



WISCONSIN LEGISLATIVE REFERENCE BUREAU

MEMORANDUM

TO: Senator Van Wanggaard and Senator Bob Wirch
FROM: Legislative Reference Bureau
DATE: October 17, 2022
SUBJECT: Proposed Kenosha casino

Overview

On January 23, 2015, Governor Scott Walker announced his nonconcurrence in the Menominee Indian Tribe of Wisconsin's (Menominee) proposed casino on the site of the former Dairyland Greyhound Park in Kenosha, thus effectively halting the project. In accordance with federal law, the governor had sole, final authority to approve or reject this proposal. Per your request, this memorandum summarizes this 2015 nonconcurrence and discusses the Menominee's recently relaunched efforts to open a casino at a different site in Kenosha.

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. 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.¹ 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.

In Wisconsin, as a condition of compact amendments made in the late 1990s and early 2000s, each tribe makes annual payments to the state based on its revenue from gaming. Some of these payments began as lump-sum payments, but are now based on a percentage of net gaming revenue. These annual shared revenue payments are regarded as a reimbursement for the exclusive ability to conduct types of gaming prohibited on nontribal lands in the state.

¹ For additional information about the history of Wisconsin's tribal gaming compacts, see: Daniel Ritsche, "[The Evolution of Legalized Gambling in Wisconsin](#)," *Informational Bulletin* 12-2 (Madison: Wisconsin Legislative Reference Bureau, November 2012). See also: Angela Miller, "[Tribal Gaming in Wisconsin](#)," *Informational Paper* 87, (Madison: Legislative Fiscal Bureau, January 2021).

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 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.”²

The Forest County Potawatomi’s (Potawatomi) Milwaukee Casino is one of only a few off-reservation casinos in the nation approved after the enactment of IGRA. While the Potawatomi’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.

Kenosha casino benefits and costs

The original 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 Hard Rock International, which is owned by the Seminole Tribe of Florida. Consultants retained by the Menominee Tribe projected that the completed project would have annually generated over \$500 million in net revenue from gamblers. The Menominee people are the overwhelming majority of the residents of Menominee County, which regularly reports the highest rate of poverty and unemployment as well as the lowest ratings for health outcomes. 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’s casino in Milwaukee. The BIA concluded that conflicting economic analyses submitted by the Menominee and the Potawatomi “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 budget due to reduced payments from the Potawatomi, as discussed below.

² 25 USC § 2719 (b) (1) (A).

2015 rejection of Kenosha casino

In July 2004, the Menominee Tribe 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 oldest 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 Governor Walker received a 180-day extension, to February 19, 2015, to make a decision.³ The governor discussed the criteria he planned to use in evaluating whether to concur, including, "consensus" among the state's 11 Indian tribes and bands, which he defined as unanimous approval.⁴ According to contemporary news reports, the Potawatomi and the Ho-Chunk Nation were the only two tribes that opposed the Kenosha casino.⁵

On January 23, 2015, Governor Walker announced his nonconurrence 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." He further stated that, as a result of 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."

The press release also linked to and enumerated the findings from a [report](#) that Secretary of Administration Mike Huebsch had issued the previous day. That report had not recommended approval or rejection of the proposed casino, but had outlined a number of potential economic and fiscal benefits, as well as various risks, in approving the project. The report predicted that the project "could create 3,900 net new jobs, increase overall wages by \$192 million across the state, and spur \$601 million in economic output." However, it also cautioned that if the casino were approved, taxpayers could lose out on hundreds of millions of dollars of future tribal revenue sharing payments. Further, the report highlighted the risk that the state may need to pay the Potawatomi "hundreds of millions of dollars in refunds of previous payments made to the state."

This was in reference to the Potawatomi's arbitrated compact amendment, which established the state's required compensation for revenues lost due to any new gaming facility located between

³ As permitted by 25 CFR 292.23 (b).

⁴ Cary Spivak, "Tribes Can Veto Casino Plans," *Milwaukee Journal Sentinel*, March 1, 2013.

⁵ Id.

30 and 50 miles of the tribe's Milwaukee casino.⁶ Under this arbitrated compact amendment, not only would the state need to reimburse the tribe for any losses linked to the Kenosha casino, which would be within 50 miles, but it could also be required to refund the shared revenue payments the tribe had already made to the state in the past for its exclusive right to offer Class III gaming in the region. Although the BIA had rejected this arbitrated compact amendment just days earlier, the Potawatomi had [announced](#) plans to challenge this ruling in federal court, so the state's obligation to the Potawatomi was unknown.

In an attempt to address this issue, days before Governor Walker nonconcurred in the proposed casino, the Menominee and the state had submitted a [new compact amendment](#) to the BIA, under which the tribe promised to make up any deficit in the state budget caused by reductions in payments by the Potawatomi. In a [letter](#) to Governor Walker, Secretary Huebsch discussed concerns that even if the BIA approved the amended compact, the state could 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 tribe were successful. The proposed compact only required the Menominee to compensate the state for any future funds it may have been required to pay to the Potawatomi, and did not account for refunds of past payments made by the tribe, which could amount to hundreds of millions of dollars. In addition, Secretary Huebsch pointed out that a court could declare the Menominee's obligation to compensate the state for any losses to the Potawatomi inconsistent with IGRA and thus unenforceable.

In a January 28 [letter](#), 10 legislators representing southeastern Wisconsin called on Governor Walker to reconsider his decision on the Kenosha casino application. They highlighted the fact that, shortly before the governor's announcement, the Menominee and its Hard Rock 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 BIA's rejection of the arbitrated compact amendment, they noted that the BIA has a record of success in defending lawsuits regarding compact decisions. Even if the Potawatomi were to prevail, they argued that the Menominee's bond and indemnity agreements under the compact amendment would compensate the state.

Governor Walker sent a [letter](#) in response to these legislators that included a memorandum from Secretary Huebsch. In his memorandum, Secretary Huebsch responded to each of the points raised by the legislators, ultimately concluding that "there is nothing Menominee can do to mitigate the risks we have identified."

⁶A 2003 compact amendment granted the Potawatomi exclusivity in gaming for 50 miles from the tribe's Milwaukee casino. The BIA rejected this 50 mile zone, providing instead for only a 30 mile zone. A 2005 compact amendment provided that the state would mitigate the tribe's revenue loss if a Wisconsin governor were to approve a new casino between 30 and 50 miles from the Milwaukee casino. In the years that followed, the state and the tribe were unable to agree on the level of compensation. In 2014, in accordance with the 2005 compact amendment, a three-member arbitration tribunal determined the state's liability.

Revived effort to open Kenosha casino

On July 20, 2022, the Menominee Tribe announced in a [press release](#) that it is relaunching the effort to open a casino and entertainment complex in Kenosha, in partnership with Hard Rock. The proposed casino, which would be smaller than the previously-planned casino, would be located less than a mile away from the Dairyland Greyhound Park, on 60 acres of land that Hard Rock recently purchased from the Village of Bristol. Menominee Chairman Ronald J. Corn stated that “much has changed” since the 2015 effort but that “the needs of our tribe and its members have continued and in some cases grown more acute.” The press release went on to explain that the revenue from the casino would allow the tribe to make investments in health care and education and to reduce the “high levels of poverty, hunger, and unemployment” on the reservation.

Given that the casino will be on a new site, the tribe will need to negotiate updated intergovernmental agreements with Kenosha County and the City of Kenosha and will also need to submit a new request to the BIA. The project will also require final approval from the governor of Wisconsin.

It remains to be seen whether the proposed casino will receive gubernatorial approval. As with the 2015 casino, the Potawatomi has [announced opposition](#) to the recently proposed project, citing competition with the tribe’s Milwaukee casino. Once again, the proposed Kenosha casino will be within 50 miles of the Milwaukee casino. However, the financial risk to the state is not as great as during the 2013-15 deliberations. Since Governor Walker rejected the Kenosha casino, the state agreed to a [2018 compact amendment](#) with the Potawatomi that significantly reduces the state’s liability if a casino opens between 30 and 50 miles from the tribe’s Milwaukee casino.

This 2018 compact amendment was agreed to shortly after a federal court rejected the Potawatomi’s challenge to the BIA’s disapproval of the 2014 arbitrated compact amendment. Most significantly, the 2018 amendment provides mitigation for revenue losses only on a going-forward basis. In other words, unlike in the 2014 arbitrated amendment, the state would not have to refund the tribe for any of the tribe’s past payments to the state. Further, the 2018 amendment caps the Potawatomi’s permissible payment withholding at \$250 million, a cap that Secretary of Administration Ellen Nowak stated was unlikely to be reached before the expiration of the compact in 2031.⁷ Secretary Nowak estimated that this cap would be a 50% reduction from the potential liability of over \$500 million in the 2014 arbitrated amendment. The 2018 compact amendment also provides that the Potawatomi may only withhold annual payments if actual losses are realized by the tribe as a result of an approved casino within 30 to 50 miles of the tribe’s Milwaukee casino. In 2014, as Governor Walker was contemplating the previous Kenosha casino proposal, the Potawatomi withheld its revenue payment, [estimated to be](#) between \$25 and \$30 million, until after Governor Walker announced his nonconcurrence in early 2015. Such a withholding, before actual revenue losses, would no longer be possible under the amended compact.

⁷ Ellen Nowak, secretary of administration, letter to Governor Scott Walker, November 23, 2018.

For these reasons, if the governor were to approve the Menominee's latest Kenosha casino proposal, it appears that the state's potential liability to the Potawatomi could be significantly less after the adoption of the 2018 compact amendment than before adopting the amendment.

We hope this information is helpful. Please let us know if you have any additional questions.