Indian Tribe, the Menominee Kenosha Gaming Authority, and the County of Kenosha (hereinafter Sales Tax Agreement), Supplemental Report Vol. II, Exhibit N.

<sup>319</sup> Sales Tax Agreement at 2.

<sup>320</sup> *See* Tribal Land Regulation (OIG Attachment 12.1).



development in the City and County. The governmental entities that signed the IGA have formed a valuable working relationship.

The Tribe has submitted the required information under 25 C.F.R. § 292.18(c) regarding the impacts to economic development, income, and employment in the surrounding community. Overall, it is likely that economic development and income in the local community will increase if the Project is built because local construction related jobs will be created and the resulting income will benefit local community members. Local employment that otherwise might be lost due to the declining population will remain the same or increase as ancillary services to the Project are provided by private businesses providing plumbing, heating, air conditioning, electrical, laundry, and food supply services. The Project will result in increased employment from spending for goods and services by the employees of the Kenosha Project.

The Tribe has submitted the required information under 25 C.F.R. § 292.18(d) regarding anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them. As discussed above, the Tribe has entered into an IGA with the City and County to address impacts on the surrounding community. Revenue from the Project will be used to mitigate the impacts to surrounding communities identified in the Tribe's application.

The Tribe has submitted the required information under 25 C.F.R. § 292.18(e) regarding anticipated costs to the surrounding community of treatment programs for compulsive gambling attributable to the Project. The Tribe will provide financial support for the problem gambling organizations to provide problem gambling services in the County, up to \$150,000 annually matching appropriations made by the County for such treatment. The City will provide an additional \$150,000 to the County for problem gambling in the first year that the County appropriates funds for the assessment and treatment of problem gamblers.

The Tribe has provided information under 25 C.F.R. § 292.18(f) regarding impact to the traditional cultural connection to the land. In this case, there is no nearby Indian Tribe, as that term is defined under the regulations. Since ground-disturbing activities have the potential to disturb unidentified subsurface cultural resources, the FEIS identified mitigation measures to ensure no adverse effects would result from the Project.<sup>321</sup>

The Tribe has submitted the required information under 25 C.F.R. § 292.18(g) regarding other information that may provide a basis for a determination that the Project would or would not be detrimental to the surrounding community. The Tribe has entered into cooperative agreements with governments of the surrounding community regarding jurisdiction, taxation, services, and mitigation. These agreements demonstrate mutual cooperation that should result in an orderly and well-planned development in a manner that protects the health and safety of nearby residents while providing for infrastructure improvements and maintenance.

Based on the application and the supporting documents submitted by the Tribe, the FEIS, the consultation process, submissions by Milwaukee government representatives and the entire record before us, we conclude that gaming at the Site will not be detrimental to the surrounding

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<sup>321</sup> FEIS at § 5.2.6 (OIG Attachment 18).



community. In this instance, Dairyland Greyhound Park, a dog racing track, which included gambling in the form of pari-mutuel betting, operated at the Site through 2009. Potential adverse impacts identified by the FEIS will be mitigated as described in the FEIS. The Tribe has entered into an IGA to mitigate social, infrastructure, community character and land use patterns of the surrounding community. The opening of the casino will positively impact the economic development, income, and employment of the area. The Tribe has identified a source of revenue to mitigate other impacts, including the cost of treatment programs for problem gambling.

#### D. Consultation

**Section 292.19 states that in conducting the consultation process:**

- a. *The Regional director will send a letter that meets the requirements in section 292.20 and that solicits comments within a 60-day period from: (1) Appropriate State and local officials; and (2) Officials of nearby Indian tribes.*

The Regional Director sent 180 Consultation Notices to the State and local officials within a 25-mile radius of the Site, as required by this subsection, between November 4 and 15, 2011.<sup>322</sup> Of the responses received by the BIA, many local jurisdictions support the project,<sup>323</sup> or voice no objections.<sup>324</sup> Several commenters voiced their objections to the Kenosha Project.<sup>325</sup> The Tribe

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<sup>322</sup> See Binder BIA Generated Document for the 25 CFR 292, Section 20 Determination. The Regional Director identified 139 state and local officials who qualified for notice under Section 292.19 (OIG Attachment 19). During the notice period, additional copies of the Notice were sent to several local governments and officials, resulting in 180 notices total being mailed. Of the 139 identified officials, 19 responded. Of those who responded, eight supported the Project, four voiced no concern, and seven opposed the Project. Of those who objected, only four were considered. Lake County and Milwaukee County responded after the comment period had run and were therefore not considered. Forest County Potawatomi Community's (FCPC) opposition was considered to the extent it was relevant to the City of Milwaukee's comments. FCPC's Potawatomi Bingo Casino gaming facility is located beyond the 25-mile comment range and FCPC did not petition to be treated as a nearby Indian Tribe so their comments cannot be considered as an objection. See Menominee Project Consultation Notices—Responses (OIG Attachment 20).

<sup>323</sup> See, e.g., response from Village of Waterford, Wisconsin, dated November 30, 2011 (Unanimous vote of the Village Board in support of the development and no additional comments with respect to the Kenosha Project); response from Eagle Lake District, Kansasville, Wisconsin, dated December 3, 2011 ("The proposed site is not within the watershed of Eagle Lake, so the development has no environmental impact on the run-off or any other water source for this lake. Further, it is our opinion, that the development would have a positive impact on the greater surrounding community and on the Menominee Indian Tribe. It will provide an economic boost for the Menominee Indian Tribe and all the surrounding communities in Southeastern Wisconsin."); response from Village of Rochester, Wisconsin, dated January 4, 2012 ("The Village of Rochester Board indicated no objection to locating the facility as proposed and supports its construction as they believe it will create much needed jobs to help benefit the surrounding area.") BIA Generated Documents Binder III, Tab 4, and Tab 5 (OIG Attachment 20).

<sup>324</sup> See e.g., response from Village of Third Lake, Illinois, dated November 3, 2011 ("The proposed destination of the Dairy/and Greyhound Park site ... seems to be an ideal spot for the Tribe to develop their facility... The Village of Third Lake has no objection to the development of this land or the use for which it is being developed."); response from Town of East Troy, Wisconsin, dated December 13, 2011 ("...the Town had no opinion."); response from Walworth County, Wisconsin, dated December 27, 2011 ("...the committee did not have any concerns relative to land use or public safety.") BIA Generated Documents Binder III, Tab 5 (OIG Attachment 20).



also provided supporting tribal resolutions from Bad River Band of Lake Superior Chippewa Indians, Lac du Flambeau Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewa Indians, and Stockbridge-Munsee Community.<sup>326</sup> Some comments were received after the close of the regulatory comment period, and the Regional Director did not consider them.<sup>327</sup>

### *Milwaukee*

The City of Milwaukee provided comments on the Project's potential adverse impacts to its community on April 19, 2012.<sup>328</sup> Milwaukee's comments focused primarily on the potential economic harm to Milwaukee resulting from the Project cannibalizing the Potawatomi Bingo Casino's (PBC) market.<sup>329</sup> Milwaukee's economists estimate that the Project would result in a

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<sup>325</sup> See e.g., response from City of North Chicago, Illinois, dated November 29, 2011 ("The City of North Chicago objects to any gaming licenses for the Menominee Indian Tribe in Kenosha County. There is already a gaming facility operating in Milwaukee, which is less than 30 miles away from the site in Kenosha, and there are a total of 20 gaming licenses in Wisconsin ... there is no need for another gaming license in Kenosha. Wisconsin and those who wish to gamble can travel to Milwaukee. I would strongly urge the Department of the Interior to reduce the number of gaming licenses available as the increased competition among gaming facilities will only impact all such facilities.") BIA Generated Documents Binder III, Tab 5 (OIG Attachment 20).

<sup>326</sup> See BIA Generated Documents Binder III, Tab 2. (OIG Attachment 20).

<sup>327</sup> On April 30, 2012, the Chairman of the Lake County Board, Illinois, requested that BIA consult with them. BIA responded to their request by letter date May 30, 2012, informing them that BIA issued the Consultation Requests on November 11, 2012, and, BIA did not receive a response in the established timeframe. On April 30, 2012, the Regional Director responded to the Milwaukee County's letter dated March 28, 2012, requesting to participate in the Consultation Notice process. In our response, BIA explained that they sent two (2) Consultation Notices to the Milwaukee County, and received signed returned receipt cards for both of the Consultation Notices, and that, based on the record, the comment time period for Milwaukee County has expired. On June 18, 2012, Milwaukee County provided comments, BIA Generated Binder Vol. III, Tab 6. BIA shared the comments with the Menominee Tribe and they responded to the comments by letter dated June 26, 2012. BIA Generated Binder Vol. III Tab 6 (OIG Attachment 20).

<sup>328</sup> The Mayor of Milwaukee submitted a written request to the Regional Director on January 27, 2012, requesting that it be consulted as a nearby government. Initially, the Regional Office thought that the City of Milwaukee was outside of the 25-mile radius required by section 292.19. After receiving the Jan. 27, 2012 letter, it was found that the edge of the Milwaukee city border is within the 25-mile radius. The Regional Director sent a Consultation Notice to the City of Milwaukee (Milwaukee) on February 21, 2012. BIA Generated Binder III, Tab 9 (OIG Attachment 20).

<sup>329</sup> Milwaukee's comments were presented under the following subject headings: 1) The Potawatomi Casino Provides Direct Benefits to Milwaukee's Residents and Economy; 2) The Market for Gaming in Southeastern Wisconsin is Currently Near Saturation; 3) Economic Models of the Proposed Casino Show a Large Negative Impact on Milwaukee's Economy; 4) Milwaukee's Social Structure, Services, Housing and Community Character will all be Negatively Impacted by Reduced Revenue at the Potawatomi Casino; 5) Summary of Anticipated Negative Impacts on the City of Milwaukee due to the Proposed Casino: Loss of high paying jobs at Potawatomi; Delay or reduced success of the Potawatomi Hotel project; Loss of compact revenue for the City of Milwaukee; Loss of Compact revenue for the Milwaukee County; Reduced Charitable donations, and, opportunity costs of future expansion in jobs, compact revenue and charitable donations. City of Milwaukee's Response to Consultation Notice, dated April 19, 2012. BIA Generated Documents Binder III, Tab 9. (OIG Attachment 20).



30-40 percent reduction in revenues at PBC.<sup>330</sup> Milwaukee's comments included references to market cannibalism in other gaming markets but did not include a full market analysis or explanation of their methodology. Milwaukee estimates that this reduction in revenue will result in significant detrimental impacts to it.<sup>331</sup> These include a loss of approximately \$1.6-\$2.2 million in revenue sharing payments and a loss of local jobs including construction, hospitality, and casino, and other indirect jobs stemming from PBC.<sup>332</sup> Milwaukee notes that many of these employees are members of minority groups. An additional concern that Milwaukee raised is the Project's local hiring preference would put Milwaukee residents at a disadvantage when seeking employment.

The Regional Director notified the Forest County Potawatomi Community (FCPC) of Milwaukee's assertions of likely detriment and sought the input of the FCPC regarding whether the Project would be "detrimental to the Milwaukee community and its economy."<sup>333</sup> In that letter, the Regional Director sought specific "findings and supporting data" from FCPC on possible detrimental impacts to local communities. The FCPC responded with information supporting the comments of Milwaukee.<sup>334</sup> Included in the FCPC submission were several documents that analyzed the gaming market and provided revenue projections for the Kenosha Project as well as the projected detrimental impact to Milwaukee and the County of Milwaukee. The FCPC's remaining comments are not relevant to the question of detriment to Milwaukee.<sup>335</sup> The FCPC presented a market analysis that focused on the impacts the Project would have on PBC.<sup>336</sup> This market analysis estimated that the Project would cannibalize about 20 percent of PBC's revenues.<sup>337</sup>

The Regional Director sent copies of Milwaukee County, Milwaukee, and FCPC comments to the Menominee Tribe.<sup>338</sup> The Menominee Tribe responded to FCPC's market analysis and

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<sup>330</sup> City of Milwaukee's Response to Consultation Notice, dated April 19, 2012. BIA Generated Documents Binder III, Tab 9, at 3 (OIG Attachment 20).

<sup>331</sup> We note that the City of Milwaukee's authorized expenditures for its 2012 budget totals \$1,422,818,236; *See also* 2013 Proposed Plan and Executive Budget Summary, City of Milwaukee at 7 (detailing total budget expenditure authority of \$1.422 billion, available at <http://city.milwaukee.gov/2013proposedbook.pdf>). The potential direct revenue loss to the City of Milwaukee equals approximately 0.0015 percent.

<sup>332</sup> City of Milwaukee's Response to Consultation Notice, dated April 19, 2012. BIA Generated Documents Binder III, Tab 9 (OIG Attachment 20).

<sup>333</sup> Consultation Notice to Forest County Potawatomi, dated April 27, 2012, BIA Generated Documents Binder III, Tab 8 (OIG Attachment 20).

<sup>334</sup> *See* Forest County Potawatomi Community, Initial Response to April 27, 2012 Notice of (Gaming) Land Acquisition Application for Proposed Off-Reservation Gaming Application for Kenosha, Wisconsin, July 30, 2012, (hereinafter FCPC Initial Response) (OIG Attachment 21).

<sup>335</sup> The FCPC submitted a 68-page letter and 53 exhibits. Pages 37 through 43 of the letter discuss impacts to surrounding communities under 25 CFR § 292.3. The remaining pages of the letter address historical connection and likely economic impacts to FCPC's casino, government and members.

<sup>336</sup> FCPC Initial Response, Exhibit 6.

<sup>337</sup> *Id.* at 54.

<sup>338</sup> BIA shared the comments with the Menominee Tribe and they responded to the comments by letter dated June 26, 2012. BIA Generated Binder Vol. III Tab 6.



revenue projections by having KlasRobison evaluate them and provide a rebuttal.<sup>339</sup>

KlasRobison projects the Project will have an impact on PBC, however KlasRobison projects this negative impact to be a reduction in revenue of about 8-12 percent and involve a 2 year recovery period.<sup>340</sup> Finally, KlasRobison asserts that the Project will have a net positive impact on the Kenosha area economy including Milwaukee as it will result in higher employment and overall economic activity.<sup>341</sup>

We note that Milwaukee's comments stated that it would be harmed as a result of decreased revenue at PBC. The Menominee Tribe's submissions, along with the submissions of Milwaukee and FCPC, indicate a range of revenue loss from 8-40 percent. Milwaukee's assertions are based in part on a market analysis that was not submitted for our review. Additionally, we were unable to determine the methodology by which they reached their conclusions. Therefore, we are unable to credit their assertions of a 40 percent reduction in revenue. FCPC and its market analysis assert a maximum of a 20 percent reduction in revenue as a result of the Project. KlasRobison's rebuttal challenged FCPC's methodology and data collection. These conflicting economic analyses establish a plausible range of revenue reduction at between 8-20 percent. This impact will likely stabilize within a few years.

This lost revenue at PBC may result in some short-term job loss and, considering PBC's employee diversity, it may result in minority job loss. The Project has a minority preference in place that will mitigate adverse employment impacts, especially on Milwaukee's minority workforce. We must also note that IGRA does not guarantee existing tribal gaming operations protection from tribal competition.<sup>342</sup> Milwaukee will face some indirect detrimental economic impacts as the result of PBC facing new competition; however, it will be relatively minor and short term.

#### *Forest County Potawatomi Community (FCPC)*

The FCPC has sought to participate through consultation and later as an impacted Indian tribe throughout Menominee's gaming application process.<sup>343</sup> However, because FCPC has not petitioned to be treated as a nearby Indian tribe under 25 C.F.R § 292.2, they are not treated as such. The FCPC's comments and economic analysis are addressed in the Milwaukee section

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<sup>339</sup> KlasRobison Rebuttal of FCPC (OIG Attachment 1.2).

<sup>340</sup> *Id.* at 27 (OIG Attachment 1.2). A recovery period is the time required for a business or the economy to adjust to new competition. At the end of the recovery period, it is assumed that the market will have stabilized and competitors will have established plans to recover lost business while attracting new customers. This is an important aspect of an overall impact analysis because it describes the behaviors observed between competitors when responding to shocks to their market, like a new competitor, and accurately models recovery and the new market balance.

<sup>341</sup> KlasRobison Rebuttal of FCPC at 28 (OIG Attachment 1.2).

<sup>342</sup> *See Sokaogan Chippewa Community v. Babbit*, 214 F.3d 941 (7<sup>th</sup> Cir. 2000) (in dicta, the Court states "Although the IGRA requires the Secretary to consider the economic impact of proposed gaming facilities on the surrounding communities, it is hard to find anything in that provision that suggests an affirmative right for nearby tribes to be free from economic competition.")

<sup>343</sup> FCPC Initial Response (OIG Attachment 21).



above. However, FCPC's interest in seeking to protect its existing Potawatomi Bingo Casino (PBC) in Milwaukee from competition by another Indian tribe warrants special attention.

The FCPC has approximately 1,400 Tribal members, of whom 531 live on the FCPC Reservation.<sup>344</sup> The FCPC received a positive two part determination in 1990 that allowed it to open the Potawatomi Bingo Casino in Milwaukee, Wisconsin, approximately 216 miles from the FCPC's government headquarters.<sup>345</sup> The FCPC's two-part determination has resulted in substantial benefits to the Tribe and has been so successful that in 2011, the PBC funded over 84 percent of FCPC's government.<sup>346</sup> The FCPC uses its gaming revenues to fund government services and per capita payments.<sup>347</sup> The FCPC's success shows that Indian gaming can be a powerful economic engine for Tribes and tribal members.<sup>348</sup>

The FCPC has sought active participation in the Menominee gaming application process. We have received correspondence from FCPC, including their Initial Response to the April 27, 2012 Notice of (Gaming) Land Acquisition Application for Proposed Off-Reservation Gaming Application for Kenosha and have met with FCPC. The FCPC has expended effort and resources during this process, including meetings with the Department, correspondence sent to the Department on behalf of FCPC from Congressional representatives and officials of local governments, *e.g.*, the County and City of Milwaukee.

The FCPC sought consultation on the Project in a letter dated July 18, 2011, wherein it requested consultation regarding the impact of the Department's withdrawal of its January 7, 2009, decision that denied the Menominee's application.<sup>349</sup> The FCPC then submitted a letter to the Assistant Secretary dated October 25, 2011, seeking information about the administrative process the Department would follow in implementing the 2011 Settlement Agreement between the United States and the Menominee Tribe.<sup>350</sup> The FCPC's request resulted in a meeting with the Office of Indian Gaming on May 12, 2012, wherein the Office of Indian gaming explained the process that would be followed in implementing the Settlement Agreement with the Menominee Tribe.<sup>351</sup>

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<sup>344</sup> Forest County Potawatomi Community, Tribal Statistics dated Jan, 2013, available at <http://witribes.wi.gov/docview.asp?docid=19077&locid=57>, BIA Generated Documents Binder IV, Tab 12.

<sup>345</sup> FCPC Distance Map, BIA Generated Documents Binder IV, Tab 11.

<sup>346</sup> FCPC Initial Response at 22-23.

<sup>347</sup> *Id.* at 44.

<sup>348</sup> We note that the when the FCPC received a positive two-part determination and the Wisconsin Governor's concurrence, the process was not fully developed. Consequently, the Menominee Tribe has been required to engage in a much more rigorous review process than FCPC, including completing an EIS and submitting numerous updates to its application.

<sup>349</sup> See Letter from FCPC to Regional Director (June 18, 2012), BIA Generated Documents, Binder III, Tab 8, at 2. At the time, the Department and the Menominee Tribe were engaged in litigation and the Department responded to FCPC that its policy is to not discuss items that are subject to ongoing litigation. (OIG Attachment 21).

<sup>350</sup> Letter from FCPC to Regional Director, dated June 18, 2012 at 2-3 (OIG Attachment 21).

<sup>351</sup> *Id.* at 3. (OIG Attachment 21).



In a June 18, 2012 letter to the Regional Director, FCPC stated that it had renewed its request to consult with the Department and the BIA on the Menominee Application.<sup>352</sup> The FCPC stated that it was anxious to participate in “meaningful consultation” with the Regional Office, and that its view of meaningful consultation allows FCPC an opportunity to submit comments.<sup>353</sup> The FCPC further stated that meaningful consultation requires that BIA share its views on applicable Departmental policies and all relevant information from the Menominee application.<sup>354</sup> The FCPC stated its belief that BIA merely providing an opportunity for FCPC to submit written comments was not meaningful consultation.<sup>355</sup>

This correspondence from FCPC does not constitute a petition for consultation, as permitted by 25 C.F.R. § 292.3.<sup>356</sup> The FCPC did not argue or establish that its “governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.”<sup>357</sup> The FCPC gaming operation is located 33 miles from the Kenosha Project site. Because FCPC is not within the regulatory 25 mile radius, and because it did not submit a petition for treatment as a nearby Indian Tribe as required under 25 C.F.R. § 292.3, we have not treated FCPC as a nearby Indian tribe. Nevertheless, we have not ignored the FCPC and have carefully considered their viewed to the extent allowed by the regulations.

We understand that FCPC ultimately wishes to prevent a favorable determination for the Menominee. While disputes between tribes are unfortunate, FCPC’s opposition to a sister tribe is neither immoral nor unexpected. The FCPC is not required to produce a welcome mat for the Menominee as they seek to create competition for the FCPC. Indeed, one could argue that FCPC’s leaders would not be doing their jobs if they did not seek to protect their own market share. The FCPC asserts that the Project is not in the best interest of the Menominee Tribe, in part because of the distance of approximately 162.5 miles from the Menominee’s government

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<sup>352</sup> We note that the FCPC’s reference to “meaningful consultation” tracks the language in Executive Order 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000). The Department has issued guidelines for implementing the consultation process. See Department of the Interior Policy on Consultation with Indian Tribes, available at <http://www.bia.gov/WhoWeAre/AS-IA/Consultation/Templates/index.html>. In the policy guidance, the Department states that the Bureau or Office may host tribal officials in a single meeting to discuss a departmental action with Tribal implications under consideration and that single meetings are particularly appropriate for local or regional issues, or a tribe-specific issue. In this instance, though the FCPC is outside the 25 mile radius in the regulations and did not petition for treatment as a nearby Indian Tribe, the Department nevertheless met with the Tribe on May 12, 2012, and explained the process that would be followed under 25 C.F.R. Part 292 and provided notice to FCPC of the application filed by the Menominee Tribe. The Assistant Secretary – Indian Affairs also met with representatives of FCPC on this matter.

<sup>353</sup> Letter from FCPC to Regional Director (June 18, 2012) (OIG Attachment 21).

<sup>354</sup> See *Id.* at 2 (OIG Attachment 21).

<sup>355</sup> Letter from FCPC to Regional Director (June 18, 2012) (OIG Attachment 21).

<sup>356</sup> See Midwest Regional Director letter to Chairman of the Forest County Potawatomi Community (Apr. 27, 2012), BIA Generated Documents Binder III, Tab 8 (OIG Attachment 21).

<sup>357</sup> 25 C.F.R § 292.18.



headquarters to the Site.<sup>358</sup> We have considered this distance issue as part of our regular analysis and we do not find FCPC's claim compelling for reasons we have stated.

The FCPC also asserts that the competitive impact of the Project will undermine the PBC's profitability, which will have a detrimental impact on FCPC's services, including its per capita payments to its members.<sup>359</sup> FCPC's ability to provide per capita payments to its members is evidence that the Tribe's gaming operation in Milwaukee has been very successful. In order for an Indian Tribe to distribute gaming revenues to its members, it must first have a revenue allocation plan approved pursuant to 25 C.F.R. Part 290.

A revenue allocation plan requires the Tribe to ensure that, before per capita payments are made, there are adequate financial reserves to fund tribal government operations or programs and for promoting tribal economic development.<sup>360</sup> In this case, the FCPC has long has an approved revenue allocation plan, demonstrating that it has adequate governmental resources for its people. Moreover, any money reserved for per capita distribution would have to be exhausted before there is any effect on tribal government operations or programs and the FCPC's ability to engage in economic development.

While the job of FCPC leadership is to care for the Potawatomi people, including arguably maximizing their per capita payments, our responsibility is broader. Faced with the decision as to whether to protect to the fullest extent possible the Potawatomi per capita payments, or instead to give Menominee a real opportunity to pull itself out of significant poverty, we must choose the latter. The potential market impacts on PBC are reviewed above, under the City of Milwaukee's comments. We are well aware of the potential for competition that a Menominee casino in Kenosha could bring to FCPC's casino operation. We are confident that the FCPC will continue to be successful and that they can weather the limited competition that they will face from the Menominee.

Moreover, the Menominee Tribe has presented a compelling case for a positive two-part determination because of the significant historical complications it seeks to overcome, including the effects of termination. The Menominee Tribe has also presented evidence that the overall impact on the FCPC's casino will not be so significant that it will affect the FCPC's ability to operate its government or provide services to its tribal members.

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<sup>358</sup> Distance Map (OIG Attachment 11). FCPC's PBC site, which includes seven acres of trust land, is 217 driving miles from FCPC's government Headquarters, about 28 driving miles further and about 50 straight-line miles farther than the Site is from Menominee's government headquarters.

<sup>359</sup> FCPC Initial Response at 44 (OIG Attachment 21).

<sup>360</sup> 25 C.F.R. § 290.12.



### III. Conclusion

We have completed our review of the Tribe's application under 25 U.S.C. § 2719(b)(1)(A), including all documents in the record. Though not all documents considered are referenced in this decision, they have nevertheless been considered.

For the reasons discussed above, we have determined that gaming on the Site would be in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community.

We request that you concur in this determination, pursuant to 25 U.S.C. § 2719(b)(1)(A). Under the Department's regulations at 25 C.F.R. Part 292, you have one year from the date of this letter to concur in our determination. You or the Tribe may request an extension of up to 180 days.

Should you decide not to concur in our determination, the Tribe may not proceed with its request for the acquisition of the land in trust on its behalf for off-reservation gaming. Should you concur in our determination, we will proceed with the final review of the Tribe's application to acquire the Site in trust on its behalf. The Tribe may use the Site for gaming purposes only after it has been accepted into trust.

This letter and its enclosures contain commercial and financial information that is protected from release under exemption 4 of the Freedom of Information Act (FOIA). Due to the sensitive nature of this information, it is the Department's practice to withhold it from the public under FOIA, and to contact the Tribe if a member of the public requests it. We respectfully request that the State of Wisconsin take appropriate steps to provide similar protections to the commercial interests of the Tribe by referring any FOIA requests to the Department.

We have included copies of the record for your review and consideration. We thank you for your consideration of this important matter.



**Menominee Indian Tribe of Wisconsin  
Section 20 Determination  
Attachment List**

**1. KlasRobinson Rebuttal of FCPC**

**Tab:1 KlasRobinson Final Report**

KlasRobinson Q.E.D., *Planned Kenosha Casino Resort, Kenosha, Wisconsin Feasibility Study*, prepared for Menominee Kenosha Gaming Authority, dated Feb. 12, 2012. This provided an update to the PricewaterhouseCoopers analysis.

**Tab:2 KlasRobinson Rebuttal of FCPC**

KlasRobinson Q.E.D., *Analysis of Hospitality and Gaming Solutions July 2012, Market Demand Analyses for a Proposed Kenosha Casino & Impact Analyses of the Proposed Kenosha Casino*, prepared for Menominee Kenosha Gaming Authority, dated March 26, 2013

**2. 2009 Denial Letter**

Letter from George T. Skibine, Acting Deputy Assistant Secretary, Indian Affairs, to Lisa Waukau, Chairperson, Menominee Indian Tribe of Wisconsin, regarding the Secretary of Interior's decision to decline to take Dairyland Greyhound Park into trust for the purpose of operating a Class III gaming facility under IGRA (Jan. 7, 2009).

**Tab:1 Final Settlement Agreement**

Final Settlement Agreement between the Menominee Indian Tribe and the U.S. Department of the Interior, signed Aug. 16, 2011.

**3. 2008 Updates**

**Tab:1 Kenosha Report**

The Menominee Indian Tribe of Wisconsin, *Impact of Kenosha on the Menominee Reservation*, prepared for the BIA, dated July 2008. This is a response to the May 14, 2008 request for further information and provides a detailed ten-year plan for how the Kenosha revenues would be allocated.

**Tab:2 Ten Year Budget Resolution**

Approval of Ten Year Budget Plan for Kenosha Revenue, Resolution No. 08-34, adopted by the Menominee Tribal Legislature July 29, 2008.

**Tab:3 2008 Update Letter**

Letter from Lisa Waukau, Chairperson Menominee Indian Tribe, to George Skibine, Acting Deputy Assistant Secretary – Indian Affairs, regarding Response to May 14, 2008 Request for Further Information (July 31, 2008).



#### 4. 2013 Financials

Menominee Kenosha Gaming Authority, *Menominee Kenosha Project, Updated Financial Information*, submitted to the BIA Apr. 15, 2013.

#### 5. 2013 Unmet Needs & Housing Update

**Tab:1** Letter from Craig Corn, Chairman, Menominee Indian Tribe of Wisconsin, to Troy Woodward, Office of Indian Gaming, regarding unmet needs – Menominee Indian Tribe of Wisconsin, with supporting exhibits (June 19, 2013).

**Tab:2** Letter from Lisa Waukau, Vice-Chairperson & Housing Committee Chair, Menominee Indian Tribe of Wisconsin, to Troy Woodward, Office of Indian Gaming, regarding Housing Unmet Needs – Menominee Indian Tribe of Wisconsin, with supporting exhibits (June 25, 2013).

#### 6. Menominee History

**Tab:1 Overview of Menominee History** Historic Territory Menominee, 2012-292 Update, Exhibit M, Tab 1.

**Tab:2 Herzberg** Stephen J. Herzberg, *The Menominee Indians: Termination to Restoration*, American Indian Law Review Vol. 6, No. 1, 143, 148 (1978) BIA Generated Documents Binder IV, Tab 7.

**Tab:3 The Mero Complex** David F. Overstreet, *The Mero Complex and Menominee Tribe: Prospects for Territorial Ethnicity*, Menominee 2012-292, Exhibit “M” Tab 2.

**Tab:4** Maps of the Mero Complex and the historic range of the Menominee, Menominee 2012-292, Exhibit “M” Tabs 3-6.

**Tab:5** *The Traditional Relationship of the Menominee Indian Tribe of Wisconsin to the City of Kenosha and the Southeastern Region of Menominee Country*, by David R.M. Beck, Menominee 2012-292, Exhibit “M” Tab 8.

#### 7. Damages From Termination:

College of Menominee Nation, *Damages From Termination Accrue Into Unmet Needs*, prepared for Menominee Kenosha Gaming Authority, dated Jan 2005, Original Submission Land Into Trust Application Supplemental Report, Vol. II (J-O), Exhibit M, Feb. 2005.

#### 8. Original Submission

**Tab:1 Request for Two-Part Determination:** Menominee Kenosha Gaming Authority, *Section 2, Request for Two Part Determination: Part One and Part Two Questions*, Original Submission, Request to Take Land into Trust, Vol. I, Tab 2.1, July 2004.



**Tab:2 Land into Trust Resolution:** Request to put Land into Trust for Gaming, Resolution No. 04-39, adopted by the Menominee Tribal Legislature July 6, 2004, Original Submission Vol. I, Tab 3, July 2004.

## 9. Menominee Unemployment

### **Tab:1 Menominee County Workforce Profile 2011**

State of Wisconsin, *Menominee County Workforce Profile 2011*, Department of Workforce Development – Office of Economic Development, 2011, available at [http://worknet.wisconsin.gov/worknet\\_info/Downloads/CP/menominee\\_profile.pdf](http://worknet.wisconsin.gov/worknet_info/Downloads/CP/menominee_profile.pdf).

### **Tab:2 Wisconsin DWD August Report**

State of Wisconsin, *Wisconsin Local Employment & Unemployment Estimates Released*, Department of Workforce Development News Release, Sept. 26, 2012, available at [http://dwd.wisconsin.gov/dwd/newsreleases/2012/unemployment/120926\\_august\\_local.pdf](http://dwd.wisconsin.gov/dwd/newsreleases/2012/unemployment/120926_august_local.pdf).

### **Tab:3 Wisconsin County Unemployment Rates (Current)**

State of Wisconsin, *Wisconsin County Unemployment Rates April 2013*, Department of Workforce Development, May 22, 2013, available at [http://worknet.wisconsin.gov/worknet/worknetinfo.aspx?htm=map\\_uRatesCo&menuselection=gp](http://worknet.wisconsin.gov/worknet/worknetinfo.aspx?htm=map_uRatesCo&menuselection=gp).

## 10. Menominee 2012 Updates

**Tab:1 Menominee 2012-292 Update:** Menominee Kenosha Gaming Authority, Menominee 2012-292 Update (Part A), prepared for the BIA.

**Tab:2 Menominee 2012-151 Update:** Menominee Kenosha Gaming Authority, Menominee 2012-151 Update (Part B), prepared for the BIA.

**Tab:3 Menominee 2012 Update:** Menominee Kenosha Gaming Authority, Menominee 2012 Update (Part C), prepared for the BIA.

**11. Distance Map** Distance to Dairyland Greyhound Park Map, 2012-151 Update, Exhibit I.1, *see also* 2012-292 Update, Exhibit B.

## 12. Menominee Ordinances

**Tab:1 Kenosha Trust Land Regulation,** Tribal Ordinance No. 04-44, as amended Feb. 3, 2005, 2012-151 Update, Exhibit E.

**Tab:2 Gaming Code,** Ordinance 93-30 The Menominee Indian Tribe of Wisconsin, *Amendment to Ordinance No. 93-30, Gaming Code*, approved March 23, 1998, Original Submission, Vol. II, Tab 14 C.

## 13. Eleventh Option Agreement



Eleventh Amendment to Option Agreement, March 12, 2013, extension of Option Agreement to purchase Dairyland Greyhound Park.

**14. PricewaterhouseCoopers (PWC) Market Assessment**

PricewaterhouseCoopers LLP, *Market Assessment Executive Summary*, prepared for Kenesah Gaming Development, LLC. dated June 14, 2004. This is a hospitality and leisure market analysis of the regional demand for gaming at the Site.

**15. Menominee Population Map Menominee 2012-151 Update, Exhibit V.**

**16. Intergovernmental Agreement**

Intergovernmental Agreement between Menominee Indian Tribe, Menominee Kenosha Gaming Authority, City of Kenosha and County of Kenosha, Resolution No. 04-62, adopted by the Menominee Tribal Legislature Feb. 17, 2005 and signed by the City of Kenosha, the County of Kenosha, The Menominee Indian Tribe of Wisconsin, and the Menominee Kenosha Gaming Authority March 28, 2005.

**Tab:1 2013 IGA Extension Agreement** 2013 Intergovernmental Agreement Extension Agreement, signed March 27, 2013, BIA Generated Documents Binder I, Tab 2.

**Tab:2 Kenosha County IGA Letter** from Mark Molinaro, Jr., County Board Chairman, Kenosha County to Diane Rosen, Midwest Regional Director, BIA, regarding Kenosha County's support for the Proposed Menominee Indian Tribe of Wisconsin's Off-Reservation Casino (March 8, 2012), BIA Generated Documents Binder I, Tab 2.

**17. Trust Management Agreement**

Trust and Management Agreement Between The Menominee Indian Tribe of Wisconsin and the Secretary of The Interior, dated April 22, 1975, BIA Generated Documents Binder I, Tab 5.

**18. FEIS** This is a separate ring-bound document.

Final Environmental Impact Statement, Menominee Casino-Hotel, 223-Acre Fee-to-Trust Transfer and Casino Project, dated April 2012. Included as a CD labeled {**FEIS Menominee Casino-Hotel 223-Acre Fee-to-Trust Transfer and Casino Project, April 2012**}

**19. Table of Consultation Notice Responses**

**20. Consultation Notice Response Letters**

**21. Consultation Notice Response From Forest County Potawatomi Community**

**22. Record of Decision**

Secretarial Determination Pursuant to the Indian Gaming Regulatory Act for the 223-acre Dairyland Greyhound Park Site in Kenosha County, Wisconsin, for the Menominee Indian Tribe of Wisconsin, dated August 2013.