

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs,
Interior.

ACTION: Notice of Deemed Approved
Technical Amendment between the
State of Wisconsin and the Forest
County Potawatomi Community.

SUMMARY: Pursuant to Section 11 of the Indian Gaming Regulatory Act of 1988 (IGRA). Pub. L. 100--497, 25 U.S.C 2710, the Secretary of the Interior shall publish, in the Federal Register, notice of approved Tribal-State Cumpacts for the purpose of engaging in Class III gaming activities on Indian lands. The Assistant Secretary-Indian Affairs, Department of the Interior, through her delegated authority, is publishing notice that the Technical Amendment to the Class III gaming compact between the State of Wisconsin and the Forest County Potawatomi Community is considered approved. By the terms of IGRA, the Technical Amendment is considered approved, but only to the extent the compact is consistent with the provisions of IGRA. The Technical Amendment provides the following: application of the arbitration section to the payment section of the Compact; deletion of payment to the University of Wisconsin; provision that state law will apply for any reimbursement payments to the tribe; and waiver of all sovereign immunity with respect to the enforcement of any provision of this Compact.

EFFECTIVE DATE: September 8, 2003.

FOR FURTHER INFORMATION CONTACT:
George T. Skibine, Director, Office of
Indian Gaming Management, Bureau of
Indian Affairs, Washington, DC 20240,
(202) 219--4066.

Dated: August 26, 2003.

Aurene M. Martin,

Assistant Secretary—Indian Affairs.

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TECHNICAL AMENDMENT
to the
FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN
and the
STATE OF WISCONSIN GAMING COMPACT OF 1992, AS AMENDED

This Technical Amendment to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992, As Amended ("Technical Amendment") is entered into by and between the FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN (the "Tribe") and the STATE OF WISCONSIN (the "State"), (referred to collectively as the "Parties").

WHEREAS, in 1992, the Tribe and the State entered into the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 (the "1992 Compact"); and

WHEREAS, the Technical Amendment clarifies and enhances the original agreements reached by the Parties in the 1992 Compact; and

WHEREAS, the Technical Amendment resolves concerns raised in a March 25, 2003 Wisconsin Legislative Council memo to Speaker Gard and Majority Leader Panzer of the Wisconsin Legislature analyzing provisions in the February 2003 amendments to the 1992 Compact which permit additional types of games; allocate compact payments made to the State for the benefit of the University of Wisconsin; waive the sovereign immunity of the State of Wisconsin; and do not set out a specific mechanism for the Forest County Potawatomi Community to obtain any applicable refund of money paid to the State, which memo was the basis for the claims asserted in the plaintiffs' petition in *Panzer and Gard v. Doyle*, No. 03-0910-CA (Wis. Sup. Ct. filed April 3, 2003), *removed*, No. 03-C-0211-S (W.D. Wis. April 25, 2003); and

WHEREAS, in 1990, the Wisconsin legislature enacted Wis. Stat. § 14.035, which authorizes the Governor, on behalf of the State, to "enter into any compact that has been negotiated under 25 U.S.C. § 2710(d)."

WHEREAS, the United States District Court for the Western District of Wisconsin ruled in 1992 that the State of Wisconsin was required to negotiate for a compact with Wisconsin Indian tribes that authorized casino games, including "banking card games played against the house, such as baccarat, chemin de fer, and blackjack, and roulette, poker and craps," as well as electronic games. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480, 482 nl (WD Wisc. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992), *cert. denied*, 506 U.S. 829 (1992). *Lac du Flambeau* was brought by Wisconsin Indian tribes against the State of Wisconsin to enforce the remedial procedures authorized in the Indian Gaming Regulatory Act, 25 U.S.C. § 2710, *et seq.* ("IGRA"); and

WHEREAS, after the appeal of *Lac du Flambeau* was dismissed by the Seventh Circuit and the District Court decision was final, the Wisconsin Legislature adopted Wis. Stat. § 569.02, which expressly delegated to the Governor, with the advice of the Director of Indian gaming, the authority to determine the types of gaming which the State of Wisconsin authorized the Governor to include in an Indian Gaming compact:

. . . (4) assist the Governor in determining the types of gaming that may be conducted on Indian lands and in entering into Indian gaming compacts. Wis. Stat. § 569.02.

WHEREAS, the 1992 Compact terms were agreed to based upon the decision of the District Court in *Lac du Flambeau*, which applied IGRA to the laws of the State of Wisconsin; and

WHEREAS, the 1992 Compact was approved by the Secretary of the Interior and became effective as a matter of federal law on August 10, 1992; and

WHEREAS, the State and the Tribe are authorized under the Indian Gaming Regulatory Act to determine in a tribal-state compact which laws will apply to gaming on Indian lands during the term of the compact, 25 U.S.C. § 2710(d)(C)(3); and

WHEREAS, the 1992 Compact, Section XXVI, provides that the terms of the Compact apply without regard to subsequent changes in either State or Tribal law, as follows:

To the extent that State law or Tribal ordinances, or any amendments thereto, are inconsistent with any provision of the Compact, this Compact shall control.

WHEREAS, the 1992 Compact reserved to the Parties the right to subsequently amend the terms of the Compact, Section XXX, which includes an amendment to authorize additional games that could have been authorized in the Compact in 1992; and

WHEREAS, the State and the Tribe agreed in the 1992 Compact, Section IV.B., that additional games could be authorized by later amendments:

The Tribe may not operate any Class III gaming not expressly enumerated in this section of this Compact unless this Compact is amended pursuant to Section XXX.

WHEREAS, the State and the Tribe agreed in the 1992 Compact, Section IV(D)-(F), to specific conditions under which the 1992 Compact could or would be reopened in order to add additional games; and

WHEREAS, the 1992 Compact, including Sections IV.B, IV(D)-(F), XXVI, and XXX, which allow amendments and the authorization of additional games, was approved by the Secretary of the Interior and has been continually in effect since the Notice of Approval was published in the Federal Register on August 10, 1992; and

WHEREAS, the 1992 Compact was amended in 1998 ("Amendment #1") to extend the Compact for an additional five years, to increase the number of authorized slot machines, and to allow 25 blackjack tables on the Menomonee Valley lands, if the Tribe obtained the approval of the City and the County of Milwaukee; and

WHEREAS, Amendment #1 also provides that the Tribe will make annual payments of \$6.375 million to the State, and under which the Tribe has paid the State \$25.5 million; and

WHEREAS, the Tribe entered into an Intergovernmental Agreement with the City and County of Milwaukee, in which the City and County of Milwaukee consented to the Tribe offering additional games at the Potawatomi Casino, and in which the Tribe agreed to pay to the City and County of Milwaukee a total of 3.0% of its Class III net win each year, and under which the Tribe has paid the City and the County of Milwaukee a total of more than \$27 million; and

WHEREAS, the Intergovernmental Agreement has no definite term of years and, thus, the Tribe is obligated to pay 3.0% of its Class III net win every year to the City and County of Milwaukee until the Tribe, the City and County agree to change or end the Intergovernmental Agreement; and

WHEREAS, the Secretary of Administration, as authorized in Wis. Stat. § 569.02(4), advised the Governor with respect to the types of gaming that may be conducted under the 2003 amendments to the 1992 Compact; and

WHEREAS, on February 19, 2003, the Parties executed Amendments to the Forest County Potawatomi Community of Wisconsin and the State of Wisconsin Gaming Compact of 1992 ("2003 Amendments") which were submitted to the Secretary of Interior for approval on February 20, 2003;

WHEREAS, the 2003 Amendments provide, among other things:

A. authorization for additional types of games that could have been included in the 1992 Compact under the holding of *Lac du Flambeau*;

B. an increase of more than 400% in the payments by the Tribe to the State, so that rather than the \$12.750 million the Tribe was required to pay under Amendment #1 during the 2003-2004 Wisconsin biennium, the Tribe is required to pay more than \$84 million to the State under the 2003 Amendment;

C. an improved renewal procedure that replaces the provision in the 1992 Compact that allowed either the State or the Tribe to send a Notice of Non-Renewal and then required the Tribe and the State to engage in good faith negotiation which, if the negotiations did not result in an agreement, could lead to last best offer arbitration under IGRA; with a new renewal procedure that requires the Tribe and the State to engage in good faith negotiations over possible compact amendments on each 5-year and 25-year anniversary, which is then followed by last best offer arbitration in the event that either party is found by an arbitrator to not have negotiated in good faith; and

WHEREAS, Senate Majority Leader Panzer and Speaker of the House of Representatives Gard of the Wisconsin Legislature objected to the approval of the 2003 Amendments by the Secretary of the Interior on a variety of grounds, which were discussed in the March 25, 2003 memorandum of the Wisconsin Legislative Council, and urged the Secretary of the Interior to delay the approval of the 2003 amendments:

In light of these concerns, and before the door to reviewing the 2003 amendments is forever closed, we ask that the Bureau of Indian Affairs immediately suspend its consideration of the Potawatomi Compact amendment until these legal issues can be resolved. Letter of Panzer and Gard to Secretary Norton on March 26, 2003.

WHEREAS, on May 8, 2003, the Secretary of the United States Department of Interior published in the Federal Register the Notice of the 2003 Compact Amendments taking effect under 25 U.S.C. § 2710(d)(8)(C); and

WHEREAS, the Parties have now agreed to the Technical Amendment to the 1992 Compact, as amended, which deletes the reference in the 2003 Amendments to the use of funds by the State for the benefit of the University of Wisconsin; deletes the express waiver of the State's sovereign immunity, and provides alternative remedies for the Tribe until or unless the Wisconsin Legislature authorizes an express waiver of the State's sovereign immunity for enforcement of compact terms; and clarifies and adds additional procedures to implement the periodic good faith negotiation followed by last best offer arbitration for compact amendments which may occur on the 5th and 25th anniversary of the 2003 Amendments; and

WHEREAS, the Parties wish the 1992 Compact to continue and agree that the amendments contained herein serve the best interests of both the State and the Tribe.

THE STATE AND THE TRIBE DO HEREBY AGREE to amend the 1992 Compact, as previously amended by Amendment #1, by the 2003 Amendments, and by the April 2003 Amendments (the "Compact"), as set forth below:

1. Section XXII.A. of the Compact, as currently amended, is further amended by inserting the following words: "XXXI.B., F., and H. (Payment to the State)" after

the following words: "XXX (Amendment and Periodic Enhancement of Compact Provisions)" in the second sentence thereof.

2. Section XXII.A. "**9. Judicial Confirmation.**" of the Compact, as currently amended, is further amended by replacing the paragraph in its entirety with the following:

9. Judicial Confirmation and Enforcement.

a. Judgment upon any award rendered by the tribunal may be entered in any court having jurisdiction.

b. An award obligating the State to pay money to the Tribe is a debt of the State, which sum may be recovered from the State by the Tribe under any procedure provided by the laws of Wisconsin for the recovery of the unpaid debts of the State, which includes Wis. Stat. §§ 16.007 & 775.01.

c. If the State fails to comply with an award of the tribunal, other than an award to pay money to the Tribe, and asserts the State's sovereign immunity, then the tribunal, upon the application of the Tribe, may issue an order requiring the State to pay the Tribe a sum of money as liquidated damages that the tribunal determines is commensurate with the value of the loss to the Tribe due to the inability of the Tribe to obtain judicial enforcement of the Compact provision which is the subject of the award and that is commensurate with the State's failure to comply with the award. The sum due to the Tribe under the order is a debt of the State, which may be recovered by the Tribe, unless the State complies with the award or a federal court sets aside the award on grounds set forth in 9 U.S.C. § 10. This paragraph shall not apply if the legislature of the State of Wisconsin ratifies the State's waiver of sovereign immunity in Section XXIII or waives the State's sovereign immunity for judicial enforcement of all arbitration awards entered under Section XXII.

3. Section XXII.A of the Compact, as currently amended, is further amended by adding an additional paragraph 10, as follows:

I. **Last Best Offer Arbitration of Compact Amendments.** In determining whether the State or the Tribe has complied with an express duty under the Compact to negotiate in good faith, the tribunal may take into account the standards applicable to the duty to negotiate in good faith under 25 U.S.C. § 2710(d)(7)(B)(iii). If, within 30 days after a tribunal determines that a party has not complied with a specific obligation under the Compact to negotiate in

good faith concerning an amendment to the Compact, the party has not agreed to an amendment to the Compact that resolves the dispute or has not otherwise resolved the dispute, then the other party may request the tribunal to resolve the dispute. The tribunal shall resolve the dispute by last best offer arbitration. Both parties may submit last best offers for compact amendments to the tribunal. The tribunal shall select the last best offer for a compact amendment that best comports with the terms of the Act, any other applicable federal law, and with the findings of the tribunal concluding that a party has failed to negotiate in good faith. Any such amendment shall be agreed to under Section XXX and is subject to review by the United States Secretary of Interior as may be provided by law.

4. XXII.D. of the Compact, as currently amended, is further amended by replacing the following words in the first sentence: "XXXI (Payment to the State)" with the following words: "XXXI.A., C., D., E., and G. (Payment to the State)".
5. Section XXII.D. of the Compact, as currently amended, is further amended by adding the following to the end of the paragraph:

In the event that an action to resolve a dispute is dismissed on the application of a party because that party has not waived its sovereign immunity to suit, then the dispute under this paragraph may be treated as a dispute described in paragraph A of Section XXII.

6. Section XXIII.C. of the Compact, as currently amended, is further amended by replacing paragraph C in its entirety with the following:

The Tribe and the State, to the extent the State or the Tribe may do so pursuant to law, expressly waive any and all sovereign immunity with respect to any claim brought by the State or the Tribe to enforce any provision of this Compact. This waiver includes suits to collect money due to the State pursuant to the terms of the Compact; to obtain an order to specifically enforce the terms of any provision of the Compact; or to obtain a declaratory judgment and/or enjoin any act or conduct in violation of the Compact. Nothing contained herein shall be construed to waive the immunity of the Tribe, except for suits arising under the terms of this Compact. This waiver does not extend to other claims brought to enforce other obligations that do not arise under the Compact or to claims brought by parties other than the State and the Tribe. In addition, the State agrees that State officials and employees may not engage in unauthorized activity. State officials

and employees are not authorized under law to engage in activity that violates the terms of the Compact; that violates an arbitration award entered under Section XXII; or, with respect to subject matters governed by the Compact, that is not authorized by the Compact. The Tribe may maintain a suit against State officials, agents, or employees to prevent unauthorized activity without regard to whether or not the State has waived its sovereign immunity.

7. Section XXXI.B. of the Compact, as currently amended, is further amended by replacing in its entirety the portion of the paragraph that begins ". . . then the parties agree to the following: .." with the following:

then the Parties agree to the following: (i) the Tribe shall thereafter be relieved of its obligation to pay the amounts required in this Section XXXI, and (ii) the Tribe shall be entitled to a refund of the amount paid to the State by the Tribe under Section XXXI.G.1.b. of the Compact and the State shall be indebted to the Tribe in that amount, which sum may be recovered from the State by the Tribe under any procedures provided by the laws of Wisconsin for the recovery of the unpaid debts of the State, which includes Wis.Stat. §§ 16.007 & 7750.1. If the Wisconsin Legislature or the voters of the State of Wisconsin fail to approve the amendment described in Section XXXI.B.2 above, the Tribe shall repay to the State the amount that was recovered by the Tribe pursuant to this paragraph.

8. Section XXXI.G.1.b. of the Compact, as currently amended, is replaced in its entirety with the following:

\$34.125 million on June 30, 2004 and \$43.625 million on June 30, 2005 to the State of Wisconsin.


9. Section XXXIII.A. of the Compact, as currently amended, is replaced in its entirety with the following:


In the event that Section XXV (Effective Date and Duration) of the 2003 Amendments is disapproved, in whole or in part, by the Secretary of the Interior or a court of competent jurisdiction finds that the provision is unenforceable or invalid, or that either party lacked the legal authority to agree to the provision, then (i) the Tribe shall be entitled to a refund of the amount paid to the State

by the Tribe under Section XXXI.G.1.b. and the State shall be indebted to the Tribe in that amount, which sum may be recovered from the State by the Tribe under any procedures provided by the laws of Wisconsin for the recovery of the unpaid debts of the State, which includes Wis. Stat. §§ 16.007 & 775.01; (ii) the Tribe shall not be required to make any further payments under Section XXXI.G.2.; and (iii) the Parties shall negotiate in good faith to reach agreement on substitute provisions for Sections XXV and XXXI.

FOREST COUNTY POTAWATOMI
COMMUNITY OF WISCONSIN

STATE OF WISCONSIN

By: 
Harold Frank
Chairman

By: 
Jim Doyle
Governor

Executed on this 29th day of May, 2003.

Executed on this 30th day of May, 2003.

UNITED STATES OF AMERICA
DEPARTMENT

APPROVED BY:

Aurene M. Martin
Assistant Secretary - Indian Affairs

Date