
Informational Memorandum

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PROPOSED INDIAN GAMING FACILITY IN KENOSHA

Summary

The Menominee tribe proposed opening a casino on the site of the former Dairyland Greyhound Park in Kenosha. On January 23, 2015, Governor Scott Walker announced his non-concurrence, thus effectively halting the project. In accordance with federal law, the governor had sole, final authority to approve or reject this proposal. The deadline for the governor's decision had been February 19, 2015. This memorandum discusses the background and other information relevant to the issue, including the decision's effect on a proposal by the Ho-Chunk Tribe to establish an off-reservation casino in Beloit.

State-Tribal Gaming Compacts

States and Indian tribes are required to negotiate compacts for the regulation of gambling on Native American lands by the Federal Indian Gaming Regulatory Act ("IGRA") of 1988 (P.L. 100-497; 25 USCA 2701, *et seq.*). The law provides that tribes may conduct gaming activities on tribal lands if such activities are permitted or not criminally prohibited by the laws of the state. (See: Informational Bulletin 12-2, "The Evolution of Legalized Gambling in Wisconsin") The agreements are to encompass "Class III" gaming, which includes "casino-type" games such as mechanical or electronic versions of slot machines, Blackjack ("21"), poker, roulette, craps, etc., but not activities such as bingo or raffles.

Off-Reservation Casino Gaming Expansion

IGRA generally provides that Class III gaming may not be conducted on trust lands acquired after October 17, 1988, unless the land is contiguous to the boundaries of the reservation or trust lands as they existed on that date. However, subject to final approval by the governor, gaming on newly-acquired

land that is not adjacent to a reservation may be authorized by the U.S. Secretary of the Interior. There is no appeals procedure if the governor withholds consent.

In making a decision regarding an off-reservation casino, the secretary of the interior is directed in s. 2719 (b) (1) (A) of the act to consult with the tribe and appropriate state and local officials, including officials of other nearby Indian tribes, to determine if the establishment "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community."

The Forest County Potawatomi tribe's Milwaukee Casino is one of only a few off-reservation casinos in the nation approved after the enactment of IGRA. While the Potawatomi community's government headquarters is located more than 200 miles from the Milwaukee facility, it is located within a geographic area historically occupied by the tribe.

Project Benefits and Costs

The Kenosha plan included a large casino, a full-service hotel, and associated amenities designed to make it a destination-type resort featuring year-round entertainment and serve as an engine of economic development. The facility would have been managed by the Hard Rock company, which is owned by the Florida-based Seminole tribe. Consultants retained by the Menominee projected that the completed project would annually generate over \$500 million in net revenue from gamblers. In addition to about 1,500 temporary construction jobs, it would have provided approximately 10,600 new, permanent jobs (including more than 3,000 directly employed by the tribe, and increased hiring by contractors and suppliers). The Menominee people are

the overwhelming majority of the residents of Menominee County, which is the poorest county in the state and has the highest rate of unemployment. The tribe assured the Federal Bureau of Indian Affairs (BIA) that revenues would not be distributed as per capita payments to members. Rather, the estimated hundreds of millions in annual proceeds, much of which was expected to come from Illinois residents, would have been used to lift the tribe out of poverty and address social needs by funding governmental operations, including health care and education, and promoting enterprise growth and job training. The tribe had pledged to make payments to nearby local governments to mitigate the infrastructure, social, and economic effects attributed to the project, including problem gambling.

The primary estimated adverse effect of the project was the reduction of other tribes' gaming revenues resulting from the enhanced competition, particularly to the Potawatomi tribe's casino in Milwaukee. The BIA concluded that conflicting economic analyses submitted by the City of Milwaukee and the Potawatomi and Menominee tribes "establish a plausible range of revenue reduction [to the Potawatomi's Milwaukee Casino] at between 8-20 percent." A less certain adverse effect was that the project may have affected the state [see below], city, and county budgets due to reduced payments from the Potawatomi.

Chronology of the Proposed Kenosha Casino

In July 2004, the Menominee Indian tribe of Wisconsin submitted a request to the BIA to acquire in trust the over 200-acre Dairyland Greyhound Park site (at which racing and pari-mutuel wagering operations closed in 2009) in the City of Kenosha, for the purpose of establishing a Class III gaming facility. The BIA Midwest Regional Director recommended approval in December 2007. However, in January 2009, the BIA's Acting Deputy Assistant for Policy and Economic Development disapproved the application for various reasons, including the 160-mile distance from the tribe's reservation. The site is on land historically occupied by the tribe, which asserts that its members are the old-

est continuous inhabitants of the state. In response to a suit the tribe filed in federal court challenging the decision as arbitrary and capricious, the tribe, and United States Department of the Interior reached a settlement agreement in August 2011, which allowed the tribe to resubmit and supplement its application for reconsideration.

The secretary of the interior issued a determination authorizing the Kenosha casino on August 23, 2013. A governor has one year to concur or reject, but as permitted by 25 CFR 292.23 (b), Governor Scott Walker received a 180-day extension, to February 19, 2015, to make a decision. The governor has on a number of occasions discussed the criteria he planned to use in evaluating whether to concur, including, as stated in a March 1, 2013 article in the *Milwaukee Journal Sentinel*, "consensus" among the state's 11 Indian tribes and bands, which he defined as unanimous approval. This same article identifies the Potawatomi and the Ho-Chunk Nation as the only two tribes opposing the Kenosha casino.

The Potawatomi compact provides for determining compensation for revenues lost due to any new gaming facility located within 50 miles of the Milwaukee casino. On January 9, 2015, the BIA rejected a proposed amendment to the Potawatomi's compact that the agency interpreted as making the state ultimately responsible for reimbursing the tribe for any losses incurred at its Milwaukee casino resulting from the operation of a competing casino within the 50-mile radius. Prior to the rejection, an attorney serving as a legal advisor to Governor Walker had submitted a letter to the BIA asserting that the governor does not have the authority to commit state appropriations, which is a legislative power. In its rejection, the BIA stated: "We do not blame (the) Potawatomi for trying to preserve its financial advantage, but we are troubled that the...amendment seeks to guarantee its profits by shifting the costs of any impact to the Menominee...they have now had the benefit of being the only Indian gaming operation in the area for 25 years. But the Potawatomi were not promised an absolute monopoly in

perpetuity” when they were authorized to open an off-reservation casino in Milwaukee.

On January 20, 2015, the state and the Menominee tribe submitted to the BIA a new amendment to the compact under which the tribe promises to make up any deficit in the state budget caused by reductions in payments by other tribes, a real concern as the Potawatomi failed to make its 2014 revenue sharing payment. The Menominee tribe also agreed to annually pay the state 7.5% of its profits. States may not tax tribes, which are semisovereign nations, but compacts provide for annual payments to the state in recognition of the “exclusivity” status that the tribes enjoy in most types of gambling. Higher payments are due from tribes that run more lucrative casinos, which are typically located closer to more populous areas. For example, the Ho-Chunk compact requires the tribe to annually pay to the state 5% of the “net win,” or 5.5% if the net win exceeds \$350 million, and the Potawatomi compact calls for a payment of 6.5% of the net win from its Milwaukee casino.

In a letter to Governor Walker also released on January 20, Department of Administration Secretary Mike Huebsch discussed concerns that even if the BIA approves the amended compact, the state may still remain at risk of being held ultimately responsible for indemnification of Potawatomi losses if one or more current and potential legal challenges by the Potawatomi are successful. The proposed compact only requires the Menominee to compensate the state for any future funds it may be required to pay to the Potawatomi, and does not account for refunds of past payments made by the Potawatomi, which could amount to hundreds of millions of dollars. In addition, a court could declare the Menominee obligation to compensate the state for any losses to the Potawatomi inconsistent with IGRA and thus unenforceable.

On January 22, 2015, the Potawatomi filed suit in federal court in Washington, DC, challenging the rejection of the agreement, based on an incorrect interpretation meaning that the Menominee, rather than the state, would have to primarily cover any shortfall in the

tribe’s revenues resulting from the opening of the proposed Kenosha casino.

Governor Walker on January 23, 2015, announced his nonconcurrence with the Kenosha proposal, thus terminating the project. In a press release, the governor stated his rationale for the decision: “After a comprehensive review of the potential economic impact of the proposed Kenosha casino project, the risk to the state’s taxpayers is too great. Due to the compacts...the current cost to taxpayers of approving the proposed casino is up to \$100 million and the long-term economic hit to the state budget would be a potential loss of hundreds of millions of dollars.”

A substantial report issued by Secretary Huebsch on January 22, contained an in-depth analysis of the issue. While the secretary did not include a recommendation regarding approval or rejection the cover letter to the governor stated: “Although the Kenosha casino could result in these positive economic benefits, approval also comes with substantial and significant risks. Our analysis shows taxpayers could lose out on hundreds of millions of dollars of tribal revenue sharing payments as a result of the compact negotiated by Governor Doyle. Due to the legal exposure created by the...compacts, beyond just losing future revenue, approving the Kenosha Casino could require taxpayers to pay FCPC (Forest County Potawatomi Community) hundreds of millions of dollars in refunds of previous payments made to the state.”

In a January 28 letter, 10 legislators representing Southeastern Wisconsin called on Governor Walker to reconsider his decision on the Kenosha casino application. They pointed out that shortly before the governor’s announcement, the Menominee Tribe and its Hard Rock Casino partners, had agreed to post a bond to protect Wisconsin taxpayers in the event that the state was required to reimburse the Potawatomi for lost revenue or previous payments to the state. Referring to the Potawatomi’s previously mentioned suit in federal court regarding the Bureau of Indian Affairs’ interpretation of compact language, they also noted that the BIA has a record of success in defending lawsuits regarding com-

pact decisions, and even if the Potawatomi were to prevail, the Menominee's bond and indemnity agreements would compensate the state.

Proposed Ho-Chunk Beloit Casino

After the governor's rejection of the Kenosha project, supporters of an off-reservation casino in Beloit to be operated by the Ho-Chunk Nation expressed hope that their project would enjoy increased prospects of coming to fruition. The Ho-Chunk purchased 32 acres of land in the City of Beloit in 2008, and in 2012 submitted an application to the BIA for approval of an off-reservation casino. The Environmental Impact Statement for the project is currently at the BIA office in Washington, DC, and is awaiting approval by that office before being sent back for further processing by the regional BIA office in Minnesota. According to reports by the Associated Press appearing in various state newspapers on January 24 and 25, 2015, officials of the City of Beloit and the Ho-Chunk Nation had been told that the Beloit application was held up in Washington for months "in part related to the Menominee project" in Kenosha, said Beloit City Manager Larry Arft.

The Ho-Chunk tribe had been expected to experience some adverse effects from the competition from the Menominee's Kenosha project, and was one of the two tribes, along with the Potawatomi, opposing the project. The proposed Beloit casino would be located more than 50 miles from the Potawatomi's Milwaukee gaming facility, so would not be subject to the same indemnification limitations which affected the Menominee's Kenosha project.

The Ho-Chunk compact provides for the establishment of a fourth major Class III gaming facility. A proposal to designate as the fourth site the tribe's Class II DeJoep facility in Madison, which primarily offers electronic video versions of bingo, was rejected by Dane County voters in a 2004 referendum. An off-reservation casino in Beloit, which would be sited on land historically occupied by the Ho-Chunk people, would also be subject to final approval or rejection by the governor.

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