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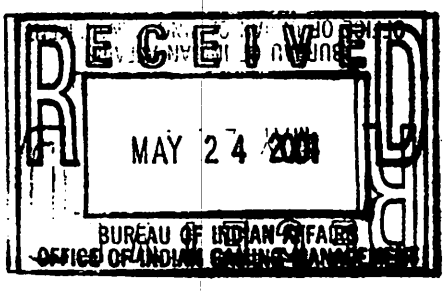
SCOTT McCALLUM

Governor
State of Wisconsin

May 14, 2001



James H. McDivitt
Deputy Assistant Secretary-Indian Affairs
United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Dear Mr. McDivitt:

I am in receipt of your February 20, 2001, correspondence to me in which you inquire whether I concur, pursuant to Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719, in your determination that approval of the application of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, Red Cliff Band of Lake Superior Chippewas, and Sokaogon Chippewa Community (Tribes) to take a 55.82 acre parcel of land located in Hudson, Wisconsin, into trust for purposes of conducting Class III gaming is in the best interests of the Tribes and not detrimental to the surrounding community. By this letter I provide notice I do not concur in this determination.

The role of the Governor is prescribed in Section 20 of the IGRA, which allows Class III gaming on certain off-reservation land only if:

> "...the Secretary [of the Department of the Interior]...determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian Tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination...." 25 U.S.C. 2719(b)(1).

The federal and State decisions regarding the determinations required by Section 20 of the IGRA are distinct for a number of reasons. First, this request for concurrence is unprecedented because the administrative record on which the Department's decision (federal determinations required by Section 20 will be referred to as those of the Department) is based is that which existed on July 14, 1995, except for certain information related to compliance with the National Environmental Policy Act (NEPA), and materials related to a hazardous substances survey and arrangements between the Tribes and proposed management contractor. This extraordinary situation was created by a settlement agreement in a lawsuit in the United States District Court for the Western District of Wisconsin challenging the previous decision of the Secretary to deny the Tribe's application. See Appendix A to Stipulation and Order for Dismissal (Settlement Agreement), Sokaogon Chippewa Community, et al., v. Babbitt, et al., #95-C-0659-C (W.D. Wis.), paragraph 8.b. I am not bound by such an artificial restriction in my deliberations.

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In establishing separate federal and state approvals, Congress recognized that federal and state concerns and interests relative to an off-reservation gaming application would be different, and established a requirement that both must be satisfied before gaming could occur. The Department acts according to federal criteria, duties and responsibilities, many of which are unique to the federal government. For example, as acknowledged in paragraph 7 of the Settlement Agreement, the Secretary has a trust responsibility relative to Tribes, including the applicants. A Governor, in exercising discretion whether to concur, acts as a state official under state authority to protect state and local concerns and interests. See Confederated Tribes of Siletz Indians of Oregon v. U.S., et al., 110 F.3d 688, 693 (9th Cir. 1997).

The determinations required under Section 20 of the IGRA provide a Governor substantial discretion and encompass a multiplicity of factors, circumstances, and public policy considerations which a Governor must analyze and weigh in the exercise of his or her independent judgement. Therefore, a Governor, to fulfill the duties and responsibilities of that office, must consider numerous facts and circumstances which may not be considered by, or be important to, the Secretary in making the determinations required by Section 20 of the IGRA. One such area is the public policy of the State of Wisconsin regarding the casino gaming industry, particularly as applied to off-reservation casinos.

Originally, this State's policy towards gambling was one of complete prohibition. The Wisconsin Constitution, as adopted in 1848, provided in Article IV., Section 24, that the Legislature "...shall never authorize any lottery....", which was interpreted by the courts as a strong statement of public policy against any activity involving the elements of prize, consideration and chance. State ex rel. Trampe v. Multerer, 289 N.W. 600, 603 (Wis. Sup. Ct. 1940).

Since that time, this complete prohibition has been amended to allow certain charitable organizations to conduct bingo and raffles, the State to operate a lottery, and to allow on-track pari-mutuel wagering. These changes in public policy were accomplished by first amending the Wisconsin Constitution. This process required each change to obtain explicit legislative authorization and the consent of the citizenry through a referendum.

These changes were also limited in scope. Bingo and raffles were limited to certain classes of charitable public service organizations. Pari-mutuel wagering was limited so that it could occur only on the grounds of a licensed racetrack. The Wisconsin Lottery may operate only games involving the matching chosen numbers against numbers randomly drawn, or instant ticket games involving preprinted numbers or symbols.

The only form of gambling currently allowed in Wisconsin which has been subject to neither explicit legislative authorization nor public referendum is casino gambling operated by Wisconsin Tribes pursuant to the IGRA. This anomalous development resulted from a decision of the United States District Court for the Western District of Wisconsin, which held that when the Constitution was amended to authorize a lottery, with no limiting definition on what was meant by that term, lottery would be construed to mean any game involving prize, chance and consideration. Consequently, because the authorization to conduct a "lottery" was sufficiently broad to include casino type games, even though no Wisconsin citizens were authorized to conduct such games, the IGRA required the State to negotiate casino gaming with the State's 11 Tribes. See Lac du Flambeau Band of Lake Superior Chippewa Indians, et al. v. Wisconsin, et al., 770 F.Supp. 480, 485-487 (W.D. Wis. 1991).

The concern regarding the extent to which the Constitutional amendment authorizing the State Lottery actually altered the public policy towards gambling by allowing casino games was initially addressed at a 1992 special session of the Wisconsin Legislature, which resulted in the enactment of 1991 Wisconsin Act 321, effective January 1, 1993. This act specifically exempted casino style games from the definition of lottery authorized by the Wisconsin Statutes, and made clear such games were not authorized by these provisions of Wisconsin law, but did provide that the provisions of any Indian gaming Compact entered into prior to January 1, 1993 would not be affected. s. 565.01(6m), Stats.

The process to amend the Wisconsin Constitution to reflect these same restrictions was also begun during the special session, culminating in an April 6, 1993, statewide referendum regarding the Constitutional amendment. The question presented to the voters read: "Gambling expansion prohibited. Shall article IV of the constitution be revised to clarify that all forms of gambling are prohibited except bingo, raffles, pari-mutuel on track betting and the current state-run lottery and to assure that the state will not conduct prohibited forms of gambling as part of the state-run lottery?" The questioned was approved by a vote of 1,075,386 to 435,180. The result is reflected in Article IV., Section 24 (6) of the Wisconsin Constitution, which specifically prohibits the State from authorizing casino style gambling.

The public policy of Wisconsin towards gaming may be characterized as allowing limited exceptions to the general prohibition against gambling after legislative authorization and ratification by the voters pursuant to the established procedures for constitutional amendment. The exception to this characterization is casino gaming, which came about as a result of the interaction of federal law and a broad judicial interpretation of Wisconsin law, not by an affirmative action of Wisconsin policy-makers to authorize casino games.

When faced with the proposition that Wisconsin law allowed casino gaming, the Legislature, Governor and citizens acted promptly to make clear that Wisconsin public policy did not authorize, and in fact prohibited, casino gambling. A statutory exception was carved out for casino gaming operated under gaming compacts then in effect.

At that time, as now, gaming conducted pursuant to those Compacts was generally limited to Indian lands within Tribal reservations.[1] While Tribal governments possessed the right to conduct casino games which were denied to non-Tribal entities, casino siting was limited to those geographical areas reserved for the occupation of Tribal members and over which the Tribal government exercised the attributes of sovereignty reserved to it.

This decision involves novel implications regarding the State's policy towards gaming because it would authorize a new casino at an off-reservation site.[2] The proposed casino site was chosen not in relation to the geographical boundaries which define

[1] The Ho-Chunk Nation is the only Tribe within this State without a land base designated as a reservation. The Nation's gaming activities are limited by Compact terms to certain Tribal land within certain enumerated areas.

[2] I am mindful of the fact that Wisconsin has authorized an off-reservation gaming facility of the Forest County Potawatomi Community of Wisconsin in Milwaukee. However, the procedures to acquire that site in trust for gaming purposes pre-dated the effective date of the IGRA. At the time the Governor was called upon to grant his concurrence the decision defining the State's obligation to negotiate regarding casino games was still almost a year away. In addition, no Compacts had been executed and the Indian gaming industry was still in its' infancy. Once those Compacts were executed they provided that gaming off-reservation was not permissible and could occur with Section 20 approval, with its attendant requirement of concurrence of the Governor. Consequently, the decision to concur regarding the Milwaukee facility is not indicative of the State's public policy towards off-reservation gaming facilities.

Tribal dominion, but on the basis of market considerations to maximize revenue to the proprietors, both Tribal and non-Tribal. Undoubtedly, there are many locations in Wisconsin which would support additional gaming facilities of varying size, thus allowing Tribes to realize greater revenues from gaming. Approval of the Tribes' application would set a precedent sanctioning the notion that Tribal governments could behave as if they were simply individual gaming firms, attempting to capture the greatest possible share of the statewide gaming market and choosing from among different statewide sites driven primarily by considerations of profit maximization. This is precisely the type of casino gaming industry the State sought to avoid when it unequivocally rejected casino gambling as a constitutionally permissible activity. The effect of the State's changes to its' public policy regarding gaming should not be to grant the 11 Tribes a monopoly on gaming so that they may develop a state-wide casino gaming industry which has been denied to all others.

Independent of any industry-wide effects, the addition of a single new casino, in this case a large facility intended to serve a major metropolitan market, is detrimental to the public interest. Wisconsin now has 17 separate casinos, a total of 22 separate sites where electronic games of chance are operated, and in excess of 16,000 electronic games of chance in operation statewide. All this is in addition to the State's other forms of legalized gaming. The public interest is simply not served by the addition of a major casino gaming facility to the existing gaming industry.

The proscriptions enacted by the Legislature, Governor and the citizens in our Constitution, and those implemented through statute, are the determinations of our civil society that certain actions operate to the detriment of the public interest, and this detriment affects all individuals, entities and communities. These laws act as both enforceable prohibitions, and as judgements by the State that certain activities so detract from the common good that their pursuit should be abandoned. Pursuant to the unique facts, circumstances and developments which established the legal principles governing Indian gaming, the State agreed to allow the operation of certain games by the Tribes, and the laws do not act as enforceable prohibitions against certain Tribal gaming activities. However, the question before me firmly places Wisconsin at a crossroads, the divergent paths of which lead to far different futures for this State. I cannot ignore the public policy reflected in our laws in making this determination.

In order to concur in the determinations made by the Department, I must be able to conclude that the proposal to construct and operate a new off-reservation casino is consistent with the public policy of the State, which applies equally to all its' local communities and citizens. For the reasons set forth above, approval of the Tribes' application would be in derogation of these interests. Therefore I do not concur with the determination under Section 20 of the IGRA.

Sincerely,

Scott McCallum
Governor