Tribal Gaming in Wisconsin

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Introduction

Prior to 1965, Article IV, Section 24 of the Wisconsin Constitution stipulated that "the legislature shall never authorize any lottery..." This provision was broadly interpreted to exclude all forms of gambling in Wisconsin. Between 1965 and 1987, four constitutional amendments modified this strict gambling prohibition. The first, ratified in 1965, allowed the Legislature to create an exception to permit state residents to participate in various promotional contests. In 1973 and 1977, amendments were passed authorizing the Legislature to allow charitable bingo games and raffles, respectively. In 1987, two amendments were adopted authorizing: (a) the creation of a state-operated lottery, with proceeds to be used for property tax relief; and (b) privately operated pari-mutuel on-track betting as provided by law.

A history and a detailed description of lottery and charitable gaming is provided in the Legislative Fiscal Bureau's informational paper entitled "State Lottery and Charitable Gaming." For more information on pari-mutuel wagering and racing activities reference the appendix in Legislative Fiscal Bureau's 2015 informational paper entitled "State Lottery and Charitable Gaming (Pari-Mutuel Wagering and Racing)."

In separate developments resulting from federal court rulings and federal law changes in the late-1980's and early 1990's, Indian tribes in Wisconsin and other states were provided the right to negotiate gaming compacts authorizing a wide variety of gambling activities on reservations and federal trust lands. As a result, 11 Indian tribes and bands began operating casino facilities in Wisconsin, under state-tribal gaming compacts signed in 1991 and 1992.

In addition to the amendments that expanded legal gambling in the state, Wisconsin voters ratified a constitutional amendment on April 6, 1993, that clarified that all forms of gambling are prohibited except bingo, raffles, pari-mutuel on-track betting and the current state-run lottery. The amendment also specifically prohibited the state from conducting prohibited forms of gambling as part of the state-run lottery. The amendment limited gambling in the state to those forms permitted in April, 1993. Further, a 2006 Wisconsin Supreme Court decision (*Dairyland Greyhound Park, Inc., v. Doyle,* 2006 WI 107) determined that the 1993 amendment to the Constitution does not invalidate existing tribal gaming compacts and that amendments to the compacts that expand the scope of tribal gaming are constitutionally protected. This decision is described in greater detail below.

This paper describes the development and current status of tribal gaming in Wisconsin, including: (a) the historical and legal background relating to the development of Indian gaming; (b) the current extent of tribal gaming in Wisconsin; (c) state administration of tribal gaming under current law; (d) the major provisions of the state-tribal gaming compacts; (e) the impact of two Supreme Court decisions affecting tribal gaming in the state; (f) other provisions of the state-tribal gaming compacts; and (g) the amount and use of gaming-related tribal payments to the state.

Historical and Legal Background

The appearance of casino gambling operations on Indian lands in Wisconsin is part of a national phenomenon resulting from the enactment of the

federal Indian Gaming Regulatory Act and several court decisions. This Act and two court decisions are described in this section before turning to a discussion of Indian gaming in Wisconsin.

Indian Gaming Regulatory Act (IGRA)

Enacted as Public Law (P.L.) 100-497 on October 17, 1988, IGRA provides that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." The Act is consistent with a principal goal of federal Indian policy: the promotion of tribal economic development, tribal self-sufficiency, and strong tribal government. The Act is also viewed as responsive to the interest many Indian tribes have in using gambling as a means to economic development. In order to provide clearer standards and regulations for the conduct of gaming on Indian lands, IGRA specifies what types of gaming are subject to what types of jurisdiction, defines on what lands Indian gaming may be operated, and establishes the requirements for compacts between Indian tribes and the states. These major features are briefly described here.

Three classes of gaming are defined by IGRA that are subject to different jurisdictions and levels of regulation. State-tribal gaming compacts are required for Class III gaming only.

Class I Gaming. Class I games are defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." Under IGRA, Class I games conducted on Indian lands are within the exclusive jurisdiction of the Indian tribes and are not subject to federal or state regulation.

Class II Gaming. Class II games are defined as the game commonly known as bingo and includes, if played at the same location, pull-tabs, punch boards, tip jars, instant bingo and other games similar to bingo. It also includes card games that are authorized by the laws of a state or are not expressly prohibited by the laws of a state and are played at any location in a state. However, Class II gaming does not include banking card games (where a player is playing against the "house" rather than other players: for example, baccarat, chemin de fer or blackjack) or electronic facsimiles of any game of chance or slot machines. Class II gaming on Indian lands is also within the jurisdiction of Indian tribes, but is subject to federal provisions under IGRA.

Class III Gaming. Class III games are defined as all forms of gaming that are not defined as Class I or Class II games. These types of games would include banking card games, electronic or electromechanical games of chance, including slot machines, pari-mutuel racing, jai alai and, generally, all high-stakes, casino-style games.

Under IGRA, Class III gaming may be conducted on Indian lands if the following conditions are met: (a) the gaming activities are authorized by an ordinance or resolution adopted by the tribe and approved by the Chairman of the National Indian Gaming Commission; (b) the gaming activities are located in a state that permits such gaming for any purpose by any person, organization or entity; and (c) the gaming is conducted in conformance with a compact entered into by the tribe and the state.

Generally, gaming may not be conducted on Indian lands acquired after October 17, 1988, and held in trust by the U.S. Secretary of the Interior for the benefit of an Indian tribe, unless: (a) the lands are located within, or are contiguous to, the boundaries of a reservation of a tribe on October 17, 1988; or (b) the tribe has no reservation as of this date, but the land is located within the tribe's last recognized reservation within a state or states

in which the tribe is presently located. An exception may be made to this rule if the Secretary of the US Department of the Interior (DOI) determines that a gaming establishment on newly acquired lands would be in the best interest of the tribe and would not be detrimental to the surrounding community, but only if the Governor of the affected state concurs in this determination.

The purpose of the state-tribal compact is to govern Class III gaming activities on Indian lands and may include provisions relating to: (a) the application of criminal and civil laws of the tribe and the state to the licensing and regulation of the gaming activities; (b) the allocation of criminal and civil jurisdiction between the state and the tribe; (c) the assessment by the state of amounts necessary to defray the costs of regulation; (d) standards for the operation of gaming activities; (e) remedies for breach of contract; and (f) any other subjects directly related to the operation of gaming activities. A state-tribal compact takes effect only when notice of approval of the compact by the U.S. Secretary of the Interior has been published in the Federal Register.

The Indian Gaming Regulatory Act also prescribes procedures for the negotiation of state-tribal compacts, requires states to negotiate in good faith and requires a mediation process to be utilized, under certain conditions, if negotiations are not successfully concluded. However, a 1996 U.S. Supreme Court decision *(Seminole Tribe of Florida v. Florida, et al.*) has determined that certain of these provisions are unconstitutional. The *Seminole Tribe* court decision and other relevant decisions are discussed next.

Early Federal Court Decisions

The development of Indian gaming has been subject to various federal court decisions that have resolved issues relating to jurisdictional disputes over the regulation of Indian gaming activities and the types of games that may be offered on Indian lands.

An important standard for subsequent cases was set in the U.S. Supreme Court's 1987 decision in *California v. Cabazon Band of Mission Indians.* This case involved California's attempt to require tribes to submit to state and local laws governing wagering on bingo and card games. The Supreme Court held that the application of a state's criminal laws to Indian gaming would depend on a state's policy toward gambling. If the policy is "criminal-prohibitory," that is, if the state prohibits all forms of gambling by anyone, the state's laws would apply to Indian gaming. However, if the state's policy is "civil-regulatory," that is, if the state allows some forms of gambling, even gaming that is subject to extensive regulation, the state is barred from enforcing its gambling laws on Indian reservations. California law was characterized by the Court as civil-regulatory. Consequently, the Court held that California could not enforce its criminal gambling laws against the Cabazon gaming operations.

Congress relied on *Cabazon* in drafting the Indian Gaming Regulatory Act of 1988. The IGRA requirement that state-tribal gaming compacts be negotiated for Class III gaming was the means devised to balance state and Indian interests in the regulation and operation of high stakes gambling.

An important interpretation of IGRA was provided in a 1991 Wisconsin case. In *Lac du Flambeau Band of Lake Superior Chippewa Indians and the Sokaogon Chippewa Community v. State of Wisconsin et al.,* the U.S. District Court for the Western District of Wisconsin held that:

"...[T]he state is required to negotiate with plaintiffs [the tribes] over the inclusion in a state-tribal compact of any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law."

This ruling settled a dispute over whether the

state had to include casino games, video games and slot machines in its compact negotiations with tribes. Wisconsin had contended that unless a state grants leave expressly for the playing of a particular type of game within the state, that activity cannot be lawful on Indian lands. The Court, however, determined that:

"[I]t is not necessary for plaintiffs to show that the state formally authorizes the same activities plaintiffs wish to offer. The inquiry is whether Wisconsin prohibits those particular gaming activities. It does not."

This ruling applied the *Cabazon* standard of civil-regulatory versus criminal-prohibitory to state policy and concluded that the state's existing lottery and pari-mutuel wagering provisions demonstrate that state policy permits gaming in a civil-regulatory sense.

The Indian Gaming Regulatory Act, in conjunction with court decisions prior and subsequent to its enactment, set the stage for the negotiation of Class III Indian gaming compacts in Wisconsin and in other states where such gambling is permitted, even in a restricted manner. However, one important provision of IGRA has been struck down by the U.S. Supreme Court.

Under IGRA, states have a duty to negotiate in good faith with a tribe toward the formation of a compact, and a tribe may sue a state in federal court to compel performance of that duty. In a 1996 decision (*Seminole Tribe of Florida v. Florida, et al.*) the U.S. Supreme Court held that the Eleventh Amendment of the U.S. Constitution prevents Congress from authorizing suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian commerce clause. The *Seminole* decision would not prevent a state from negotiating or renegotiating a gaming compact in the future. However, if a state fails to negotiate or renegotiate a compact to the satisfaction of a tribe, the tribe would have recourse in federal court only if the state did not claim immunity under the Eleventh Amendment to the U.S. Constitution. If a state would claim such immunity, the ability of a tribe to operate Class III gaming in that state would be determined under regulations issued by the DOI Bureau of Indian Affairs.

Current Extent of Tribal Gaming in Wisconsin

As a result of these developments, 11 state-tribal gaming compacts were signed in Wisconsin in 1991 and 1992, and Indian gaming casinos featuring electronic games and blackjack tables began operation across the state. Currently, 15 Class III facilities offer both electronic and table games and nine facilities offer only electronic games. Based on the most recent data available from the Department of Administration's Office of Indian Gaming, Table 1 lists, for each tribe or band, the name and location of these Class III facilities and the number of electronic gaming devices and gaming tables operated at each site.

The compacts require the tribes to submit annual independent financial audits of casino operations to the Department of Administration (DOA) and to the Legislative Audit Bureau. These audits are confidential, and the revenue data for individual tribal operations may not be publicly disclosed. Aggregate statewide data relating to Class III net revenue for all casino operations is identified in Table 2, which shows the annual net revenue (revenue remaining after winnings are paid out) for tribal casinos for the period 1992 to 2015. Summarizing this data by year is complicated by the fact that fiscal year periods used by the 11 tribes and bands are not uniform and do not necessarily coincide with the state's fiscal year.

From 1992 through 2008, tribal revenues from Class III gaming generally increased over time. Net revenue increased each year through 1996 before declining somewhat in 1997. Revenue then steadily increased to its highest level to date

Table 1: Indian Gaming Casinos, September, 2016

Tribe or Band	Casino Name	Casino Location	County	Gaming Devices	Tables
Bad River*	Bad River Casino	Odanah	Ashland	392	6
Ho-Chunk Nation	Ho-Chunk Gaming – Wisconsin Dells	Baraboo	Sauk	1,802	42
Ho-Chunk Nation	Ho-Chunk Gaming – Nekoosa	Nekoosa	Wood	647	12
Ho-Chunk Nation	Ho-Chunk Gaming – Black River Falls	Black River Falls	Jackson	641	8
Ho-Chunk Nation	Ho-Chunk Gaming – Wittenburg	Wittenburg	Shawano	498	0
Ho-Chunk Nation	Ho-Chunk Gaming – Tomah	Tomah	Monroe	97	0
Lac Courte Oreilles*	LCO Casino Lodge & Convention Center	Hayward	Sawyer	555	13
Lac Courte Oreilles*	Grindstone Creek Casino	Hayward	Sawyer	88	0
Lac du Flambeau*	Lake of the Torches Resort Casino	Lac du Flambeau	Vilas	825	9
Menominee Indian Tribe	Menominee Casino Resort	Keshena	Menominee	771	11
Menominee Indian Tribe	The Thunderbird Mini-Casino	Keshena	Menominee	30	0
Oneida Tribe of Indians	Oneida Main Casino	Green Bay	Brown	958	25
Oneida Tribe of Indians	IMAC Casino/Bingo	Green Bay	Brown	406	0
Oneida Tribe of Indians	Oneida Mason Street Casino	Green Bay	Brown	780	0
Oneida Tribe of Indians	Oneida Casino Travel Center	Oneida	Outagamie	112	0
Oneida Tribe of Indians	Oneida One-Stop Packerland	Green Bay	Brown	85	0
Stockbridge-Munsee Community	North Star Mohican Casino Resort	Bowler	Shawano	1,220	16
Forest County Potawatomi Comm.	Potawatomi Bingo Casino	Milwaukee	Milwaukee	2,709	99
Forest County Potawatomi Comm.	Potawatomi Carter Casino & Hotel	Carter	Forest	484	7
Red Cliff*	Legendary Waters Resort & Casino	Bayfield	Bayfield	249	4
Sokaogon Chippewa Comm.	Mole Lake Casino	Crandon	Forest	321	4
St. Croix Chippewa Indians	St. Croix Casino – Turtle Lake	Turtle Lake	Barron	1,086	28
St. Croix Chippewa Indians	St. Croix Casino – Danbury	Danbury	Burnett	498	10
St. Croix Chippewa Indians	St. Croix Casino – Hertel	Hertel	Burnett	148	0
Totals				15,402	294

*Band of Lake Superior Chippewa Indians

Table 2: Tribal Class III Net Gaming Revenue - 1992-2015 (In Millions)

Reporting Period	Net Revenue	Percent Change
1992	$142.7	
1993	333.0	133.4%
1994	498.7	49.8
1995	612.0	22.7
1996	634.4	3.7
1997	611.9*	-3.5
1998	693.5	13.3
1999	750.5	8.2
2000	845.3	12.6
2001	904.1	7.0
2002	970.4	7.3
2003	993.6	2.4
2004	1,117.9	12.5
2005	1,150.6	2.9
2006	1,207.2	4.9
2007	1,224.0	1.4
2008	1,224.2	0.0
2009	1,188.0	-3.0
2010	1,146.3	-3.5
2011	1,157.5	1.0
2012	1,177.7	1.7
2013	1,151.6	-2.2
2014	1,134.0	-1.6
2015	1,194.3	5.3
Total	$21,451.2	

in 2008, before dropping in 2009. Net revenue fell 3.0% and 3.5% in 2009 and 2010, respectively, recovering somewhat in 2011 and 2012 with growth of 1.0% and 1.7% respectively, before falling by 2.2% in 2013 and 1.6% in 2014. In 2015, revenue increased by 5.3%. Gaming revenue in 2015 was 2.4% below the peak of gaming revenue in 2008.

The revenue decline in 1997 and the subsequent increase in 1998 are primarily attributable to the fact that one tribe failed to provide data for its 1996-97 fiscal year. Net revenue increases beginning in 1998 can be traced to the fact that under some of the 1998 compact amendments, some physical expansion of casino gambling was permitted (for example, the expanded Potawatomi Casino in Milwaukee, which opened in 2000). Further, following the 2003 amendments, new casino games were implemented. In addition, the Potawatomi Casino in Milwaukee opened a second expansion in 2008. New casino games and expanded facilities affect overall net revenues, but it should be noted that the aggregate data is not necessarily representative of revenue performance for individual tribes. Finally, the 6.4% decline in revenue from 2008 to 2010 reflects the national economic downturn, from which revenues have not yet fully recovered. Although net revenue increased from 2010 to 2012, revenue decreased again in 2013 and 2014 with some recovery in 2015.

The tribes make certain payments to the state based on these net revenue amounts. These payments are discussed in detail in the section on state revenues from tribal gaming.

State Administration of Tribal Gaming

State regulatory oversight of tribal gaming has been assigned to several different state agencies since the first tribal gaming compacts were signed. Under the original gaming compacts, state administration for tribal gaming was under the Lottery Board, which was responsible for the operation of the state lottery. Effective October 1, 1992, the three-member Wisconsin Gaming Commission was created by 1991 Wisconsin Act 269 to coordinate and regulate all activities relating to legal gambling, including the operation of the state lottery, the regulation of pari-mutuel wagering and racing, the regulation of charitable bingo and raffles, and the state's regulatory responsibilities under the state-tribal gaming compacts.

Under 1995 Wisconsin Act 27, the Gaming Commission was eliminated and replaced by a Gaming Board, effective July 1, 1996. On that

date, the administration of the state lottery was transferred to the Department of Revenue (DOR) and all other responsibilities of the former Gaming Commission were transferred to the Gaming Board. Finally, 1997 Wisconsin Act 27 eliminated the Gaming Board, and its functions were transferred to a Division of Gaming in the Department of Administration (DOA), effective October 14, 1997.

In the Division of Gaming, an Office of Indian Gaming is responsible for the state's administrative oversight of tribal gaming. A total of 16.4 full-time equivalent (FTE) positions are authorized for the Office, including 1.65 FTE unclassified positions (1.0 FTE attorney position and 0.65 FTE division administrator position). These employees are subject to background investigations and criminal record restrictions before hiring.

The Office's funding in 2015-16 totals $1,986,600 in program revenue (PR) derived from the following sources: (a) tribal payments as reimbursement for state costs of regulation of Indian gaming; (b) tribal gaming vendors and from persons proposing to be tribal gaming vendors as reimbursement for state costs of certification and background investigations; (c) tribes, as reimbursement for state costs of gaming services and assistance provided by the state that are requested by an Indian tribe; and (d) additional revenue received by the state from tribes pursuant to the gaming compacts. Tribal payments to the state are described in greater detail in the section on state revenues from tribal gaming.

In addition to DOA's regulatory role, the compacts authorize the Department of Justice (DOJ) to monitor each tribe's casino gaming to ensure compliance with the compacts, to investigate the activities of tribal officers, employees, contractors or gaming participants who may affect the operation or administration of the tribal gaming, and to commence prosecutions relating to casino gaming for violations of any applicable state civil or criminal law or provision of a compact. These responsibilities are primarily assigned to the Special Operations Bureau, a unit within DOJ's Division of Criminal Investigation. The Department allocates 1.25 FTE positions for regulation and enforcement of tribal gaming in the state, with 2016-17 funding totaling $144,800 PR from Indian gaming receipts.

Features of Wisconsin's State-Tribal Gaming Compacts

Effective April 27, 1990, the Governor was authorized, under s. 14.035 of the statutes, to negotiate Indian gaming compacts on behalf of the state. The original gaming compacts with the 11 tribes and bands in the state were signed between August 16, 1991, and June 11, 1992, with an initial term of seven years.

Between February, 1998 and March, 1999, the compacts were amended, and the terms were extended for an additional five years. The Menominee Indian Tribe also negotiated additional amendments, dated August 18, 2000, mostly relating to a proposed casino to be operated in Kenosha. Many of these provisions were eliminated under the Menominee Tribe’s 2010 amendments.

Except for the Lac du Flambeau, additional amendments to the state-tribal gaming compacts were completed in 2003. The 2003 amendments made major changes to certain aspects of the compacts, including the term of the compacts and the payment of significant additional amounts of tribal revenues to the state. Some of these provisions have been the subject of legal action. The Lac du Flambeau negotiated major amendments in 2009, generally along the same lines as the 2003 amendments negotiated by the other tribes.

The Potawatomi and the state agreed to additional amendments in October, 2005, to address issues raised by a 2004 Wisconsin Supreme

Court ruling involving the Potawatomi compact, and in April, 2010, to settle a dispute regarding the definition of "net win" used to calculate payments to the state. Further, the Ho-Chunk Nation and the state also signed additional amendments in September, 2008, to resolve certain issues that emerged following the 2004 Wisconsin Supreme Court ruling on the Potawatomi compact provisions.

The gaming compacts, as modified by the various amendments, are described in detail in this section. Two Wisconsin Supreme Court decisions (*Panzer v. Doyle*, 2004 WI 52, and *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107) pertaining to tribal gaming are referenced in this section insofar as they apply to certain features of the compacts. These cases are also discussed in greater detail later in this paper.

While the 11 Wisconsin state-tribal gaming compacts contain many identical provisions, they also include a number of differences. Each set of additional amendments modified provisions of the original compacts and, in addition, created new features. The following discussion summarizes the major compact components, as provided under the amended compacts. Generally, these provisions apply to all of the compacts; however, important differences are specifically noted. Where variations between the compacts are deemed minor or technical in nature, they are not separately described.

Sovereign Immunity. Sovereign immunity refers to the legal doctrine that prohibits a lawsuit against a government without its consent. The original compact provisions generally provided that by entering into the compact neither the state nor the tribe waive their sovereign immunity under either state or federal law (except as expressly provided in the compact and subject to the provisions of IGRA). However, both the state and the tribe agreed that suit to enforce a compact provision could be brought in federal court against a state or a tribal official, but only for prospective declaratory or injunctive relief. If any enforcement provision of a compact was found to violate the sovereign immunity of the state or the tribe, or if a court should otherwise determine that the state or the tribe lacks jurisdiction to enforce the compact, the two parties were required under the original compacts to immediately resume negotiations to create a new enforcement mechanism.

Under most of the 2003 amendments, these provisions were largely restated, but the tribes and state expressly waived any and all sovereign immunity with respect to any claim brought by the state or tribe to enforce any provision of the compact, to the extent the state or tribe may do so under its laws. Under the 2003 compact amendments with the Oneida and St. Croix, each tribe waives its sovereign immunity with respect to certain claims under the compact; however, this waiver becomes ineffective in the event the state's sovereign immunity prevents the resolution of the claim. In the 2003 amendments with the Stockbridge-Munsee, both the tribe and state, pursuant to law, grant a limited waiver of sovereign immunity and consent to arbitration and suit in federal court solely with respect to certain claims under the compact.

While there are variations between the compacts, the 2003 amendments represent a limited waiver of the state's sovereign immunity in disputes based on compact provisions. The sovereign immunity waiver provision of the 2003 amendments to the Potawatomi compact was challenged in 2004 in the case *Panzer v. Doyle.* The Wisconsin Supreme Court concluded, with respect to the 2003 Potawatomi compact amendments only, that the Governor has neither the inherent nor the delegated power to waive the state’s sovereign immunity in compact negotiations. Therefore, provisions of the compact that waive the state’s sovereign immunity are invalid. This court decision is discussed in greater detail in the section on Supreme Court decisions.

Compacts with several other tribes include provisions relating to the waiver of state sovereign immunity that are similar to those held unconstitutional in *Panzer v. Doyle;* they have not yet been amended or challenged. Subsequent to the *Panzer v. Doyle* decision, the state and the Potawatomi Tribe entered into additional compact amendments in 2005, that, in part, amended provisions relating to the state's waiver of sovereign immunity. In addition, the Lac du Flambeau's 2009 amendments included revisions to their sovereign immunity provisions. To date, these amended provisions have not been challenged.

Term and Renewal. The term of each original compact was for seven years, beginning in 1991 and 1992. The 1998/1999 amendments extended this term for five years, to 2003 and 2004, and provided that the duration would automatically be extended for successive terms of five years. However, either party could serve written notice of nonrenewal on the other party not less than 180 days before the expiration date of a compact. Under these provisions, if written notice of nonrenewal were given by either party, the tribe could request the state to enter into negotiations for a successor compact, pursuant to procedures under IGRA. In this event, the state agreed that it would negotiate with the tribe in good faith concerning the terms of a successor compact. If a compact were not renewed and a successor compact was not concluded by the expiration date, the tribe would be required either to: (a) cease all Class III gaming upon the expiration date; or (b) commence action in federal court under procedures enumerated in IGRA. Under this second option, the compact would remain in effect until the procedures under IGRA were exhausted.

Under the 2003 amendments, the duration provisions of the compacts were significantly modified to provide that the compacts remain in effect until terminated by mutual agreement of the parties, or by a duly adopted ordinance or resolution of the tribe revoking the authority to operate Class III gaming (except that the Stockbridge-Munsee require the mutual agreement of both the state and the tribe to terminate their compact). The 2003 amendments resulted in the compacts having unlimited duration (that is, they are "perpetual" compacts).

However, the 2003 amendments with three tribes (the Oneida, St. Croix, and Stockbridge-Munsee) specify that if the unlimited duration provision were found to be invalid or unlawful by a court of competent jurisdiction, then the term of the compact would default to expiration dates in 2101 or 2102 (approximately 99 years following the effective date of the 2003 amendments).

In addition to the unlimited duration provisions, the 2003 compact amendments deleted the provisions allowing either party to give a nonrenewal notice at five-year intervals. This nonrenewal process was one means for the parties to seek revisions in the terms of the compacts. The 2003 amendments include new provisions for the periodic amendment of the compacts. First, at five-year intervals, either the state or a tribe may propose amendments to the regulatory provisions of the compact. Second, at 25-year intervals, the Governor, as directed by the Legislature through the enactment of a session law, or a tribe may propose amendments to any compact provision. If amendments are requested by either party, the state and tribe are required to negotiate in good faith regarding the proposed amendments. Disputes over the obligation to negotiate in good faith are subject to the dispute resolution provisions of the compact, described below.

The perpetual duration provision of the 2003 Potawatomi amendments was also challenged as part of the *Panzer v. Doyle* litigation involving the Potawatomi compact. In its 2004 ruling, the Wisconsin Supreme Court concluded that with respect to the Potawatomi amendments, the Governor was without authority to agree to the "perpetual" duration provision. This court decision is discussed in greater detail in the section on Su-

preme Court decisions.

As a result of the court's ruling, the Potawatomi and the state renegotiated the compact's duration provisions. Under the October, 2005 amendments, the Potawatomi compact is extended for a term of 25 years from the date notification of the amendments is published in the Federal Register, and thereafter extended automatically unless either party serves a notice of nonrenewal. The Governor may serve a notice of nonrenewal on the tribe not later than 180 days prior to the expiration of the term of the compact or any extension thereof, but only if the state first enacts a statute directing the Governor to serve a notice of nonrenewal and consenting, on behalf of the state to be bound by the remedies specified under the compact. The tribe may serve a notice of nonrenewal on the state not less than 180 days prior to the expiration of the term of the compact or any extension thereof.

In the event written notice of nonrenewal is given by either the state or the tribe, the tribe must cease all Class III gaming under the compact upon the expiration of the compact or the expiration of any amended, renewed, or successor compact. Pursuant to the procedures of IGRA, the tribe may also request the state to enter into negotiations for an amended, renewed, or successor compact. The state is required to negotiate with the tribe in good faith concerning the terms of an amended, renewed, or successor compact. If an agreement is not reached, the tribe agrees to immediately cease all Class III gaming upon the expiration date, or commence action under federal law.

Finally, in the event neither party serves a notice of nonrenewal, either party may propose amendments to any term of the compact, or propose new terms, and the parties must negotiate in good faith to reach agreement. Either party may require that disagreements regarding proposed compact terms be resolved through last best offer arbitration as specified in the compact. The last best offer selected must provide for a term of not less than 15 years, nor more than 25 years.

The Lac du Flambeau, in their 2009 compact amendments, have term and renewal provisions identical to these 2005 Potawatomi provisions.

Also as a consequence of the *Panzer v. Doyle* decision, the Ho-Chunk compact duration provisions were renegotiated. Under September, 2008 compact amendments, the Ho-Chunk Nation's gaming compact with the state is extended for a term of 25 years from the date that notification of federal approval of the amendments is published in the Federal Register. On the 15th anniversary of the date of publication in the Federal Register, the compact would be automatically extended for 25 years (for a total term of 50 years) unless the state serves notice on the tribe, within 90 days preceding the fifteenth anniversary alleging any of the following: (a) either party has served a notice of nonrenewal, in which case the compact would expire at the conclusion of the initial 25 year duration; (b) the tribe has not made all payments required to date under the terms of the amendment; (c) the tribe has been found to be in material breach of the compact under the dispute resolution procedures of the compact, or the tribe has refused to participate in a dispute resolution procedure contained in the compact; or (d) the state has served notice on the tribe that it is in material breach of the compact, and that allegation has not been finally resolved under the dispute resolution procedures of the compact. [In the event of condition (d), if the allegation is finally resolved in favor of the tribe, the compact would be extended for 25 years within 30 days after the final resolution.]

In addition to the 15th anniversary provision, the compact would be extended automatically unless either party serves a notice of nonrenewal. The Governor would be authorized to serve a notice of nonrenewal on the tribe not later than 180 days prior to the expiration of the term of the compact or any extension, but only if the state

first enacts a statute directing the Governor to serve a notice of nonrenewal and consenting, on behalf of the state, to be bound by the dispute resolution remedies specified in the compact. The tribe would be authorized to serve a notice of nonrenewal on the state not less than 180 days prior to the expiration of the term of the compact or any extension.

If notice of nonrenewal is made, the tribe may, pursuant to IGRA, request the state to enter into negotiations for an amended, renewed, or successor compact. The state is required to negotiate with the tribe in good faith. If an agreement is not reached before the expiration date of the existing compact, the tribe would be required to either cease all Class III gaming or commence action under federal law.

Finally, if neither party serves a notice of nonrenewal on the other, the compact would automatically renew, although either party may propose amendments to any term of the compact, or propose new terms. In this case, the parties would be required to negotiate in good faith to reach agreement. If the parties do not reach agreement by the expiration of the term of the compact or any extension, either party may require that the disagreements be resolved through last best offer arbitration proceedings specified in the compact. The tribe would be authorized to continue to conduct Class III gaming pursuant to the terms of the compact in effect at the time of the expiration of the term of the compact or any extension, until such time as compact amendments have been executed or the arbitration has been concluded.

Types of Games Authorized. The compacts specify the Class III games that may be operated by each tribe or band. Under the original compacts, these games included: (a) electronic games of chance with video facsimile displays; (b) electronic games of chance with mechanical displays; (c) blackjack; and (d) pull-tabs or break-open tickets, when not played at the same location where bingo is being played. Tribes were also not authorized to operate any other types of Class III gaming unless the compact is amended.

The original compacts also provided that a tribe may request that negotiations be reopened in the event the state operates, licenses or permits the operation of other types of games that are not authorized in the tribe's compact. This renegotiation provision would also apply in cases where additional games were newly authorized under another state-tribal gaming compact. Under some of the state-tribal compacts, tribes were authorized to request annually that the state and tribe discuss and consider the addition of new types of games, if the tribe specified the need to operate additional games to realize a reasonable return on its investment.

Under the 2003 amendments (and the 2009 Lac du Flambeau amendments), the types of authorized games were significantly expanded to include the following: electric keno, pari-mutuel wagering on live simulcast races, roulette, craps, poker, and non-house banked card games. In addition, for some tribes, the compact amendments specify that other games, including lottery games, variations of blackjack, and other types of dice games are authorized. The Lac du Flambeau's 2009 amendments also specify that the tribe may allow the play of tournaments that permit players to engage in competitive play against other players in an authorized game.

This expansion of authorized games was challenged in *Panzer v. Doyle.* The petitioners contended that the Governor exceeded his authority by agreeing to these new types of games in the Potawatomi compact amendments. The Wisconsin Supreme Court ruled in this case that most, but not all, of the games added in the 2003 amendments with the Potawatomi tribe could not validly be included in a compact as a matter of state law because their inclusion violated both the Wisconsin Constitution and state criminal code. Therefore, the Court concluded, the Governor

had no authority to agree to these provisions. The ruling stated that the Governor did have the authority to agree to pari-mutuel wagering on live simulcast racing events because that form of wagering is not prohibited under state law.

However, in its 2006 *Dairyland v. Doyle* decision, the Wisconsin Supreme Court withdrew its language in *Panzer v. Doyle* that the Governor did not have the authority to agree to the additional games. Rather, the Court held that amendments to the original compacts, such as the 2003 amendments, that expanded the scope of games, were constitutionally protected under the Contract Clause of the Wisconsin and U. S. Constitutions.

In November, 2010, the Ho-Chunk Nation began offering non-banked electronic poker at Ho-Chunk Gaming Madison. Wisconsin sought an injunction as Dane County did not authorize Class III gaming at this location. In April, 2015, the US Seventh Circuit Court of Appeals found non-banked poker to be a Class II game, because it fit the description of a non-banked card game that was not explicitly prohibited by the state. Therefore, Ho-Chunk was allowed to offer non-banked electronic poker without Wisconsin's authorization.

Gaming Procedures and Requirements. The state-tribal compacts provide detailed procedures and requirements relating to the operations of Class III games to ensure gaming security and adequate regulatory oversight. The compacts establish the following general gaming provisions: (a) no person under 18 years of age may be employed in the conduct of gaming; (b) no person visibly intoxicated is allowed to play any game; (c) games must be conducted on a cash basis (bank or credit card transactions are permitted); (d) a tribe must publish procedures for the impartial resolution of a player dispute concerning the conduct of a game; and (e) alcoholic beverages may be served on the premises of gaming facilities only during the hours prescribed under state law. With two exceptions, the minimum age to play is 21 years. Under the Lac Courte Oreilles and Sokaogon compacts, the minimum playing age is 18 years.

Under IGRA, Class III games may not be conducted outside qualified tribal lands. These lands include all lands within the limits of any Indian reservation, or land held in trust by the United States for the benefit of any tribe or individual, or held by any tribe or individual subject to restriction by the United States against alienation and over which a tribe exercises governmental power. Further, the compacts specify that Class III gaming may not be conducted through the use of common carriers such as telecommunications, postal or delivery services for the purpose of facilitating gambling by a person who is not physically present on tribal lands.

Separate requirements are specified for the operation of electronic games of chance and the conduct of blackjack and pull-tab ticket games. These requirements are briefly summarized, as follows:

1. *Electronic Games of Chance.* The compacts require that electronic games of chance be obtained from a manufacturer or distributor holding a state certificate required for gaming-related contracts (described below). The electronic game must also be tested, approved, and certified by a gaming test laboratory as meeting the requirements and standards of the compact. Provisions also delineate procedures for testing, modifying, installing, operating, and removing games from play and specify hardware, cabinet security, software, and other requirements.

Under the original compacts, video games that are not affected by player skill must pay out a minimum of 80% of the amount wagered, and games affected by player skill must pay out a minimum of 83% of the amount wagered. In both types of games the maximum payout was established at 100%. The 2003 amendments for some

tribes modified the maximum payout provision to: (a) authorize maximum payouts for games that are not affected by player skill to exceed 100%, if the games are being utilized in slot tournaments; and (b) authorize maximum payouts for games that are affected by player skill to be no more than 103%.

Under the 2003 compact amendments (and the 2009 Lac du Flambeau amendments), an original compact provision that an electronic game of chance may not allow a player to wager more than $5 during a single game was eliminated for ten of the 11 tribes. Only the Ho-Chunk (whose 2003 amendments did not make this change) still retains the $5 maximum wager limitation on electronic games.

2. *Blackjack.* Under each original compact: (a) a tribe is authorized to operate blackjack games at no more than two facilities, unless the state (by amendment of the compact) consents to additional locations; (b) blackjack may not be operated at any location for more than 18 hours a day; and (c) the maximum wager before double-downs or splits is $200. Under Ho-Chunk compact amendments, blackjack may operate at three locations, but the 18-hour and $200 maximum wager provisions remain unchanged. However, the 2003 amendments for nine other tribes and the 2009 Lac du Flambeau amendments eliminate the $200 maximum wager limitation. For most tribes, the 18-hour daily limitation for blackjack play is also eliminated. Finally, five tribes (Lac du Flambeau, Menominee, Oneida, Potawatomi, and Stockbridge-Munsee) have the two blackjack facilities limitation deleted in their amendments.

The compacts also define a variety of blackjack terms and specify the regulations that apply to players and non-players, the cards used in the games, wagers, playing procedures and payment of winners. Minimum staffing levels for the conduct of blackjack and surveillance requirements are also provided.

3. *Pull-Tab Ticket Games.* For nine tribes, pull-tab ticket games, when conducted as Class III gaming under the compacts, must be conducted in accordance with the most recently published standards of the North American Gaming Regulators Association. Two tribes (Oneida and Stockbridge-Munsee) deleted this provision in their 2003 amendments. For these two tribes, pull-tab ticket games are now subject to each tribe's internal gaming regulations.

For the Class III games authorized under the amended compacts, most tribes specified in their 2003 amendments that the rules of play would be promulgated as minimum internal control standards that would provide accurate payout ratios for all games, ensure fairness of play, and ensure that revenue is adequately accounted for in conformance with generally accepted accounting principles. Disagreements between the state and tribes concerning these rules of play are to be resolved through mediation or arbitration procedures established under the compacts. These procedures regarding rules of play were adopted by the Potawatomi in their 2005 compact amendments and by the Lac du Flambeau in their 2009 amendments.

Wisconsin Supreme Court Decisions

There have been two important Supreme Court decisions relating to tribal gaming compact provisions in Wisconsin following the 2003 agreements on compact amendments: *Panzer v. Doyle*, 2004 WI 52, and *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107. The *Panzer* case challenged the Governor's authority to agree to certain provisions contained in the 2003 Potawatomi compact amendments while the *Dairyland* case challenged the continuation of casino gambling in Wisconsin. This section describes each of these cases.

***Panzer v. Doyle*.** This litigation began in 2003 when the petitioners (Senator Mary E. Panzer, Speaker John G. Gard, and the Joint Committee on Legislative Organization) contended that Governor James E. Doyle had exceeded his authority by agreeing to certain provisions in the 2003 amendments to the gaming compact between the state and the Forest County Potawatomi Tribe. The 2003 provisions that were challenged relate to the: (a) newly authorized games; (b) unlimited duration of the compact; and (c) waiver of the state's sovereign immunity.

On May 13, 2004, the Wisconsin Supreme Court ruled 4-3 that the Governor had exceeded his authority by agreeing to these provisions in the 2003 Potawatomi amendments. The major features of the Court's ruling are described below.

Scope of Games. In addition to the electronic games, blackjack, and pull-tab games originally authorized under the 1992 compact, the 2003 Potawatomi amendments authorized variations of blackjack, pari-mutuel wagering on live simulcast racing events, electronic keno, and additional casino table games such as roulette, craps, poker or other non-house banked games, and other games played at blackjack style tables. Under federal law (IGRA), tribal gaming activities are to be permitted in a state only if the state permits such gaming for any purpose by any person, organization, or entity, and the games are conducted in conformance with a tribal-state compact. The question before the Court was whether these new games could be authorized, given the previously described 1993 state constitutional amendment.

The Court held that most, but not all, of these added games could not validly be included in a compact as a matter of state law because they violate both the Wisconsin Constitution and the state statutes. The Governor, therefore, did not have the authority to agree to provisions adding certain casino games. Under the ruling, the Governor did have the authority to agree to pari-mutuel wagering on live simulcast racing events because this type of wagering is not prohibited under state law. [The Court did not clearly address the status of casino games that were authorized under the original compact, particularly, electronic games of chance and blackjack.]

Duration of the Compact. Under the 2003 Potawatomi amendments, the compact would remain in effect until terminated by mutual agreement of the parties, or by a duly adopted ordinance or resolution of the tribe revoking the authority to operate Class III gaming. Essentially, this provision resulted in a compact of unlimited duration. While the Governor is delegated the authority to negotiate gaming compacts with the tribes, the question raised in *Panzer* was whether the new duration provision exceeded this delegated authority.

The Court held that the Legislature's delegation of power to the Governor to negotiate and enter into tribal gaming compacts under s. 14.035 of the statutes was subject to "certain implicit limits." Those limits, according to the Court, prohibited the Governor from agreeing to the duration provision in the 2003 Potawatomi amendments, which the Court characterized as creating a "perpetual" compact. According to the Court, the "perpetual" nature of the compact meant that the Governor had given away power delegated to him by the Legislature in a way that the Legislature could not take back. Under this ruling, the duration provision in the 2003 amendments circumvented the procedural safeguards which sustained the delegation in the first place. Therefore, the Court concluded, the Governor had not been delegated authority to agree to an unlimited duration provision.

Waiver of the State's Sovereign Immunity. Sovereign immunity refers to the legal doctrine that prohibits a lawsuit against a government without its consent. Under the Wisconsin Constitution: "The legislature shall direct by law in what manner and in what courts suits may be

brought against the state." [Wis. Const., art. IV, s. 27.] Several provisions in the 2003 Potawatomi amendments related to suits to enforce the agreements made under the compact. Generally, under the compact amendments, both the tribe and state expressly waived any and all sovereign immunity with respect to any claim brought by the state or tribe to enforce any provision of the compact. For example, one provision in the amendments provided that, to the extent the state may do so pursuant to law, the state expressly waives any and all sovereign immunity with respect to any claim brought by the Potawatomi to enforce any compact provision. The plaintiffs argued that the Governor did not have the authority to waive the state's sovereign immunity under the gaming compacts.

The Supreme Court noted that prior court decisions had held that: (a) only the Legislature may exercise the authority to waive sovereign immunity on the state's behalf; (b) a waiver of sovereign immunity is a fundamental legislative responsibility under the Wisconsin Constitution; and (c) if the Legislature wishes to authorize a designated agent to waive the state's sovereign immunity, the Legislature must do so clearly and expressly. The Court concluded that the Governor did not have inherent or delegated power to waive the state's sovereign immunity in the 2003 Potawatomi amendments.

[As mentioned previously, subsequent to the *Panzer v. Doyle* decision, the state and the Forest County Potawatomi Tribe entered into additional compact amendments in 2005. In part, these amended provisions relate to the state's waiver of sovereign immunity. In addition, the Lac du Flambeau's 2009 amendments included revisions to their sovereign immunity provisions. To date, these amended provisions have not been challenged. Compacts with several other tribes include provisions relating to the waiver of state sovereign immunity that are similar to those held unconstitutional in *Panzer v. Doyle;* they have not yet been amended or challenged.]

Given that the *Panzer v. Doyle* decision only addressed the Potawatomi compact amendments, the extent to which the Court's ruling is binding on the other tribes also remains unclear with respect to other compact provisions. For example, while the Supreme Court's decision concluded that the Governor is prohibited from agreeing to the perpetual duration provision in the 2003 Potawatomi amendments, three tribes (the Oneida, St. Croix, and Stockbridge-Munsee) have provisions stipulating that if the unlimited duration provision is voided by a court of competent jurisdiction, the term of the compact would expire approximately 99 years following the effective date of the 2003 amendments. The Supreme Court's *Panzer* ruling was silent on the permissibility of this type of provision because this feature was not a part of the Potawatomi compact amendments. Since the Court did not specify an acceptable compact term, it is not known whether a 99-year term for the compacts is an appropriate alternative to compacts with unlimited duration.

In addition, the Supreme Court's *Panzer* decision had implications for tribal payments to the state specified under the 2003 amendments. Uncertainties with respect to the applicability of the decision beyond the Forest County Potawatomi Tribe complicated the status of certain tribal payments to the state, particularly in the case of the Ho-Chunk Nation. This is discussed in more detail below.

The Court also did not clearly address the continued legality of casino games like electronic games of chance and blackjack that were authorized under the original compact. This issue was resolved under the *Dairyland* ruling.

Dairyland Greyhound Park, Inc. v. Doyle. This litigation began in 2001 when the Dairyland racetrack sued to bar the Governor from extending or amending tribal gaming compacts that authorize casino gambling, characterized by Dairyland as including blackjack and slot machines. The case is based on the 1993 state constitutional

amendment to Article IV, Section 24 of the Wisconsin Constitution that clarified that all forms of gambling in Wisconsin are prohibited except bingo, raffles, pari-mutuel on-track betting and the state-run lottery. The amendment and corresponding statutes also specifically prohibit the state from conducting prohibited forms of gambling as part of the state-run lottery. The amendment, in effect, limits gambling in the state to those forms permitted in April, 1993.

Dairyland challenged the fundamental ability of the state and the tribes to agree to renewed tribal gaming compacts. The plaintiff argued that the 1993 constitutional amendment precluded the Governor from extending or renewing Indian gaming compacts to allow casino gambling to continue in the state, except for the limited forms of gambling authorized in the Wisconsin Constitution.

The Supreme Court took the *Dairyland* case on certification from the Court of Appeals (a Dane County Circuit Court had earlier ruled against Dairyland). However, the Supreme Court tied 3-3 (with one recusal), withdrew its certification, and remanded the case to the Court of Appeals. On November 4, 2004, the Court of Appeals recommended that the Supreme Court again grant certification and rule on the case because the Supreme Court's composition had changed since it remanded the *Dairyland* case to the Court of Appeals, and because its subsequent decision in *Panzer v. Doyle* appeared to bear on the matter. On January 13, 2005, the Supreme Court agreed to hear the case again.

The Court's ruling in *Dairyland Greyhound Park, Inc. v. Doyle* was made on July 14, 2006. The Court concluded that the 1993 constitutional amendment does not invalidate the original compacts. Further, because the original compacts contemplated future amendments, including amending the scope of gaming authorized under the compacts, the Court ruled that the renewal of the compacts and amendments to the compacts, including amendments to expand the scope of gaming, are constitutionally protected under the Contract Clauses of the Wisconsin and U. S. Constitutions. The Court's ruling withdrew any language to the contrary in the *Panzer v. Doyle* decision.

A key finding in the ruling is that the compact renewals (effected under the 1998/1999 and 2003 amendments) constitute the continuation of the original compacts and are not new or independent contracts. The Court maintained that the 1993 constitutional amendment did not apply to these original compacts (which were entered into prior to 1993). The Court does note that the 1993 constitutional amendment could apply to successor compacts or other new Wisconsin gaming compacts agreed to in the future.

While the *Dairyland* decision clarified a number of legal questions, including the expanded scope of gaming under the 2003 compact amendments, it did not address the *Panzer* Court's rulings on the duration or the sovereign immunity provisions of the 2003 amendments.

Additional Provisions of Wisconsin's State-Tribal Gaming Compacts

The following discussion summarizes additional compact components. Generally, these components apply to all of the compacts; however, important differences are specifically noted. Where variations between the compacts are deemed minor or technical in nature, they are not separately described. In addition, this discussion provides a general overview of the Menominee's Kenosha proposal, which was introduced in 2000 and rejected in 2015.

Internal Control Standards. A memorandum of understanding (MOU) associated with the 1998/1999 compact amendments for nine of the

11 tribes included provisions whereby each affected tribe agreed to utilize minimum internal control standards in their casino operations. Generally, these standards must be at least as restrictive as those adopted by the National Indian Gaming Commission and, under certain conditions or for certain tribes, at least as restrictive as the National Indian Gaming Association. These MOUs are discussed in more detail below.

Requirements for internal control standards under the 2003 amendments are similar to those in the 1998/1999 agreements, but are more developed and formalized. Under the 2003 amendments, minimum internal control standards (MICS) applicable to the conduct of casino games and to all Class III gaming facility operations are required to be proposed and implemented by the tribes. The MICS relating to the conduct of play provide for an accurate payout ratio for each game, ensure the fairness of the playing of all games, and ensure that the revenue generated from the playing of each game is adequately counted and accounted for.

The MICS relating to Class III gaming facility operations are intended to ensure not only that all revenue is adequately accounted for, but also to provide a system of internal control standards that is consistent with industry standards and to ensure compliance with relevant provisions of the Compact. The MICS applicable to Class III gaming facility operations must meet or exceed the standards promulgated by the National Indian Gaming Commission. The amendments establish timelines and procedures for the tribes and the state to agree to the MICS and provide for an arbitration process to resolve disagreements between a tribe and the state concerning these standards.

Updated provisions for internal control standards were adopted by the Potawatomi in their 2005 compact amendments and by the Lac du Flambeau in their 2009 amendments.

State Data Collection. With some variations, the MOUs associated with the 1998/1999 compact amendments require the tribes to provide the state with electronic access (in addition to the on-site physical access allowed under the compacts) to certain slot machine accounting data. Generally, the data must be treated as confidential by the state and may not be disclosed in the form of statewide aggregate totals without the permission of the tribes.

The 2003 amendments extend and formalize the state reporting requirements initiated under the 1998/1999 agreements. Generally, each tribe agrees that it will report information from its slot machine accounting systems to the state's Data Collection System (DCS) and will utilize DCS's hardware, software, and reporting formats. However, at no time may the DCS be used for live, on-line monitoring of any tribe’s on-line accounting system. The tribes and the state also agree to meet and confer regarding any proposed modifications to the hardware, software and reporting formats of the DCS. Disagreements on such modifications are subject to arbitration. The arbitrators must approve the proposed modification, if it is determined to be reasonably necessary to allow the state to maintain electronic monitoring of the specified information, or must reject the modification, if it is determined to be unreasonably burdensome on the tribe.

Under the 2003 amendments, the tribes also agree to submit to DOA, in an electronic format maintained by the tribe, a variety of daily revenue information for table games. This information must be submitted no later than 14 days (21 days for certain tribes) after the conclusion of the previous calendar month.

Updated data reporting provisions consistent with those described above were adopted by the Potawatomi in their 2005 compact amendments and by the Lac du Flambeau in their 2009 amendments.

Gaming-Related Contracts. The compacts define agreements under which a tribe procures materials, supplies, equipment or services that are unique to the operation of gaming and are not common to ordinary tribal operations as "gaming-related contracts." These contracts include, but are not limited to: (a) contracts for management, consultation, or security services; (b) prize payout agreements; (c) procurement of materials, supplies and equipment, and equipment maintenance; and (d) certain financing agreements related to gaming facilities. A gaming-related contract must provide that it is subject to the provisions of the state-tribal compact and will be terminated if the contractor's certificate, issued by DOA, is revoked.

Under the original compacts, any contract exceeding $10,000 requires that the contractor be issued a certificate by DOA. Eligibility for a certificate is subject to criminal history background checks and other restrictions to ensure the integrity of Class III gaming conducted under the compacts. These provisions still apply to the Ho-Chunk, Lac Courte Oreilles, and Potawatomi, but the other tribal compacts were modified by the 2003 amendments (and the 2009 Lac du Flambeau amendments) with respect to these contracting provisions.

These amendments generally require: (a) state certification by DOA, if the value of the contract exceeds $25,000 annually; or (b) disclosure and the provision of fingerprints to DOA by the prospective contractor of all owners, officers, directors and key employees, if the value of the contract is more than $10,000 but less than $25,000 annually. Under this latter provision, if DOA has reasonable belief that the person does not meet all of the criminal history requirements, DOA may require the person to submit to the full certification process applicable to contracts exceeding $25,000.

Provisions are also in place for the temporary certification of contractors. Such temporary certification has been in effect since the 1998/1999 amendments for the Ho-Chunk and the Menominee tribes and, except for the Lac du Flambeau and the Potawatomi, other tribes adopted these provisions in the 2003 amendments. The provisions were adopted by the Potawatomi in their 2005 compact amendments and the Lac du Flambeau in their 2009 amendments. Generally, under these provisions, DOA may grant a temporary certificate to an applicant, at the request of the tribe, if certain criteria are met, including the submission of a complete application. The temporary certificate allows the applicant to provide gaming-related goods and services to the tribe until such time as DOA approves the certification, or suspends, revokes, or denies the temporary certificate. After an applicant receives a temporary certification, if DOA finds cause to deny the contractor a certificate, or to suspend or revoke the temporary certificate, any contract entered into by the contractor and the tribe is considered null and void and all payments received by a contractor while holding a temporary certificate must be returned to the tribe.

Pursuant to a gaming compact or regulations and agreements with the National Indian Gaming Commission, DOA must certify and conduct background investigations of any person proposing to be an Indian gaming contractor. Such persons must be photographed and fingerprinted. Further, DOJ is authorized to submit these fingerprint cards to the Federal Bureau of Investigation. Any certificate authorizing a person to be a gaming vendor is void if the results of the background investigation disclose information that disqualifies the person from being a vendor, under the terms of the gaming compacts. A person applying for a certificate must provide all required information and pay the state for the actual costs of the background investigation.

Management contracts for the operation and management of Class III gaming are subject to additional requirements. At least 60 days prior to a tribe's approval of a management contract,

background information on the person or corporation proposed to perform the management services must be provided to DOA along with a copy of the contract. A management contract must also provide for: (a) adequate accounting procedures; (b) access to the daily operations and records of the gaming facility by appropriate officials of the tribe, DOA and DOJ; (c) a minimum guaranteed payment to the tribe that has preference over the retirement of development and construction costs; (d) an agreed ceiling for the repayment of development and retirement costs; (e) a term of five to seven years for the contract depending on capital investment and income considerations; (f) a detailed specification of all compensation to be paid to the contractor; and (g) the grounds and mechanisms for contract termination. Finally, a management contract providing for a fee based on a percentage of the net revenues from gaming activities may not exceed 30% unless the tribe determines that an additional fee is required, based on capital investment and income considerations; however, in no event may any additional fee payments exceed 40% of net revenues. [Only the Oneida compact provides that the tribe agrees not to enter into management contracts for gaming activity conducted pursuant to the compact.]

Employee Restrictions. Under the compacts, the tribes agree that no person may be employed in the operation or conduct of gaming (including persons employed by a gaming contractor) who fails to pass a criminal history background check or poses a threat to the public interest or to the integrity of the gaming operation. A tribal governing board may waive these restrictions if the individual demonstrates to the tribal board evidence of sufficient rehabilitation and present fitness. The tribes have responsibility for investigations and determinations regarding employees. Employees must also be reviewed at least every two years to determine whether they continue to meet these requirements. DOJ must provide a tribe with criminal history data, subject to state and federal law, concerning any person subject to investigation as a gaming employee. The tribes must reimburse DOJ for the actual costs of compiling this data.

Audit and Records Requirements. An independent financial audit of the books and records of all gaming operations must be performed by a certified public accountant at the close of each tribal fiscal year. The audit must be completed within 90 days of the close of the fiscal year, and copies of any audit reports and management letters must be forwarded to DOA and the State Auditor (Legislative Audit Bureau).

A security audit to review and evaluate the effectiveness, adequacy and enforcement of the systems, policies and procedures relating to the security of all aspects of the tribe's gaming operations must be performed every two years by a qualified independent auditor. The audit must be completed within 90 days of the close of the tribal fiscal year and copies of any audit reports and management letters must be forwarded to DOA and the State Auditor.

Under the compacts, the state also has the right to submit written comments or objections regarding the terms of the engagement letters between the tribes and their auditors, to consult with the auditors prior to or following an audit, to have access, upon written request, to the auditors' work papers, and to submit written comments or suggestions for improvements regarding the accounting or audit procedures.

The compacts also specify that the state has the right to inspect and copy a variety of tribal gaming records including: (a) accounting and financial records; (b) records relating to the conduct of games; (c) contracts and correspondence relating to contractors and vendors; (d) enforcement records; and (e) personnel information on gaming employees. In exchange for the right of the state to inspect and copy these records, the state pledges under the compacts not to disclose such records to any member of the public, except

as needed in a judicial proceeding to interpret or enforce the terms of the compacts.

Withholding Wisconsin Income Tax. The tribes generally must withhold Wisconsin income tax on any payment of a prize or winnings subject to federal tax withholding. Withholding is not required from payments made to enrolled members of the tribe or to individuals who have certified that they are not legal residents of the state and who are not subject, under state law, to Wisconsin income tax on such winnings.

Allocation of Criminal Jurisdiction. Criminal jurisdiction is governed by gaming compacts as well as federal law. Under federal Public Law 280 (P.L. 280, enacted in August, 1953), jurisdiction to prosecute violations of criminal laws (including gambling laws) that occur on tribal lands was transferred from the federal government to state government in five states, including Wisconsin. When recognition of the Menominee Tribe was restored in 1973, the Menominee Reservation was not subjected to P.L. 280. Therefore, concurrent federal, tribal, and state criminal jurisdiction applies in various cases to the Menominee, rather than state jurisdiction as required under P.L. 280 for the other tribes in the state.

Relative to state criminal gambling statutes, however, P.L. 280 is superseded by 18 U.S.C. §1166 (enacted concurrent with IGRA). Under this law, state criminal gambling laws are applicable to all states and on all tribal lands, regardless of the state's relationship to P.L. 280. Under the federal law, state criminal gambling laws are enforced by the federal government, unless a tribe has consented through a gaming compact to transfer criminal jurisdiction to the state. All of the Wisconsin gaming compacts, including the Menominee agreement, provide for state jurisdiction of gambling law enforcement. If general criminal jurisdiction for a tribe were transferred back to the federal government (a process called retrocession), 18 U.S.C. §1166 would still authorize state enforcement of criminal gambling laws on tribal lands in Wisconsin.

Under the gaming compacts, for the term of the compact, the state has jurisdiction to prosecute criminal violations of its gambling laws that may occur on tribal lands. The consent of the state Attorney General is required before any prosecution may be commenced. The state may not initiate any prosecution against an individual authorized by the tribe, on behalf of the tribe, to engage in Class III gaming activities under the compact (or Class I or II gaming under IGRA). Some compacts specify that the tribe has jurisdiction to prosecute violations of its tribal gaming code against all individuals subject to the tribal code. Each compact provides that the allocation of civil jurisdiction among federal, state and tribal courts does not change.

Enforcement. Under the compacts, DOA and DOJ have the right to monitor each tribe's Class III gaming to ensure compliance with the provisions of the compacts. Agents of DOA and DOJ are granted access, with or without notice, to all gaming facilities, storage areas, equipment and records. DOA and DOJ are authorized to investigate the activities of tribal officers, employees, contractors or gaming participants who may affect the operation or administration of the tribal gaming. Suspected violation of state or federal law or tribal ordinances must be reported to the appropriate prosecution authorities; suspected violations of the compacts must be reported to DOA. Both DOA and DOJ may issue a subpoena, in accordance with state law, to compel the production of evidence relating to an investigation. The Attorney General is provided jurisdiction to commence prosecutions relating to Class III gaming for violations of any applicable state civil or criminal law or provision of a compact.

Dispute Resolution. Under the original compacts, if either the tribe or the state believed that the other party had failed to comply with any requirement of the compact, that party could serve written notice on the other. The tribe and the state

were required to meet within 30 days of the notice being served to attempt to resolve the dispute. If the dispute was not resolved within 90 days of the service, either party could pursue other remedies that were available to resolve the dispute. This procedure did not limit the tribe and state from pursuing alternative methods of dispute resolution, if both parties mutually agreed on the method.

The 2003 amendments generally provide that if either party believes the other party has failed to comply with the requirements of the compact, or if a dispute arises over compact interpretation, either party may serve a demand on the other for dispute resolution under a variety of mechanisms. These include negotiations, non-binding mediation, binding arbitration, and, for certain disputes, court action. Under some tribal amendments, negotiation and mediation are required before binding arbitration can be utilized. Under other agreements, binding arbitration may be utilized without first engaging in negotiations or mediation.

Disputes over matters such as game conduct, game contractors, management contracts, criminal and background restrictions, records, conflicts of interest, audits, income tax, public health and safety, duration of the compact, liability, and compact amendments are generally subject to the negotiation, mediation, and arbitration processes. However, most of the compact amendments specify that, unless the parties agree otherwise, disputes over authorized Class III gaming, dispute resolution, sovereign immunity, payments to the state, and reimbursement of state costs must be resolved by a court of competent jurisdiction.

In addition to the dispute resolution procedures described above, most of the agreements also provide that, prior to engaging in these dispute resolution procedures, the tribe or state may petition a court of competent jurisdiction for provisional or ancillary remedies to a dispute, including preliminary or permanent injunctive relief.

The major change in the 2003 amendments relating to dispute resolution under the compacts is the institution of a binding arbitration process for settling disagreement between the state and a tribe. However, this arbitration process is not uniform among the tribes. For example, some of the compact amendments specify the appointment of a single arbitrator, while others require the appointment of a panel of arbitrators. Most, but not all of the compact amendments provide that the arbitration must be conducted in accordance with the Federal Rules of Civil Procedure and Evidence. Several of the tribal agreements specify that the arbitrators must conduct the proceedings according to the "last best offer" format and subject to guidelines detailed in the compact amendments. Despite these differences, a binding arbitration process has now been instituted in the state-tribal relationship to deal with disputes arising from the gaming compacts.

The 2005 compact amendments of the Potawatomi and the 2008 amendments of the Ho-Chunk further enumerate and clarify the dispute resolution processes specified in each tribe's 2003 amendments. Finally, the Lac du Flambeau 2009 amendments include dispute resolution provisions generally consistent with those of other tribal agreements.

Severability. All tribes now have a severability provision in their compacts. The Ho-Chunk have had this provision since 1992, and the Menominee since 2000. Other tribes, except the Lac du Flambeau, added the provision in their 2003 amendments. The provision was added to the Lac du Flambeau compact in their 2009 amendments. Generally, the severability provision states the each provision of the compact will stand separate and independent of every other provision. If a court of competent jurisdiction finds any provision of the compact to be invalid or unenforceable, it is the intent of the state and the tribe that the remaining provisions remain in full force and

effect.

Menominee Indian August, 2000, Compact Amendments. The Menominee compact amendments of August, 2000, made extensive changes to the tribe's gaming compact, primarily with respect to establishing provisions to govern Class III gaming at a proposed site in Kenosha, Wisconsin. In addition, the amendments revised other provisions that affect all of the tribe's Class III gaming operations.

The application for the Kenosha proposal was denied by the Department of the Interior in January, 2009. In August, 2011, the Menominee and the DOI entered into a settlement agreement under which DOI rescinded the denial and agreed to reconsider the application, conditional on receiving updated application materials from the tribe. In August, 2013, the DOI approved the proposal. However, the Tribe could not proceed with plans for the Kenosha facility unless it received a concurrence in the determination by the Governor. In January, 2015, the Governor rejected the proposal. [A detailed description of the 2000 amendment provisions may be found in a previous version of this publication, *Informational Paper #78, Legal Gambling in Wisconsin*, published by the Legislative Fiscal Bureau in January, 2001. However, many of the 2000 amendment provisions relating to the proposed Kenosha facility were eliminated under the tribe's 2010 amendments.]

State Revenues from Tribal Gaming

The first state-tribal gaming compacts required tribes to jointly provide $350,000 annually to the state as reimbursement for its costs of regulation of Class III gaming under the compacts. Each tribe's share of this amount is calculated annually, based on its relative share of the total amount wagered on tribal Class III gaming statewide during the previous fiscal year. These state payments are still in effect. Each tribe must also directly reimburse DOA and DOJ for their actual and necessary costs of providing requested services and assistance.

More significant state payments were agreed to under the 1998/1999, and 2003 and subsequent compact amendments.

The 1998/1999 Compact Amendments. These amendments were required to extend the original seven-year term of the compacts. Each tribe agreed to make additional annual payments to the state that had not been required under the original compacts. The payment amounts differed by tribe and reflected variations in total net winnings among the tribes at that time. The payments extended over the five-year term of the amended compact agreements, from the 1999-00 fiscal year through the 2003-04 fiscal year.

During the first four years of this period, 1999-00 through 2002-03, tribal payments averaged $23.5 million annually. Annual payments were to continue through 2003-04 with a $24.4 million payment scheduled for that year. However, because the subsequent 2003 amendments modified these payment provisions for most tribes, the 2003-04 amounts actually received by the state have reflected payments under either the 1998/1999 amendments or the 2003 amendments (or both), depending on the tribe. The 2003-04 payments from the tribes are elaborated in a discussion below.

Under the 1998/1999 amendments, each compact included a provision that relieved the tribe of its obligation to pay these additional amounts in the event that the state permitted the operation of electronic games of chance or other Class III games by any person other than a federally-recognized tribe under the Indian Gaming Regulatory Act or by the state lottery. For some tribes, the amended compacts also provided that the state and tribe must negotiate a reduction in the

amount of tribal payments if a subsequent agreement with another tribe regarding Class III gaming causes a substantial reduction of a tribe's Class III gaming revenues. One tribe's agreement (Red Cliff) also stated that the state and tribe must meet to discuss a reduction in the payment amount, in the event that the state lottery permitted the operation of video lottery terminals or other forms of electronic games of chance not currently operated by the state lottery.

These provisions reflect the view that the additional tribal payments are not a form of state tax payment or a payment made in lieu of state taxes. Rather, the payments were agreed to by the tribes in recognition of an exclusive right to operate Class III gaming without additional competition from other parties in the state. Federal law (IGRA) prohibits a state from taxing tribal gaming revenue, but federal authorities (who must approve compact provisions and their amendment) have allowed tribal payments to a state in exchange for exclusive tribal rights to Class III gaming.

With the exception of the Lac Courte Oreilles and Sokaogon agreements, each amendment also provides that, under certain circumstances, a natural or man-made disaster that affects gaming operations would allow for the state payment to be proportionately reduced. The percentage reduction would equal the percentage decrease in the net win for the calendar year in which the disaster occurs compared to the net win in the prior calendar year. Under this provision, the state and tribes also agree to meet to discuss additional assistance in the event of such a disaster.

Intended Use of the Additional State Revenues. The intended use of the additional state revenue under the 1998/1999 amendments was specified, with some variations, in most of the amended compact agreements. Nine agreements included an ancillary memorandum of understanding (MOU) relating to government-to-government matters, including the intended use of the additional state payments. The Ho-Chunk and Lac du Flambeau amendments did not include a MOU on government-to-government matters and are silent on the matter of how the state utilizes the additional gaming revenue.

The nine MOUs have a number of common elements (as well as some important differences) relating to the use of the additional payments. The most important element common to eight of the nine MOUs is the provision that the Governor must undertake his or her best efforts within the scope of his or her authority to assure that monies paid to the state are expended for specific purposes.

With the exception of the Menominee, Potawatomi, and Red Cliff, these purposes are: (a) economic development initiatives to benefit tribes and/or American Indians within Wisconsin; (b) economic development initiatives in regions around casinos; (c) promotion of tourism within the state; and (d) support of programs and services of the county in which the tribe is located.

The Menominee MOU specifies three of these four purposes (the support of programs and services of the county in which the tribe is located is not included since the reservation and the county are coterminous).

The Potawatomi MOU specifies these four spending purposes, but limits such spending to Milwaukee and Forest Counties.

The Red Cliff MOU states these four purposes differently and adds a fifth purpose. These purposes are: (a) economic development initiatives to benefit federally-recognized Wisconsin tribes or their enrolled members; (b) economic development initiatives in Red Cliff and regions around Red Cliff; (c) promotion of tourism within the northwest region of the state; (d) support of programs and services which benefit the Red Cliff tribe or its members; and (e) law enforcement initiatives on the reservation.

Other differences among the MOUs include the following:

- Similar to the Red Cliff MOU, three of the MOUs specify an additional spending purpose: (a) the Bad River and St. Croix agreements include expenditures for law enforcement initiatives on reservations; and (b) the Stockbridge-Munsee agreement includes spending for public safety initiatives on the Stockbridge-Munsee reservation.

- Eight of the MOUs (Lac Courte Oreilles, Menominee, Oneida, Potawatomi, Red Cliff, Sokaogon, St. Croix, and Stockbridge-Munsee) require the establishment of a schedule of regular meetings between the tribes and the state to address issues of mutual concern. The Potawatomi and Red Cliff MOUs specify that these meetings must occur annually, no later than certain prescribed dates.

- The Bad River MOU requires the establishment of a schedule of regular meetings to address law enforcement issues of mutual concern.

- Under four of the MOUs (Menominee, Potawatomi, St. Croix, and Stockbridge-Munsee), the state is required to consult with these tribes regarding the content of the proposals for the distribution of the monies paid to the state.

- Four MOUs (Bad River, Menominee, St. Croix, and Stockbridge-Munsee) specify that the state and the tribe shall negotiate additional MOUs relating to state-tribal issues of mutual concern no later than certain annual dates.

- Seven MOUs (Bad River, Menominee, Oneida, Potawatomi, Red Cliff, St. Croix, and Stockbridge-Munsee) require that one state-tribal government meeting each year contain an accounting of funds expended in accordance with the agreements.

- The Stockbridge-Munsee MOU, in addition to requiring a meeting with an annual accounting of expended funds, also include a discussion regarding the distribution of monies in the coming year.

The variations among the MOUs appear to reflect, in part, the different concerns of each tribe or band. However, the variations may also be a reflection of how the negotiation of the compact agreements built on the earlier ones. Thus, the later agreements in the negotiation cycle are generally more detailed and thorough than is the case with the first agreements signed in the negotiation cycle.

These variations may or may not be considered material by the tribes; however, they have remained in place despite the fact that inconsistencies between the agreements could have been resolved. This is because each agreement contained a provision allowing a tribe to request that its agreement be revised should the state and any other tribe amend a compact or adopt a new compact with terms that are more favorable than the terms contained in the first tribe's agreement. The state and tribe, under these circumstances, would have been required to meet to negotiate the incorporation of substantially similar provisions in the applicable agreement.

The 2003 and Subsequent Compact Amendments. The 2003 amendments to the tribal gaming compacts significantly increased tribal payments for those tribes with larger casino operations. Initially, the combined annual payments from all tribes were expected to exceed $100 million, due to significant lump-sum payments by certain tribes scheduled to be made in 2003-04, 2004-05, and 2005-06. These increased payments were associated with 2003 amendment provisions that established compacts with unlimited duration and expanded the types of authorized games played at the tribal casinos.

Following the Supreme Court's *Panzer v. Doyle* ruling, some tribal payments to the state

were delayed because the ruling was adverse to both the unlimited duration and the expanded scope of games provisions. The *Dairyland v. Doyle* decision reversed the *Panzer* Court's position on the scope of games, but did not address the *Panzer* ruling relating to the unlimited duration provisions. Consequently, there remained some uncertainty regarding the legal status of the state payment provisions in the 2003 amendments. However, tribal payments have generally continued to be made to the state in conformity with the 2003 amendments, with the exception of the Ho-Chunk Nation. The Ho-Chunk interpreted the *Panzer v. Doyle* ruling as affecting the terms of the Ho-Chunk Nation's gaming compact and eliminating the requirement for state payments. The dispute, which resulted in several years of litigation, was resolved with the signing of additional compact amendments in September, 2008. The new Ho-Chunk payment schedule is described below. The following describes tribal payment provisions under the 2003 and subsequent amendments.

2003 Compact Payment Provisions. Under the 2003 amendments to the state-tribal gaming compacts, payments in 2003-04, 2004-05, and 2005-06 were based on either lump-sum payments (for seven tribes) or a percentage of net revenue (that is, gross revenue minus winnings) for the remaining tribes (with the exception of the Lac du Flambeau, which did not amend their compact again until 2009). Under the 2003 compact provisions, only one tribe was scheduled to make a lump-sum payment in 2005-06 and, beginning in 2006-07, all scheduled tribal payments to the state under the 2003 amendments were to be made on a percentage of net revenue basis.

The seven tribes scheduled to make lump-sum payments in 2003-04 were the Ho-Chunk, Lac du Flambeau, Menominee, Oneida, Potawatomi, St. Croix, and Stockbridge Munsee. The four tribes scheduled to make lump-sum payments in 2004-05 were the Ho-Chunk, Oneida, Potawatomi, and Stockbridge-Munsee.

The scheduled lump-sum payments for the Ho-Chunk, Oneida, and Potawatomi totaled $90.5 million in 2003-04 and $93.6 million 2004-05. These payments represented more than 89% of the total tribal payments anticipated under 2003 Wisconsin Act 33 (the 2003-05 biennial budget act) in each of these years.

Table 3 shows actual tribal gaming-related revenue received by the state between 1999-00 and 2015-16. Figures in the table reflect the lump-sum payments specific to each tribe, as well as annual payments of $350,000 to the state for the cost to regulate Class III gaming under the compacts, payments made on the basis of a percentage of net win, vendor certification revenue, other miscellaneous revenue, and accounting adjustments. Those tribes paying a percentage of net revenues are aggregated to maintain the confidentiality of their net casino revenue stream, as required under the compacts.

In 2005-06, only the Stockbridge-Munsee Community was originally scheduled to make a lump-sum payment (which was supplemented with a payment based on a percentage of net revenue). And, as noted previously, beginning in 2006-07, scheduled payments for all tribes are to be based on a percentage of net revenue only. However, one lump-sum payment by the Potawatomi was made in 2005-06, which was a delayed payment originally scheduled for 2004-05. In addition, the Ho-Chunk made a lump-sum payment in 2005-06 of $30 million, which the tribe characterized as a "good-faith" payment made in the midst of its compact dispute with the state. This delayed Potawatomi payment and the single "good faith" Ho-Chunk payment during this period were consequences of the *Panzer v. Doyle* Supreme Court decision. An explanation of this situation requires the presentation of some further background on the 2003 amendments.

All 10 tribes that signed 2003 amendments included provisions specifying that a compact remains in effect until terminated by

Table 3: Tribal Gaming-Related Revenue to the State (1999-00 through 2015-16)

Lump-Sum Payments Tribe or Band	1999-00 to 2008-09	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	Total
Bad River	$920,000	$0	$0	$0	$0	$0	$0	$0	$920,000
Ho-Chunk	119,500,000	0	0	0	0	0	0	0	119,500,000
Lac Courte Oreilles	1,750,056	0	0	0	0	0	0	0	1,750,056
Lac du Flambeau [1]	5,506,700	788,000	50,000	50,000	50,000	50,000	50,000	50,000	6,594,700
Menominee	3,176,327	0	0	0	0	0	0	0	3,176,327
Oneida	59,451,387	0	0	0	0	0	0	0	59,451,387
Potawatomi	109,625,000	200,000 [2]	100,000 [2]	0	0	0	0	0	109,925,000
Red Cliff	0	0	0	0	0	0	0	0	0
Sokaogon	850,904	0	0	0	0	0	0	0	850,904
St. Croix	12,264,000	0	0	0	0	0	0	0	12,264,000
Stockbridge-Munsee	6,900,000	0	0	0	0	0	0	0	6,900,000
Subtotal Lump-Sum Payments	$319,944,374	$988,000	$150,000	$50,000	$50,000	$50,000	$50,000	$50,000	$321,332,374
Regulatory Payments	$3,500,000	$350,000	$350,000	$350,000	$350,000	$350,000	$350,000	$350,000	$5,950,000
Net Win-Based Payments and Other Revenue [3]	$205,529,627	$50,250,878	$50,274,775	$51,717,738	$52,152,764	$24,566,463	$76,290,584	$51,956,602	$562,739,431
Total State Revenue	$528,974,001	$51,588,878	$50,774,775	$52,117,738	$52,552,764	$24,966,463	$76,690,584	$52,356,602	$890,021,805

[1] Payment under Lac du Flambeau's 2009 amendments.

[2] Payment under Potawatomi's 2010 amendments.

[3] Includes vendor certification revenue, other miscellaneous revenue, and accounting adjustments.

mutual agreement of the tribe and the state, or by the tribe revoking its own authority to conduct casino gaming. However, the Supreme Court in *Panzer v. Doyle* held that the Governor exceeded his authority when he agreed unilaterally to this type of indefinite duration provision in the Potawatomi compact amendments. All of the 2003 amendments to the state-tribal gaming compacts contain provisions to address court decisions that may be adverse to certain features of the amended compacts.

As previously noted, three of the tribes agreeing to an indefinite compact duration provision (Oneida, St. Croix, and Stockbridge Munsee) have a default provision in their 2003 amendments specifying that if the indefinite compact duration provision is voided by a court, each affected compact would instead expire on different dates in 2101 or 2102. Under this provision, these three tribes would have compact terms of 99 years. Further, the three tribes with the default 99-year compact term would be relieved of their state payments only if both the indefinite compact duration provision and the 99-year compact term are found unenforceable or invalid by the courts. Because a 99-year compact term provision was not included in the Potawatomi amendments, the *Panzer* decision did not address this type of provision. The provision, therefore, has not been found invalid at this time, and state payments by these three tribes still appear to be required under the terms of the 2003 compact amendments.

The seven other tribes (Bad River, Ho-Chunk, Lac Courte Oreilles, Menominee, Potawatomi, Red Cliff, and Sokaogon) with an unlimited compact duration provision, but no 99-year default term, included amendment provisions specifying that if the unlimited compact duration provision is determined by a court to be unenforceable or invalid, the tribe would not be required to make further payments to the state. The Ho-Chunk also have a provision requiring the state to refund any tribal payments made in 2003-04 or 2004-05, if a court voids the indefinite compact duration provision. Under the 2003 amendments, the Ho-Chunk had agreed to make annual payments of $30.0 million in 2003-04 and in 2004-05.

The Potawatomi's 2003 compact amendments included a provision governing the consequences of a court determination that the indefinite compact duration provision is unenforceable or invalid. Under such circumstances, the state would be indebted to the tribe, if payments of $34.1 million in 2003-04 and $43.6 million in 2004-05 have been made. The tribe would recoup these payments under procedures in state law for the recovery of unpaid debts of the state. [The Potawatomi also had a required payment to the state of $6.4 million in 2003-04 under the tribe's 1998 compact amendments. This payment was unaffected by the *Panzer* decision.]

Given these compact provisions, and in light of the Court's *Panzer* decision, many of the tribal payments agreed to in the 2003 amendments could have been in jeopardy. However, because the Court's decision dealt only with the Potawatomi amendments, the decision's applicability to the other tribes' compact amendments remained somewhat unclear. In addition, there appeared to be a desire on the part of both the state and the tribes to maintain a stable and functional relationship between the parties with respect to tribal gaming in Wisconsin. Consequently, significant payment delays only occurred with two tribes: the Potawatomi and the Ho-Chunk.

2005 and 2010 Potawatomi Amendments. Following the *Panzer v. Doyle* decision, the Potawatomi withheld its $43.625 million scheduled payment in 2004-05 until it had negotiated new compact amendments with the state (in October, 2005). This payment, which was made in 2005-06, completed the Potawatomi's lump-sum payments to the state. The percent of net revenue payments to the state under the 2005 amendments are unchanged from those specified in the 2003

amendments.

In April, 2010, the Potawatomi and the state signed a further agreement to settle a dispute regarding the definition of "net win" used to calculate payments to the state. Under the agreement, the tribe is allowed to exclude from their net Class III gaming revenue the dollar value of credits a casino gives players to be used in electronic gaming devices. The exclusion of these promotional expenses has the effect of reducing payments to the state. As part of the settlement of this dispute, the tribe made payments of $200,000 in 2009-10 and $100,000 in 2010-11 to satisfy payment obligations relating to the dispute in prior fiscal years. These payments are outlined in the tribe's 2010 amendments.

2008 Ho-Chunk Amendments. The Ho-Chunk did not pay its scheduled $30 million annual payments in 2003-04 and 2004-05 due to the Court's decision in *Panzer v. Doyle* on the compact duration and the expanded scope of games provisions. The tribe made a $30 million lump-sum payment in 2005-06 (May, 2006), but made no further payments (either lump-sum or percent of net win) pending the resolution of its compact dispute with the state. The compact dispute was resolved with the signing of additional amendments in September, 2008. The resolution included new compact duration provisions (described above) and a revised payment schedule. With respect to state payments, under the 2008 amendments, the Ho-Chunk agreed to pay the State the total sum of $90 million, minus a credit for the $30 million paid to the state in May, 2006, for a total of $60 million. Under the agreement, this payment satisfied the tribe's obligations to make payments to the state for the period up to, and including, June 30, 2008. The $60 million payment was made to the state on December 15, 2008.

The amendments further require that on May 1, 2009, and each May 1 thereafter that the Compact is in effect, the tribe would be required to pay to the state an annual payment of 5% of the net win from the tribe's Class III (casino) gaming facilities. If the net win at the Nation's Class III gaming facilities for any July 1 through June 30 period is greater than $350 million, the tribe would be required to pay to the state an amount equal to 5.5% of the net win for that period.

The tribe would also be authorized to offset a share of payments to the state in several ways. First, commencing May 1, 2010, and continuing thereafter for as long as the tribe is required to make the annual payments, the tribe would deduct from its annual payment to the state payments made to counties totaling $1,000 for every acre of land owned by the United States government in trust for the tribe located within each county's jurisdiction in July, 2003. These county payments may be expended by each county for any purpose, except that the county cannot use the funds in a manner that would diminish the tribe's governmental jurisdiction or have an adverse financial impact on the tribe. If a county uses the funds for such a purpose, the tribe would cease making payments to the county and instead pay the amount to the state. In July, 2003, the Ho-Chunk had approximately 2,300 acres of trust land, which could result in a reduction to the annual state payment of $2.3 million.

In addition, beginning with the annual payment due May 1, 2010, the tribe would be authorized to deduct from the annual payment the amounts paid by the tribe for public works projects that benefit both the tribe and the state, including its political subdivisions. Examples of such projects are included in an exhibit incorporated into the compact. The tribe could make this deduction from the annual payment in any year between the first state payment (May 1, 2009) and the annual payment made on May 1, 2019. The deduction would be limited to no more than $1.0 million in any one year and the total deductions for these years may not exceed $5.0 million. To date, the tribe has deducted amounts for public works projects in 2010-11 ($1.0 million),

2011-12 ($0.3 million), 2012-13 ($1.0 million), 2013-14 ($0.5 million), 2014-15 ($0.8 million), and 2015-16 ($0.4 million). The tribe is required to consult with, but does not need the prior consent of, the state regarding which projects qualify for the deduction.

Finally, the tribe would be authorized to deduct from its annual payment any additional amounts paid by the tribe for projects that the state and the tribe agree provide a substantial public benefit in the areas of economic development, infrastructure improvement, or public health, welfare or safety. However, these deductions could not be taken prior to the annual payment on May 1, 2019, or after the final credit for the public works projects described above is taken, whichever is earlier, without the written consent of the state. Deductions from the annual payment for these purposes may not exceed $4.0 million in total and may not be greater than $1.0 million from any annual payment unless a greater amount is agreed to by the State. The tribe would also be required to obtain the agreement of the Secretary of the Department of Administration regarding any project that the tribe uses to authorize a deduction and the Secretary's agreement must not be unreasonably withheld.

2009 Lac du Flambeau Amendments. Under its 2009 payment provisions, the Lac du Flambeau agreed to make two lump-sum payments in 2008-09 of $2,952,000 and $338,000. An additional payment of $738,000 was required to be made on or before July 30, 2009. The tribe is also required to pay the state a total of $500,000, with payments distributed over the ten-year period of June 30, 2010 to June 30, 2019. Generally, these lump-sum payments satisfy the tribe's payment obligations prior to 2009-10. In addition, beginning on June 30, 2010, and on or before June 30 of each succeeding year, the tribe will make annual payments based on a percentage of net win. As is the case with other state-tribal gaming compacts, the Lac du Flambeau annual payments can be reduced for payments made to certain local governmental programs. These reductions are limited to no more than $400,000 in 2008-09 and $300,000 in each subsequent year.

In conjunction with the 2009 amendments, the Lac du Flambeau also executed a memorandum of understanding with the state relating to the definition of "net win" used to calculate payments to the state (similar to the 2010 Potawatomi settlement agreement described above). Under the MOU, the tribe is allowed to exclude from their net Class III gaming revenue the dollar value of credits a casino gives players to be used in electronic gaming devices. The exclusion of these promotional expenses has the effect of reducing state payments.

2010 Menominee Amendments. Under the tribe's 2010 amendments, the duration of the compact was redefined to extend 25 years from the date of the amendment, November, 2010, to November, 2035. In addition, allowable deductions were increased from $200,000 to a maximum of $500,000. First, a provision allowing up to $100,000 to be deducted for the Menominee Tribal School was revised to allow up to $200,000 to be deducted from payments to the state for payments to any of the following: the tribe's Early Head Start program, the Menominee Tribal School, or the College of the Menominee Nation. Second, a provision was created allowing the tribe to deduct up to $200,000 for tribal governmental programs, traditionally provided by state or local governments, which provide a public benefit to both tribal members and non-tribal residents.

Fiscal Implications of Delayed Tribal Payments. Total tribal payments to the state are estimated in each biennial budget process. From the amounts paid by the tribes, annual funding is appropriated to a variety of state programs, including tribal gaming regulation in DOA and gaming law enforcement in DOJ (described below). Under current law, the allocations to state agency programs are a first draw on the tribal gaming

revenue. The net revenue in excess of the total amounts appropriated is credited to the general fund.

The delays in tribal payments to the state, described above, made it difficult to estimate general fund revenue in those years for budgeting purposes. Generally, state budgets have assumed that outstanding disputes would be resolved in a timely fashion and overdue tribal payments would be made within a given biennium. However, due to longer than expected delays in certain tribal payments, the state fiscal effect has been a shortfall in the amount of revenues credited to the general fund. In particular, in years 2003-04 through 2007-08, there were shortfalls of between $29.7 million and $78.7 million in general fund payments as a result of the delayed payments.

In 2008-09, actual revenues significantly exceeded estimates due to the Ho-Chunk's $60 million payment in December, 2008. Now that the compact renegotiations have generally resolved some of the uncertainties that followed the Supreme Court's *Panzer v. Doyle,* and *Dairyland v. Doyle* decisions, it is likely that tribal gaming payments can be more accurately estimated. Starting in 2009-10, tribal payments and general fund estimates have more closely aligned with actual revenues.

However, in June, 2014, the Potawatomi notified DOA of its decision to withhold its 2013-14 payment to the state in anticipation of a possible approval of the proposed Kenosha facility to be operated by the Menominee Tribe. The confidentiality provisions of the Potawatomi gaming compact prohibit the disclosure of individual net win-based payments. However, the payment withholding contributed to a shortfall in revenue for 2013-14. As shown in Table 3, in 2013-14 revenues received by the state totaled $25.0 million. In January, 2014, net revenue, which would be available to deposit to the general fund, was projected to total $23.7 million for 2013-14. Because actual revenue received was less than 2013-14 expenditures from tribal gaming revenue-funded appropriations a program revenue deficit resulted in the tribal gaming receipts appropriation. No revenue was deposited to the general fund from DOA's tribal gaming receipts appropriation in 2013-14. Potawatomi's withheld payment was made in 2015 as indicated in Table 3.

Allocation of Tribal Gaming Revenue to State Agency Programs. The additional tribal gaming revenue provided to the state beginning in 1999-00 has been allocated in each biennial budget to various state agencies for a variety of purposes. Under the respective biennial budget acts, appropriations of tribal gaming revenue to state agencies, excluding regulatory and enforcement costs of DOA and DOJ, averaged $24.9 million annually since 1999-00, and total $24.7 million annually in the 2015-17 biennium. The agencies and programs receiving this funding have remained relatively stable through this period.

In reviewing Table 4, it should be noted that support for expenditures may include: (a) expenditure authorization carried forward from the previous year; (b) revenue from previous years; and (c) appropriation supplements. In addition, certain appropriations may retain unexpended revenue or expenditure authority for the following year. The Department of Natural Resources appropriation of $84,500 for payment to the Lac du Flambeau Band relating to fishing and sports licenses (listed as program #28) was provided funding, but the funds were not expended.

The costs of regulation and enforcement for DOA and DOJ respectively are partially offset by the regulatory payments ($350,000 annually) under the original compact provisions. The remainder of these costs are funded with the additional tribal gaming revenue provided to the state beginning in 1999-00 and other miscellaneous revenue. Appropriations to DOA for the regulation

of tribal gaming have averaged about $1.7 million annually since 1999-00 and total $2.1 million annually in the 2015-17 biennium. Appropriations to DOJ for tribal gaming law enforcement have averaged just over $0.1 million annually since 1999-00. The Department was provided $144,600 PR in 2015-16 and $144,800 PR in 2016-17 for tribal gaming law enforcement.

Actual 2015-16 expenditures and 2016-17 budgeted allocations to state agencies, including DOA regulation and DOJ enforcement activities, under 2015 Wisconsin Act 55 are summarized in Table 4.

Table 4: 2015-17 Tribal Gaming Revenue Expenditures and Allocations

	Agency	2015-16 Actual	2016-17 Appropriated	Purpose
1	Administration	$563,200	$563,200	County management assistance grant program.
2	Administration	247,500	247,500	UW-Green Bay and Oneida Tribe programs assistance grants.
3	Administration	0	79,500	Tribal governmental services and technical assistance.
4	Children and Families	442,060	395,000	Indian child high-cost out-of-home care placements.
5	Children and Families	0	75,000	Indian juvenile out-of-home care placements.
6	Corrections	50,000	50,000	American Indian tribal community reintegration program.
7	Corrections	75,000	0	Indian juvenile out-of-home care placements.
8	Health Services	459,383	445,500	Elderly nutrition; home-delivered and congregate meals.
9	Health Services	95,809	106,900	American Indian health projects.
10	Health Services	203,442	242,000	Indian aids for social and mental hygiene services.
11	Health Services	419,110	445,500	Indian substance abuse prevention education.
12	Health Services	998,052	961,700	Medical assistance matching funds for tribal outreach positions and federally qualified health centers (FQHC).
13	Health Services	590,261	712,800	Health services: tribal medical relief block grants.
14	Health Services	128,087	133,600	Minority health program and public information campaign grants.
15	Health Services	21,182	22,500	American Indian diabetes and control.
16	Health Services	250,000	250,000	Reimbursements for high-cost mental health placements by tribal courts.
17	Higher Education Aids Board	700,358	779,700	Indian student assistance grant program for American Indian undergraduate or graduate students.
18	Higher Education Aids Board	434,838	454,200	Wisconsin Higher Education Grant (WHEG) program for tribal college students.
19	Historical Society	236,600	236,600	Northern Great Lakes Center operations funding.
20	Historical Society	210,015	210,300	Collection preservation storage facility.
21	Justice	631,200	631,200	County-tribal law enforcement programs: local assistance.
22	Justice	84,017	84,900	County-tribal law enforcement programs: state operations.
23	Justice	490,000	490,000	County law enforcement grant program.
24	Justice	695,000	695,000	Tribal law enforcement grant program.
25	Kickapoo Valley Reserve Board	66,715	66,300	Law enforcement services at the Kickapoo Valley Reserve.
26	Natural Resources	3,000,000	3,000,000	Transfer to the fish and wildlife account of the conservation fund.
27	Natural Resources	93,000	93,000	Management of an elk reintroduction program.

	Agency	2015-16 Actual	2016-17 Appropriated	Purpose
28	Natural Resources	154,700	154,700	Management of state fishery resources in off-reservation areas where tribes have treaty-based rights to fish.
29	Natural Resources	0	84,500	Payment to the Lac du Flambeau Band relating to certain fishing and sports licenses.
30	Natural Resources	996,893	1,156,600	State snowmobile enforcement program, safety training and fatality reporting.
31	Natural Resources	80,895	78,200	Reintroduction of whooping cranes.
32	Public Instruction	210,064	222,800	Tribal language revitalization grants.
33	Shared Revenue	0	0	Farmland tax relief credit payments by tribes with casinos associated with certain pari-mutuel racetracks. (No allocations are made in the 2015-17 biennium.)
34	Tourism	160,000	160,000	Grants to local organizations and governments to operate regional tourist information centers.
35	Tourism	7,461,084	8,967,100	General tourism marketing, including grants to nonprofit tourism promotion organizations and specific earmarks.
36	Tourism	24,900	24,900	State aid for the arts.
37	Transportation	247,500	247,500	Elderly transportation grants.
38	University of Wisconsin System	256,665	200,200	Ashland full-scale aquaculture demonstration facility debt service payments.
39	University of Wisconsin System	417,500	417,500	Ashland full-scale aquaculture demonstration facility operational costs.
40	University of Wisconsin-Madison	488,700	488,700	Physician and health care provider loan assistance.
41	Veterans Affairs	36,932	61,200	Grants to assist American Indians in obtaining federal and state veterans benefits and to reimburse veterans for the cost of tuition at tribal colleges.
42	Veterans Affairs	44,510	96,500	American Indian services veterans benefits coordinator position.
43	Wisconsin Technical College System Board	612,955	594,000	Grants for work-based learning programs.
44	Workforce Development	366,995	314,900	Vocational rehabilitation services for Native American individuals and American Indian tribes or bands.
	Subtotal (Non-Regulatory Items)	$22,745,120	$24,741,200	
45	Administration	1,781,185	1,986,600	General program operations for Indian gaming regulation under the compacts.
46	Justice	140,794	144,800	Investigative services for Indian gaming law enforcement.
	Subtotal (Regulation/Enforcement)	$1,921,979	$2,131,400	
	Total	$24,467,099	$26,872,600	