United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

MAR 12 2015

The Honorable Gary Besaw
Chairman, Menominee Indian Tribe of Wisconsin
P.O. Box 910
Keshena, Wisconsin 54135

Dear Chairman Besaw:

On January 28, 2015, my Office received from the Menominee Indian Tribe of Wisconsin (Tribe) a copy of the January 2015 Amendment to the Menominee Indian Tribe of Wisconsin and the State of Wisconsin (State) Class III Gaming Compact (2015 Amendment) between the Tribe and the State providing for the conduct of class III gaming activities by the Tribe.[1]

Under the Indian Gaming Regulatory Act (IGRA), the Secretary of the Department of the Interior (Secretary) may approve or disapprove a compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8). If the Secretary does not act to approve or disapprove a compact within the prescribed 45-day period, IGRA provides that it is considered to have been approved by the Secretary, "but only to the extent that the Compact is consistent with the provisions of [IGRA]." 25 U.S.C. § 2710(d)(8)(C). Under IGRA, the Secretary must determine whether the Compact violates IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians.

DECISION

We have completed our review of the 2015 Amendment and the additional material submitted by the Tribe and the State. For the following reasons, the 2015 Amendment is disapproved pursuant to the Secretary's authority under Section 2710(d)(8)(B) of IGRA.

First, the 2015 Amendment contains the agreement of the parties that the Governor of Wisconsin (Governor) would concur with the Department of the Interior's (Department) August 23, 2013 Secretarial Determination made pursuant to section 2719(b)(1)(A) that a gaming establishment on lands in Kenosha, Wisconsin, is in the best interest of the Tribe and its members and not detrimental to the surrounding community. The 2015 Amendment relies on the Governor's concurrence as a major concession from the State to justify not only increased revenue sharing payments to the State, but assumption of risk for litigation and other payments to the State. However, on January 23, 2015, the Governor notified the Department that he did not concur

[1] The 2015 Amendment was received in our office on January 28, 2015. Under our regulations at 25 C.F.R. Part 293, compacts and amendments to compacts must be submitted to the Office of Indian Gaming, United States Department of the Interior, 1849 C. Street, NW., Washington, DC 20240.

with the Secretarial Determination.[2] Because the Governor did not concur with the Secretarial Determination, a condition precedent to the Tribe's ability to conduct gaming at the Kenosha site, the Tribe has lost the benefit of its bargain with the State. The Tribe's agreement to pay the State without receiving a commensurate economic return results in an unauthorized tax, fee, charge or other assessment in violation of IGRA. We cannot approve an amendment that does not provide substantial economic benefits to the Tribe in exchange for revenue sharing.

ANALYSIS

The Tribe's original Compact was approved on August 3, 1992, and subsequently amended in February and April of 1999, October 2000, July 2003, January 2011, and May 2013.[3] In the October 2000 Compact Amendment, the Tribe and the State included the Kenosha Facility as a class III gaming location operated by the Tribe on land that was to be taken into trust for the benefit of the Tribe.[4]

The 2015 Amendment before us is concerned almost entirely with gaming at the Kenosha Site. The amendment asserts that the Governor's concurrence with the August 23, 2013 Secretarial Determination, along with other purported concessions by the State, is a meaningful concession for the Tribe's agreement to increase its revenue sharing payment to the State.

Revenue Sharing Provisions

We review revenue sharing requirements in gaming compacts with great scrutiny. Our analysis first looks to whether the state has offered meaningful concessions to the tribe. In other words, the state conceded something it was not otherwise required to negotiate, such as granting exclusive rights to operate class III gaming or other benefits sharing a gaming-related nexus. We then examine whether the value of the concessions provide substantial economic benefits to the tribe in a manner justifying the revenue sharing required.

a. Meaningful Concessions

An important part of our analysis involving class III gaming compacts involves guidance from *Rincon Band of Luiseño Mission Indians of the Rincon Reservation v. Schwarzenegger*, in which the United States Court of Appeals for the Ninth Circuit opined on the extent to which variations on tribal gaming exclusivity constitute "meaningful concessions" in exchange for revenue sharing under IGRA. While *Rincon* is not binding here because it arose under IGRA's remedial provisions and involved facts and circumstances unique to the litigants, aspects of the decision may provide useful guidance in our inquiry here. In reaching its decision, the court reiterated that to be lawful under IGRA, the State may request revenue sharing if the revenue sharing

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[2] Letter from Governor Scott Walker to Assistant Secretary Kevin Washburn (Jan. 23, 2015) (on file with the Office of Indian Gaming). The Governor did not provide a rationale for his refusal to concur with the Secretarial Determination.

[3] *See generally* Notices of Compact and Amendment Approval, http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#Wisconsin (web site last visited Feb. 24, 2015).

[4] *See* Amendment to the Gaming Compact of 1992 between the Menominee Indian Tribe of Wisconsin and the State of Wisconsin, 65 Fed. Reg. 62749 (Oct. 19, 2000) http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038605.pdf (web site last visited Feb. 24, 2015).

provision is (a) for uses "directly related to the operation of gaming activities," (b) consistent with the purposes of IGRA, and (c) not "imposed" but rather bargained for in exchange for a "meaningful concession." We have not directly addressed whether a governor's concurrence with a Secretarial Determination under Section 20 of IGRA is a meaningful concession supporting revenue sharing. Likewise, we need not resolve that question here. Whether a governor's concurrence can constitute a meaningful concession, it was pressure by both parties to be a meaningful concession, and it was not forthcoming. The Governor's failure to concur denied the Tribe the benefit of the bargain it sought. Absent the Governor's concurrence, the 2015 Amendment fails to meet the first prong of our test and therefore violates IGRA.[5]

b. Substantial Economic Benefits

While we have already determined that the 2015 Amendment violates IGRA, we turn to the second prong of our analysis. Under the second prong of our analysis, there is no concession by the State that can provide a substantial economic benefit to the Tribe in a manner justifying the revenue sharing required under the Compact. Since the Governor did not concur and the Tribe will not be operating class III gaming at Kenosha, there is no prospect of the Tribe receiving any economic benefits under the 2015 Amendment.

Impermissible tax, fee, charge, or other assessment

The 2015 Amendment also violates IGRA by imposing a fee on the Tribe for purposes other than to defray the State's cost of regulating class III gaming activities. The IGRA does not authorize a State to impose any tax, fee, charge, or other assessment upon an Indian tribe to engage in a class III activity except assessment by the State to defray its costs of regulating class III gaming.[6]

The 2015 Amendment obligates the Tribe to make mitigation payments to the State to reimburse it for any revenue reduction the State experiences from the Tribe opening a gaming facility in Kenosha. The payments would continue for the life of the Tribe's Compact.[7] We find that this provision violates IGRA because it imposes an impermissible fee on the Tribe.

The Department is committed to adhering to IGRA's statutory limitations on tribal-state gaming compacts, and therefore, this Amendment must be disapproved pursuant to 25 U.S.C. § 2710(d)(8)(B)(i).

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[5] The parties indicate that the State makes several additional concessions to the Tribe including exclusivity, compact negotiations for gaming on lands not yet in trust, the extension of the existing gaming compact and the extension of credit to casino patrons. In light of the Governor's refusal to concur in the Secretarial Determination, these claimed concessions are similarly meaningless.

[6] *See* 25 U.S.C. § 2710 (d)(4).

[7] In the course of reviewing several compact amendments from the State of Wisconsin in 2003, the Department raised concerns about the suppression of tribal competition and noted that the anti-competitive provision was contrary to the basic notions of fairness in competition and inconsistent with the goals of IGRA. *See* Letter to Chairman Harold "Gus" Frank from Acting Assistant Secretary-Indian Affairs Aurene Martin (April 25, 2003) at http://www.bia.gov/cs/groups/xoig/documents/text/idc1-024612.pdf (web site last visited Feb. 27, 2015).

CONCLUSION

Based on this analysis we find that the 2015 Amendment violates IGRA. Therefore, we must disapprove the 2015 Amendment. A copy of this letter has been sent to the Honorable Scott Walker, Governor of Wisconsin.

Sincerely,

Kevin K. Washburn
Assistant Secretary – Indian Affairs

AMENDMENTS TO THE MENOMINEE INDIAN TRIBE OF WISCONSIN AND THE STATE OF WISCONSIN GAMING COMPACT OF 1992

WHEREAS, Section XXXI.A of the Menominee Indian Tribe of Wisconsin and the State of Wisconsin Gaming Compact of 1992, as amended ("Compact") provides that it may be amended upon the written agreement of both parties; and,

WHEREAS, on August 23, 2013, under delegated authority to act on behalf of the U.S. Secretary of the Interior, the Assistant Secretary – Indian Affairs of the Interior issued a finding pursuant to Section 20 of the Act, 25 U.S.C. §2719(b)(1)(A), that gaming on land proposed to be taken into trust in Kenosha, Wisconsin by the Menominee Indian Tribe of Wisconsin ("Tribe") would be in the best interest of the Tribe and not detrimental to the surrounding community ("Secretary's August 2013 Determination"). Pursuant to federal regulations, 25 C.F.R. Part 292, the Governor of the State of Wisconsin has until February 19, 2015, to determine whether to concur in the Secretary's Determination; and

WHEREAS, the Forest County Potawatomi Community ("FCPC") failed to make its 2014 revenue sharing payment to the State, based on claimed concern over the State's potential courses of action in relation to the Secretary's August 2013 Determination and its interpretation of the tribal-state compact between the State and FCPC ("FCPC Compact"). Despite the State's explanation that, particularly prior to the Governor taking action with regard to the Secretary's August 2013 Determination, FCPC's actions violate the FCPC Compact, FCPC has not made its 2014 revenue sharing payments and the State does not believe FCPC will be likely to do so if the Governor concurs in the Secretary's August 2013 Determination; and

WHEREAS, as a result of provisions contained in the FCPC Compact, the State and the FCPC undertook an arbitration proceeding in which the State and FCPC submitted to last best offer arbitration proposed amendments to the FCPC Compact which specify the rights, duties and obligations of the State and FCPC in the event the State concurs in the Secretary's Determination. The arbitration tribunal selected FCPC's proposed amendment, which the State and FCPC then submitted for review to the U.S. Secretary of the Interior on November 26, 2014 ("FCPC Arbitration Amendment"); and

WHEREAS, on January 9, 2015, the Assistant Secretary - Indian Affairs disapproved the FCPC Arbitration Amendment; and

WHEREAS, the State and the Tribe anticipate that, absent agreement between the State and FCPC, FCPC may challenge the disapproval of the FCPC Arbitration Amendment, claim that it is effective without need for approval, seek further arbitration under the FCPC Compact or bring other legal actions that create uncertainty as the Governor decides whether to concur in the Secretary's Determination; and

WHEREAS, although the Governor has not yet decided whether to concur in the Secretary's August 2013 Determination and the parties acknowledge that nothing herein constitutes the Governor's concurrence in the Secretary's August 2013 Determination, both parties believe the

amendments to the Compact contained herein serve the best interests of both the State and the Tribe.

NOW THEREFORE, the State and the Tribe do hereby agree to amend the Compact as set forth below:

1. Section XIV.A. is amended to delete the phrase "except the Kenosha Facility".

2. Section XIV.D. is amended to read as follows:

   D. Until such time as the Tribe enacts the ordinances referenced in subsec. A in regard to the Kenosha Facility, the public health and safety standards for public buildings, electrical wiring, fire prevention, plumbing and sanitation set forth in the Wisconsin Statutes and Wisconsin Administrative Code referenced in subsec. A, including any amendments thereto, shall be directly applicable to the Kenosha Facility, except that the terms of the Compact shall provide the exclusive remedies for non-compliance with such standards.

3. Section V.D. is deleted in its entirety and replaced with the following:

   D. Extension of Credit.

      1. Except as provided in this subsec. D, no person shall be extended credit for gaming at any tribal gaming facility. This Section shall not restrict the Tribe's ability to install or accept bank card or credit card transactions in the same manner as would normally be permitted at any retail business within the State.

      2. Not sooner than the second anniversary of the Tribe commencing Class III Gaming at the Kenosha Facility, the Tribe may send written notice to the State of its intent to extend credit for gaming to patrons of the Kenosha Facility as set forth in this subsec. D. Upon such notice, the State may either approve, disapprove, or take no action. If the State does not approve or disapprove the Tribe's request within a period of 180 days, then the Tribe's request to extend credit for gaming to patrons of the Kenosha Facility shall be deemed approved and the Tribe may extend credit for gaming to patrons of the Kenosha Facility as set forth in this subsec. D.

      3. The Tribe may extend credit or permit another person to offer credit to patrons for gaming at the Kenosha Facility so long as such credit is authorized and extended as follows:

         a. For the first two years after the Tribe is authorized to extend credit to patrons, the Tribe may extend credit only to patrons who have previously established a positive history with an industry recognized gaming patron credit bureau.

b. To obtain credit, the Tribe will require a patron complete a credit application and submit that application to the Tribe's credit department.

c. The Tribe's credit department will review a patron's credit worthiness and, based upon credit agency reports, casino credit history, and bank information, recommend a credit amount. The Tribe shall extend credit only to patrons whose recommended credit amount is $2,500 or more.

d. The Tribe shall verify the credit worthiness of each patron to whom credit has been extended no less than one time every twelve (12) months to confirm compliance with this subsection's requirements.

e. Neither the Tribe, nor any other entity, may charge patrons any fee, including interest, in relation to extending credit for gaming to patrons at the Kenosha Facility.

4. The Tribe shall not commence extending credit for gaming to patrons at the Kenosha Facility until the State and the Tribe approve a regulatory framework and MICS for implementing an extension of credit program. As provided under Section XLII.B.1., such MICS must be at least as stringent as those set forth at 25 C.F.R. Part 542, as it may be amended from time to time. The Tribe agrees to pay any additional regulatory costs the State incurs in relation to the Tribe extending credit to patrons.

4. Section XXII is amended to insert the phrase "as they may be from time-to-time amended" between the term "Matters," and "each" in the second sentence of that Section.

5. Section XXIII.B. is deleted in its entirety and replaced with the following:

B. Matters Subject to Dispute Resolution. Any claim, controversy, action, grievance, dispute, complaint, or other disagreement arising out of, or relating to this Compact, including, without limitation, a claim that a Compact provision is invalid, that a party has failed to comply with the requirements of the Compact, or regarding the proper interpretation of any Compact provision, shall be resolved as provided in this Section XXIII. unless the parties agree, in writing, to resolve the dispute in a different manner.

6. Section XXIII.C. is amended by deleting the words "If either the Tribe or the State believes the other has failed to comply with the requirements of this Compact" and replacing it with "If a dispute within the meaning of Section XXIII.B. arises" so the Section now reads:

C. Negotiation. If a dispute within the meaning of Section XXIII.B. arises, then either party may serve a written notice on the other identifying the specific provision or

provisions of the Compact in dispute and specifying in detail the factual bases for any alleged non-compliance and/or the interpretation of the provision of the Compact proposed by the party providing notice. Within seven (7) days following delivery of the written notice of dispute, the party receiving the notice shall serve a detailed written response on the other party. Within ten (10) days following delivery of the written notice of dispute, representatives designated by the Governor of Wisconsin and the Tribe shall meet at a neutral site, or other mutually agreed upon location to resolve the dispute. Negotiations pursuant to this Section shall be a pre-requisite to pursuing mediation under Section XXIII.D. below.

7. Section XXIII.D. is amended to delete the word "shall" and replace it with "may" so the section now reads:

D. Mediation. If the parties fail to resolve the dispute through negotiation as set forth in Section XXIII.C., above, the parties may then attempt to resolve the dispute by non-binding mediation in accordance with the procedures set forth below.

8. Section XXIII.D.4 is deleted.

9. Section XXIII.E. is amended by deleting in the introductory paragraph and replacing it with the following:

E. Arbitration. If the parties undertake arbitration to resolve a dispute, the arbitration proceedings shall be conducted in accordance with the following procedure:

10. Section XXIII.E.8. is amended by deleting the phrase "the United States District Court under the Federal Arbitration Act, 9.U.S.C. Sections 1, et. seq.", and replacing that phrase with "any state or federal court of competent jurisdiction. Nothing in the foregoing shall preclude either party from removing any action described in this subsection to federal court if such court would have jurisdiction over that action." so the Section now reads:

8. Any action to compel arbitration, determine whether an issue is arbitrable or to confirm an award entered by the arbitrator shall be brought in any state or federal court of competent jurisdiction. Nothing in the foregoing shall preclude either party from removing any action described in this subsection to federal court if such court would have jurisdiction over that action."

11. In the event that the Governor concurs in the Secretary's August 2013 Determination, Section XXIII.F. is amended by deleting that subsection and replacing it with the following:

F. Disputes Resolved by Courts of Competent Jurisdiction. If a dispute arises regarding compliance with or the proper interpretation of the requirements of the Compact under the following Sections: IV (Authorized Class III Gaming), XXIII (Dispute Resolution), XXIV (Sovereign Immunity), or XXXIII (Payment to the State), and XXV (Reimbursement of State Costs), and the dispute remains unresolved after

complying with the requirements of Sections XXIII. A. through C, above, unless the parties agree otherwise, the dispute shall be resolved by any state or federal court of competent jurisdiction. Nothing in the foregoing shall preclude either party from removing any action described in this subsection to federal court if such court would have jurisdiction over that action.

12. A new Section XXIV.G. is created to read:

G. The provisions of this subsection G. shall apply to any dispute arising out of, or related to, the operation of the Kenosha Facility.

1. The Authority and the Tribe expressly and irrevocably waive any and all sovereign immunity enjoyed by the Authority and the Tribe in connection with disputes or claims arising under this Compact. This includes suits to collect money due to the State pursuant to the terms of the Compact, including remedies against assets of the Authority; 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. The Tribe's and the Authority's waiver of immunity is the necessary inducement for the State to enter into this Compact.

   The Tribe and the Authority agree that the phrase "contract, claim or other obligation" as used in Section 7 of the Authority's charter includes all duties, responsibilities and obligations contained in this Compact, and any agreements incorporated by reference. The Authority and Tribe consent to be sued in any state or federal court of competent jurisdiction, and specifically in any Circuit Court in Wisconsin where venue is proper, the State Court of Appeals and the State Supreme Court in connection with such disputes or claims, and the Authority and Tribe shall not contest jurisdiction or venue of the above-referenced courts for any dispute or claim arising under this Compact; *provided*, where permitted by law, any claim against the Tribe and the Authority may be removed to a federal court of competent jurisdiction. The Authority and Tribe agree to not invoke the doctrine of exhaustion of tribal or administrative remedies to defeat or delay such jurisdiction. The Authority and Tribe further agree neither shall invoke the doctrine of tribal sovereign immunity to evade their respective duties or obligations under this Compact. The Tribe guarantees any of its obligations under this Compact that are delegated to the Authority under the Authority's charter, and the Tribe consents to be sued on such guarantees to the same extent and subject to the same limitations as the Authority's consent to suit herein. In any suit for monetary damages, the parties agree that such damages shall be limited to undistributed or future net revenues or other assets of the Authority.

2. In the event there has been a final determination by a court of competent jurisdiction that the State may not obtain a remedy specified in subsection

1. above because: (1) either the Tribe or the Authority has asserted a position which is contrary to subsection 1.; or (2) such court has found that the waiver of sovereign immunity contained in subsection 1. was ultra vires or otherwise unenforceable against the Tribe or Authority, the State and the Tribe shall meet to negotiate alternative remedies acceptable to the Tribe and the State. In the event agreement is not reached within ninety (90) days, either the State or the Tribe may, within thirty (30) days, provide the other with written notice of termination of the authorization to conduct gaming at the Kenosha Facility as provided in this Compact. The Compact shall then expire as to the Kenosha Facility ninety (90) days after the date on which the written notice of termination is given to the other party and the Tribe shall cease Class III gaming at the Kenosha Facility.

3. The Tribe may not alter the Authority's charter, a true and correct copy of which is attached hereto as Exhibit C, without the State's prior written consent (such consent to not be unreasonably withheld). In the event that the Tribe alters, without the State's consent, the Authority's charter or other governing documents in a manner which prevents the State from enforcing or obtaining compliance with any Compact terms, and a court or other tribunal determines that the State may not obtain a remedy specified in subsection 1. above due to the alteration of the Authority's charter, which determination is binding on the State, whether or not such judgment has been appealed or is otherwise subject to further review, the State and the Tribe shall meet to negotiate alternative remedies acceptable to the Tribe and the State. In the event agreement is not reached within ninety (90) days, either the State or the Tribe may, within thirty (30) days, provide the other with written notice of termination of the authorization to conduct gaming at the Kenosha Facility as provided in this Compact. The Compact as to the Kenosha Facility shall then expire ninety (90) days after the date on which the written notice of termination is given to the other party and the Tribe shall cease Class III gaming at the Kenosha Facility.

13. In the event that the Governor concurs in the Secretary's August 2013 Determination, Section XXVI.A. is amended to delete the term "2010" and replace it with the term "2014" so that Section XXVI.A now reads:

A. The Compact shall be extended for a term of 25 years from the date notification of this 2014 Amendment is published in the Federal Register pursuant to 25 U.S.C. 2710(d)(8)(D).

14. Section XXXII is amended by adding a new Section XXXII.C. as follows:

C. The Tribe's and the Authority's waiver of immunity is a material consideration and necessary inducement for the State to enter into this Compact and for any concurrence in the Secretary's August 2013 Determination. In consideration of that inducement:

1. The Authority shall:

   a. take or cause to be taken all action required to maintain, both directly and/or indirectly all rights, privileges, permits, licenses and franchises reasonably necessary in the normal course of business of the Kenosha Facility; and

   b. take or cause to be taken all action required to maintain all rights, privileges, permits, licenses and franchises reasonably necessary for the Authority to legally exist and conduct the operations for which it was formed which includes the ownership and operation of the Kenosha Facility.

2. The Tribe agrees that:

   a. it shall not, during the term of this Compact, amend its constitution with regard to waiver of sovereign immunity in a manner that could adversely impact the State's rights or remedies; and

   b. if the Tribe amends the Tribe's constitution or other laws in a manner that allows for a more extensive or direct waiver of the Tribe's sovereign immunity, including with respect to other entities in relation to the Kenosha Facility, the Tribe shall extend such waiver of sovereign immunity to the State. Specifically, if the Tribe undertakes any financing, borrowing, bonding, or other indebtedness and the Tribe in relation to such transaction(s) waives its sovereign immunity, the Tribe shall also waive its sovereign immunity with respect to the State to provide at least the same rights to the State as any such entity.

3. The Tribe agrees that it will not:

   a. enact any statute, law, ordinance or rule that would have a material adverse effect on the State's rights, including, but not limited to, allowing any entity other than the Authority to own and operate the Kenosha Facility;

   b. permit or incur any consensual liability of the Tribe (or any other instrumentality, enterprise or subunit of the Tribe except the Authority) that is or will become a legal obligation of the Authority;

   c. enact any bankruptcy law or similar law for the relief of debtors that would materially impair, limit, restrict, delay or otherwise materially adversely affect the State's rights or remedies;

d. exercise any power of eminent domain over the assets of the Kenosha Facility;

e. receive, accept, or retain any payments from the Authority if the receipt, acceptance or retention would cause the Authority to default on the obligations herein;

f. commingle the Kenosha Facility's assets with any other assets of the Tribe;

g. adopt or enforce, or permit the adoption or enforcement of, any ordinance, law, or agreement that would abolish, consolidate, merge or otherwise change the organizational structure of the Authority unless the Authority (or, if the Authority is not the successor or surviving entity, the successor or surviving entity) has the capacity to and does, in fact, assume all of the Authority's obligations under this Compact pursuant to an assumption agreement that is satisfactory to the State;

h. adopt or enforce, or permit the adoption or enforcement of, any ordinance, law, or agreement that would abolish or change the power and right of the Authority to be the Tribe's sole entity to develop, manage, and operate the Kenosha Facility or to limit the Authority's sovereign immunity waiver contemplated in this Compact; or

i. revoke or limit, in whole or in part, the Tribe's or the Authority's waiver of sovereign immunity or in any way attempt to revoke or limit, in whole or in part, such waiver of sovereign immunity and the Tribe will take all available steps to prevent any action to revoke or limit, in whole or in part, the Authority's sovereign immunity waiver. In the event of any such revocation, limitation, attempted revocation, or attempted limitation, the parties expressly recognize and agree that there remains no adequate remedy at law available to the State, the State will be irreparably injured upon any revocation or limitation hereof, and the Tribe, for itself and the Authority, hereby consents to the entry of injunctive relief to the extent necessary for the State to enforce the Tribe's and the Authority's obligations under this Compact. In the event of any attempted limitation or revocation of the waiver of sovereign immunity granted herein, the State may immediately obtain judicial injunctive relief. The Tribe, for itself and the Authority, expressly consents to the jurisdiction of any court of competent jurisdiction and agrees to be bound by any order or judgment.

15. Section XXXIII.A. is deleted in its entirety, and replaced with the following provisions:

A. State Concessions. In consideration of the payments required in this Section, the State agrees to make the following concessions. The parties agree that these meaningful concessions were negotiated in good faith and confer a substantial economic benefit upon the Tribe.

1. Exclusivity.

   a. In the event a change in State law permits the operation of electronic games of chance, or other Class III games that are not permitted by State law on January 1, 2003, by any person or entity (including the State or a political subdivision of the State) other than a federally recognized Tribe under the provisions of the Act; or

   b. If the State enacts an amendment to the Wisconsin Constitution that authorizes any entity, other than a federally recognized Tribe under the provisions of the Act, to engage in gaming, except as was authorized by the 1993 Amendment to the Wisconsin Constitution; then,

   c. The Tribe shall thereafter be relieved of its obligation to pay the amounts required in Sections XXXIII.B, XXXIIIC.1., and XXXIII.D., except for the amounts required in Section XXXIII.D.3 and D.4.

2. Additional Concessions. In further consideration of potential temporary payments that may arise under this Section, the State makes the following concessions to the Tribe:

   a. Governor's Concurrence. The Governor has substantial discretion as to whether to concur in the Secretary's Determination. The Governor's concurrence in the Secretary's Determination that the Kenosha Facility is in the best interest of the Tribe and its members, and would not be detrimental to the surrounding community, would give rise to potential temporary payments required under this Section. Such concurrence would confer a substantial economic benefit upon the Tribe.

   b. Compact Negotiation for Gaming on Lands not yet in Trust. The Act at 25 U.S.C. § 2710(d)(3) requires the State to negotiate a class III gaming compact in good faith only with "[a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted or is to be conducted." During the negotiation of this amendment, and on the date of its execution, the Tribe did not yet have jurisdiction over the lands on which the Kenosha Facility will be located. The State is not required to

negotiate a class III gaming compact amendment with the Tribe with respect to the Kenosha Facility, and doing so confers a substantial economic benefit upon the Tribe.

c. Extension of Existing Gaming Compact. The Tribe and the State agree that the State is not required to agree to extend the parties' existing class III gaming compact, and that the certainty provided to the Tribe for conducting class III gaming for an additional 25 years under an established regulatory regime confers a valuable economic benefit upon the Tribe.

d. Extension of Credit to Patrons. The provisions established in Section V.D. heretofore have been unavailable to all gaming establishments within the State of Wisconsin, whether operated by an Indian tribe or other entity. The State is not required to negotiate this provision, and it confers a substantial economic benefit upon the Tribe.

16. Section XXXIII.C through I are deleted in their entirety and replaced by the following:

C. In addition to the amounts paid under subsec. B., the Authority shall also pay the following amounts:

1. From the date the Authority commences Class III Gaming at the Kenosha Facility, the Authority shall pay to the State an annual payment equal to 7.5% of the net win of the Kenosha Facility. Net Win shall mean the total amount wagered in Class III gaming, less the amount paid out in prizes, including the actual cost of non-cash prizes, which shall mean any personal property distributed to a patron as the result of a specific legitimate wager. For non-house banked games net win shall mean the gross revenue received by the Tribe for conducting the Class III game.

2. The Authority shall make its payments under this subsection as follows:

a. The Authority agrees that it will retain only such cash at the Kenosha Facility as is commercially reasonable and shall deposit all other gaming receipts (net of prizes) in one separate and segregated account at a bank or other financial institution (the "Gaming Account").

b. The Authority shall provide irrevocable payment instructions for the Gaming Account, authorizing payment to the State on a daily basis an amount based on the percentages set forth in C.1 (subject to any deductions for any credits against payments described in Section XXXIII). The Authority shall be entitled to withdraw all

remaining monies from the Gaming Account after the State has been so paid.

c. Any balance due shall be paid by the Authority within thirty (30) days after the completion of the financial audit under Section XII for the fiscal year.

d. Payments made pursuant to this subsection shall be by electronic transfer of funds. After commencement of Class III gaming at the Kenosha facility, the Department and the Tribe shall establish further procedures regarding how payments are made under this subsection.

D. The State anticipates that if the Governor concurs in the Secretary's August 2013 Determination, the State will experience reductions in, or the loss of, revenue sharing payments it receives from FCPC and the Ho-Chunk Nation. The Tribe believes that its payments under Section XXXIII.C. will exceed the amount of any such losses experienced by the State. Subject to subsection D.3, commencing with the State's 2014 fiscal year, and continuing through December 31, 2030, if, in any State fiscal year, the combined total of the Authority's revenue sharing payments to the State under Section XXXIII.C.1, revenue sharing payments from the Ho-Chunk Nation, and revenue sharing payments from FCPC's gaming facility in Milwaukee received by the State is less than $37,500,000, then by July 31 of the next State fiscal year, the Authority will deliver to the State funds equal to the difference. The parties further agree that:

1. Pursuant to the State's tribal-state gaming compact with the Ho-Chunk Nation, the State is to enter into an indemnification agreement or undertake arbitration with the Ho-Chunk Nation to determine the amount of the reduction in Ho-Chunk Nation Class III gaming revenues that would be caused by the operation of the Kenosha Facility, and the Ho-Chunk Nation's revenue sharing obligation is to be reduced accordingly. If the Tribe delivers to the State, or the State is in possession of, evidence that the State determines is likely to prove that the loss incurred by the Ho-Chunk Nation is materially less than the amount of any such reduction determination, and the State determines that the State seeking to adjust the amount of any reduction determination would be fiscally prudent, then the State shall undertake reasonable and good faith efforts to obtain an adjustment of the reduction determination.

2. The parties anticipate that FCPC may not deliver revenue sharing payments to the State that the State believes are due pursuant to the FCPC Compact. The parties acknowledge the Tribe's inherent interest in ensuring FCPC's compliance with FCPC's obligation to make revenue sharing payments to the State under the FCPC Compact. Although the parties believe that FCPC has no legal basis to refuse to make revenue sharing payments, particularly before the Governor concurs in the

Secretary's August 2013 Determination, the State believes FCPC would recommence such revenue sharing payments if the Governor declined to concur in the Secretary's August 2013 Determination. The State shall, therefore, undertake all steps that the State in good faith determines to be in the State's best interest to recover payments due from FCPC pursuant to FCPC's Compact. In the event that the State succeeds in enforcing FCPC's revenue sharing obligations and FCPC delivers such payment to the State: (i) the Authority may reduce its next payment due under subsection D by the amount the State actually recovers from FCPC; or (ii) if the Tribe does not owe the State any further amount under subsection D, then the Authority may reduce its next payment due under subsection C by that amount.

3. For any amounts attributable to the State's 2014 fiscal year and for subsequent State fiscal years through the State fiscal year in which the Tribe commences Class III gaming at the Kenosha Facility ("Accrued Obligation"), the Authority shall make payments to the State as follows:

   a. Annually in increments equal to 10% of the Accrued Obligation, with the Tribe delivering the first such incremental payment to the State on or before the first June 30th following its first full calendar year of Class III gaming operations in Kenosha, Wisconsin and the remaining incremental payments made each subsequent June 30th thereafter until such Accrued Obligation is paid in full;

   b. In any year in which the Authority's revenue sharing payments to the State under Section XXXIII.C.1 exceed $37,500,000, the Authority shall receive a credit equal to the amount by which payments the State receives under Section XXXIII.C.1 exceed $37,500,000. This credit may be applied against any amounts owed to the State by the Authority pursuant to subsection D.3.a. above.

   c. In the event the Authority notifies the State that the Tribe paying the State the Accrued Obligation would have a significant detrimental effect on the operation of the Kenosha Facility, the parties shall meet and discuss the possibility of restructuring the timing of the payments due under this subsection D.3.

4. The Tribe shall reimburse the State for costs and expenses the State incurs in relation to the Governor's concurrence in the Secretary's August 2013 Determination, including, but not limited to, legal fees and other related expenses incurred both before and after the Governor's concurrence in the Secretary's Determination if such expenses are related to the Governor's decision to concur in the Secretary's Determination (including any costs and expenses incurred in relation to steps the State takes pursuant to Section XXXIII.D.1. and Section XXXIII.D.2.). Such reimbursement

payments shall be limited to $2,000,000 attributable to costs and expenses incurred before the Governor concurs in the Secretary's August 2013 Determination and $2,000,000 per State fiscal year thereafter. Reimbursement for such costs and expenses shall be made on the first anniversary of the Tribe's commencement of Class III gaming at the Kenosha Facility and, thereafter, or before July 31 of the State fiscal year following the State fiscal year in which such costs and expenses are incurred. To the extent that such costs and expenses exceed $2,000,000 in a particular State fiscal year, the remaining unreimbursed costs and expenses shall be reimbursed in the following State fiscal year.

E. The Authority shall indemnify the State in the event that the State is required to make any expenditures to FCPC in relation to the Governor concurring in the Secretary's Determination. The Tribe shall indemnify the State by making any required State payments directly to FCPC. If, however, the Department of the Interior or the National Indian Gaming Commission disallow such payments, the Parties shall negotiate another mechanism by which the Tribe fulfills the State's obligations without requiring the State to appropriate State funds. The Authority shall indemnify the State in the following circumstances:

1. Litigation. If, as a result of litigation, FCPC obtains a judgment that results in the FCPC Arbitration Amendment becoming effective or the Secretary of the Interior approving the FCPC Arbitration Amendment. If the State is named as a party in any such litigation, the State will undertake all efforts to defend such litigation and avail itself of rights to appeal in a manner that the State deems appropriate.

2. Arbitration. If, after the State undertakes all defensive efforts in a manner that the State deems appropriate, the State is required by a non-appealable court or arbitration order or decision that is not a consent/stipulated decision to re-enter arbitration pursuant to the substitute compact amendment provisions of Section XXII.A.11 of the FCPC Compact and the resulting substitute compact amendment arbitration leads to an effective amendment to the FCPC Compact that requires the State to pay any amount to FCPC.

3. Negotiated FCPC Compact Amendment. Subject to the following paragraphs a.-d., if the State and FCPC execute a valid and binding amendment to FCPC's Compact that requires payments by the State or the Tribe to FCPC.

    a. Within thirty (30) days after commencing negotiations with FCPC regarding an FCPC Compact Amendment, the State shall notify the Tribe in writing that it has commenced negotiations with FCPC. The State shall undertake reasonable efforts to communicate with the Tribe regarding any proposed FCPC Compact Amendment.

b. Within ninety (90) days after the State provides written notice to the Tribe that the State has reached agreement with FCPC on the terms of an FCPC Compact Amendment, together with the contents of that FCPC Compact Amendment, the State and the Tribe shall execute an amendment to this Compact whereby the Authority shall indemnify the State for the State's obligations pursuant to such FCPC Compact Amendment. The parties intend to expedite the compact amendment process such that the Tribe's compact amendment and the FCPC Compact amendment are submitted to the Secretary simultaneously. The State and the Tribe shall in good faith encourage the Secretary to approve pursuant to 25 U.S.C. §2710(d)(8) any amendments to this compact. If a compact amendment between the State and the Tribe is not executed by the deadline specified in this paragraph, or if the Tribe does not in good faith encourage the Secretary to approve pursuant to 25 U.S.C. §2710(d)(8) any amendments to this compact, there shall exist a failure of consideration and a breach of this Compact by the Tribe. Upon such a breach or failure of consideration, the Tribe shall cease gaming operations at the Kenosha Facility within seven (7) days until an amendment to this compact by which the Authority indemnifies the State for the State's obligations that arise as a result of an FCPC Compact Amendment has, pursuant to 25 U.S.C. §2710(d)(8), been approved by the Secretary and published in the Federal Register. The Authority's obligation to indemnify the State shall not be effective unless the Tribe's Compact Amendment and any FCPC Compact Amendment have, pursuant to 25 U.S.C. §2710(d)(8), been approved by the Secretary and published in the Federal Register. If the Secretary disapproves any compact amendment with FCPC or the Tribe, the parties acknowledge that the State may continue to develop compact amendments pursuant to this Subsection and that the Tribe's obligations under this Subsection continue until the Secretary has approved and published in the Federal Register compact amendments between: (i) the State and FCPC; and (ii) the State and the Tribe.

c. The Tribe shall not be required to indemnify the State for any obligations it incurs through a FCPC Compact Amendment which arise or continue after December 31, 2030.

d. An FCPC Compact Amendment must be executed within 365 days of the latter of: (i) a final, non-appealable judgment in any lawsuit brought by FCPC in connection with Section XXII.A.11 of FCPC's Compact or the Department of the Interior's disapproval of the FCPC Arbitration Amendment; or, (ii) the State's timely transmittal of notice to the Tribe that the State has in good faith

determined that the State's obligations under Section XXII.A.11 of FCPC's Compact have been fully and finally fulfilled, and that no further proceedings or challenges to such a determination will occur; or (iii) the Secretary's disapproval under 25 U.S.C. §2710 of an FCPC Compact Amendment contemplated under Section XXXIII.E.

The parties agree that the State would not have executed this amendment or concur in the Secretary's Determination absent the Tribe's agreement to fully indemnify the State in the event that such concurrence would cause the State to incur any expense. The Tribe, therefore, agrees that, because this Compact is directly related to, and necessary for, the licensing and regulation of Class III gaming and otherwise directly relates to the operation of the Kenosha Facility, the Authority's failure to make payments under Sections XXXIII.D. and E. constitutes a failure of consideration and breach of this Compact and the Tribe agrees that, upon such a failure of consideration or breach, it will cease Class III gaming operations at the Kenosha Facility.

F. Payments due under this Section XXXIII.C through E., shall be paid from the Net Win at the Kenosha Facility, as defined in subsection C., above.

G. In the event that a natural or man-made disaster renders impossible the operation of fifty percent (50%) or more of the electronic games of chance operated by the Tribe under this Compact at a gaming facility for a period of fourteen (14) consecutive days or more, the applicable payment required under this Compact for the year in which the disaster occurs shall be reduced by a percentage equal to the percentage decrease in the net win (total amount wagered less winnings paid) for the fiscal year in which the disaster occurred compared with the net win for the previous fiscal year, and the State and Tribe shall meet to discuss additional assistance. Notwithstanding the forgoing, to the extent the State's obligations to compensate FCPC for lost revenue continues notwithstanding such a natural or man-made disaster's impact, the Tribe's obligation to indemnify the State also shall continue.

H. In the event state or federal law prevents the Tribe from offering any type of Class III game permitted under this Compact at the date of execution, the Tribe may suspend payments under this Section and the State and the Tribe shall meet to discuss the amount of payments due under this Section after such date.

I. The State and the Tribe agree to cooperate and to consult in the preparation of the State's budget to the extent it proposes the appropriation of the funds made available to the State under this Section XXXIII of the Compact. The State and the Tribe shall cooperate as is appropriate for governments that share their revenue to fund programs or activities to achieve goals of mutual interest.

17. Section XL.A. is amended by adding the following at the end of that subsection:

Because the Tribe's obligations in Sections XXXIII.D. and E. constitute material and irreplaceable consideration for the State to enter into this Compact and amendment and for any concurrence in the Secretary's Determination, and that the State would not have entered into this Compact or concur in the Secretary's Determination absent the Tribe undertaking the obligations in Sections XXXIII.D. and E., the State and the Tribe specifically agree to not contest the validity of any provisions of Sections XXXIII.D. and E. or otherwise fail to make the payment set forth in Sections XXXIII.D. and E. for any reason. If, notwithstanding the foregoing, the Tribe: (a) brings an action challenging Sections XXXIII.D. and E., and, as a result, Sections XXXIII.D. and E. are found invalid or unenforceable, or (b) fails to make the payments set forth in Sections XXXIII for any reason, then, notwithstanding any other provision in this Compact, the Tribe will cease Class III gaming at the Kenosha Facility.

18. Exhibit C is amended by deleting Exhibit C and replacing it with the document that is attached to this Amendment as Exhibit 1.

19. The Authority executing this Compact Amendment constitutes the Authority's agreement with, and approval of, all previous Compact amendments.

IN WITNESS WHEREOF, The Menominee Indian Tribe of Wisconsin, the Menominee Kenosha Gaming Authority and the State of Wisconsin have hereunto set their hands and seals.

MENOMINEE INDIAN TRIBE OF WISCONSIN

By:_____
Laurie Boivin, Chairperson

STATE OF WISCONSIN

By:_____
Scott Walker, Governor

MENOMINEE KENOSHA GAMING AUTHORITY

By:_____