

*INTER - GOVERNMENTAL AGREEMENT
BETWEEN
KENOSHA COUNTY
AND
THE MENOMINEE INDIAN TRIBE OF
WISCONSIN*



Office of the Kenosha County Corporation Counsel

Parties to IGA



- Kenosha County
- City of Kenosha
- Menominee Indian Tribe of Wisconsin
[MITW]
- Menominee Kenosha Gaming Authority

Menominee Kenosha Gaming Authority

- **What is MKGA?**
 - MKGA is a charter entity approved by MITW not unlike a corporation recognized by the State of Wisconsin after the issuance of Articles of Incorporation
- **How was it created?**
 - By Tribal Ordinance 99-11
- **Why was it created and how is business conducted?**
 - To develop, construct, conduct and manage gaming business on Trust Lands in Kenosha County, Wisconsin
 - Business is conducted by Board of Directors pursuant to rules set forth in the Charter

Menominee Kenosha Gaming Authority --- Cont.

- What are its powers of the Board of Directors?
 - MKGA has all of the proprietary powers of the Tribe necessary to permit the Authority to discharge its obligations and enforce its rights, and
 - To enact and amend ordinances and regulations to regulate gaming that are not in conflict with third party agreements such as the IGA

Menominee Kenosha Gaming Authority --- Powers Cont.

- **Pledge, mortgage, encumber Authority assets as security for debts;**
- **Acquire, sell, lease, exchange, transfer or assign personal property**
- **Consent to suit against the Authority upon any contract, claim or obligation arising out of authorized Charter activities**
- **Waive requirement of exhaustion of Tribal remedies**

*Menominee Kenosha Gaming Authority ---
Powers - Waivers Cont.*

- **Such waiver of sovereign immunity is limited to the recovery of monetary damages to the undistributed or future net revenues or other assets of the Authority.**
- **Assets of the Tribe -- including other lands are not subject to any obligations of the Authority**

Menominee Kenosha Gaming Authority --- Powers Cont.

- **Authority Assets**
 - **Income from whatever source at the Kenosha facility, including gaming operations**
 - **funds that are advanced, granted, given, or loaned to the Authority**
- **Limitations**
 - **Tribal real and personal property is not an asset of the Authority -- except leaseholds**
- **Guarantees**
 - **Charter is guaranteed**

Menominee Kenosha Gaming Authority --- Cont.

- What are the responsibilities of MKGA?
 - Establish fiscal practices such as accounting procedures, compiling fiscal reports, taking inventories, and providing for audits
 - Distribute profits to tribe and 3rd parties

Terms

- Bureau of Indian Affairs [BIA]
- Indian Gaming Regulatory Act [IGRA]
- National Indian Gaming Commission [NIGC]
- State Compact



Bureau of Indian Affairs

- **Responsibility for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians.**
- **Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development.**
- **Provide educational services to approximately 48,000 Indian students.**
- **Approves Trust Land applications for gaming**

Indian Gaming Regulatory Act - [IGRA]

- Congressional response to 1987 U.S. Supreme Court decision [Calif v. Cabazon Band of Mission Indians] confirming authority of Tribal governments to establish gaming operations independent of state regulations --- provided state permits some form of gaming

Indian Gaming Regulatory Act - [IGRA]

- Establishes jurisdictional framework governing Indian gaming
- Congress compromised
 - Tribes retained control over Class II gaming
 - Class III gaming required Compacts with the states defining the scope and extent of such gaming

Indian Gaming Regulatory Act - [IGRA]

- Establishes 3 classes of games
 - Class I - traditional Indian and social gaming for minimal prizes [authority is vested solely in Tribal governments]
 - Class II - Bingo and card games played exclusively against other players and not against the house [Tribes retain authority over these games as long as the State permits this gaming and Tribe adopts appropriate ordinance approved by Commission]
 - Class III - Gaming that is not Class I or II [includes slots, craps, black jack, roulette, pari-mutual]
- The proposed IGA addresses Class III gaming but acknowledges that Class II gaming is a future possibility

Indian Gaming Regulatory Act - [IGRA]

- **Pre-Conditions to Class III Gaming**
 - **The particular form of Class III gaming that the Tribe wants to conduct must be permitted in the State**
 - **The Tribe and the State must have negotiated a compact that has been approved by the Secretary of the Interior or the Secretary must have approved regulatory procedures, and**
 - **The Tribe must have adopted a Tribal gaming ordinance that has been approved the Chairman of the Commission**



National Indian Gaming Commission

- Independent Federally regulated agency of the U.S. Government
- Established under IGRA
- Chairman appointed by President / confirmed by Senate
- Two Commissioners appointed by Sec. Of Interior
- Full time appointments with 3 year terms; 2 of the 3 Commissioners must be from recognized Tribes and no more than two from same political party



National Indian Gaming Commission

- Purpose of the Commission
 - To regulate gaming on Indian Lands
 - To shield Tribes from organized crime and other corrupting influences
 - To ensure Tribes are primary beneficiaries of gaming activity
 - To assure gaming is conducted fairly and honestly



National Indian Gaming Commission

- Powers
 - **Conduct investigations**
 - **Undertake enforcement actions, including fines and closures**
 - **Conduct background investigations**
 - **Conduct audits**
 - **Review and approve Tribal gaming ordinances**
- Regulations and NIGC FAQs found at <http://www.nigc.gov>

Tribal - State Compact

- Compacts are is a Federally required agreement between the State and the Tribe that establishes the rules to govern the conduct of Class III gaming activities
- While negotiated between the Tribe and the State the Compact must be approved by the Secretary of the Interior

Tribal - State Compact

- Compact will allocate jurisdiction between the State and the Tribe
- Authorize games that may be played
- Provide oversight for gaming operations
- Allow for payments to the State and related matters

Tribal - State Compact



- Menominee 1992 Compact and 1999 and 2003 Amendments

Tribal - State Compact

- Panzer v Doyle
 - Authority of Governor to enter into an indefinite Compact
 - dealt with types of games the Governor could authorize in light of Wisconsin Constitution prohibition of conducting casino games beyond blackjack, slot machines and video gaming machines

Tribal - State Compact

- Dairyland lawsuit claims:
 - Indian casino gambling is illegal under 1993 amendment to State Constitution, and
 - Governor does not have power to negotiate Compacts or extend Compacts negotiated in 1991 -1992
 - State Supreme Court tied 3 -3 and was remanded back to Court of Appeals


Application and Process for Placing Land into Trust

- BIA approval of application to place land into Trust
- Criteria
 - Activity must be found to be in the best interests of the Tribe
 - Not detrimental to the surrounding community
[**must address impact of development and lost taxes**]
- Governor of State must concur in the above findings

Application and Process for Placing Land into Trust --- Cont

- BIA and Governor examine the IGA as evidence of the Tribe's effort to mitigate the impact of placing lands into Trust
- Resolutions of Local Support
- NIGC must approve Tribal gaming ordinances

Application and Process for Placing Land into Trust --- Cont



- Time Frames
 - BIA minimum 18 months from date of application July 6, 2004
 - Governor's approval -- no deadline
- Public Comment

Trust Land Description

- 223 acres
- Needed for the proposed size of the entire project
- Desire of Tribe for jurisdiction and control over the entire project development to ensure surrounding development is consistent with the Tribe's master plan for a "destination type casino" that will meet the overall expectations and projections of the Tribe and financial lending institutions
- Does not include roads or R.O.W.

Trust Land Description



Trust Land and IGA Term

- ***Effective Date of IGA***
 - ***upon approval of and execution by the governing bodies of the City, the County, the Tribe and the Authority,***
- ***Term.***
 - ***for so long as the Federal Trust Land exists***
 - ***unless otherwise terminated by the mutual written consent of the parties***
- ***Termination***
 - ***IGA terminates if the Tribe is unsuccessful in securing the approvals by December 31, 2009.***

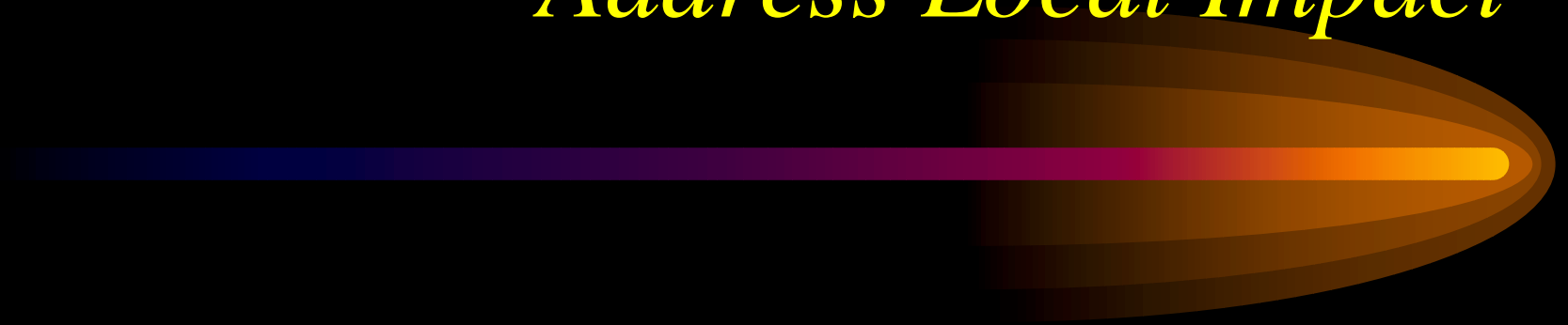
Cessation of Gaming

- **Cessation of Gaming.** *In the event that gaming operations at the Kenosha Facility cease for any reason for **365 consecutive days**, the Tribe shall use its best efforts, including, but not limited to, petitioning the United States Congress, to ensure that the Federal Trust Land reverts to taxable status under ch. 70 of the Wisconsin Statutes. **In the event that gaming ceases for the period described herein, the minimum payment provisions of Section 2(A) of this Agreement shall continue to apply.***
- **Subject to “Force Majeure**

Difference Between 1999 and 2004 Application

- Jurisdictional and Waiver issues
- Set Dollars v Percentage of Net Win

*Commitments made in IGA to
Address Local Impact*



Commitments of the Parties

- City / County Commitments
 - Usual and Customary Services
 - Support for Trust land Application
 - Support Compact Amendments Consistent with IGA
 - Exclusivity
 - Good Faith / No Impairment
- Tribal and Tribal Authority Commitments
 - Monetary Payments, Contributions & Requirements
 - Audit
 - Enactment of Certain Policies and Programs
 - Sovereign Immunity and Guarantees
 - Maintain Charter of Gaming Authority
 - Good Faith / No Impairment

Policies and Programs



- Responsible Gaming***
- Minority Recruitment***
- Local Preference***

Responsible Gaming Policy

***Consult with Wis
Council on
Problem Gambling
and KCDHHS***

**Help Line
Self-limit Policies
Local Media Promotion
Employee training
Conferences / workshops
Customer age ID
Pamphlets / videos
No employee gambling**

**Financially support WCPG
& similar organizations**

**Financial County dollar match up to
\$150,000 annually**

Minority Recruitment -- (25% goal)

- D. Minority Recruitment and Retention. The Authority shall designate a compliance officer within ninety (90) days of the final approval necessary to establish the Federal Trust Land to ensure that **minority recruitment and retention at the Kenosha Facility (including tribal preference) complies with a goal of twenty-five percent (25%) minority employment.** The Authority and the Kenosha Facility's human resources department will follow the Tribe's guidelines on Indian preference.

Local & Minority Preferences

- preference of three percent (**3%**) over and above the lowest quoted price of a bidder whose principal place of business is not located in Kenosha County to **qualified Kenosha County vendors** who seek to supply services, goods or materials to the Kenosha Facility.
- use its best efforts to award fifteen percent (**15%**) of all contracts to vendors or enterprises certified as **minority business enterprises**
- use its best efforts to award ten percent (**10%**) of all contracts to enterprises which are certified as fifty-one percent (**51%**) owned, controlled or managed by **women or Native Americans**.

Sovereign Immunity and Guarantees

- ☐ Only **authorized gambling**
- ☐ State retains jurisdiction over **criminal** and certain civil matters [PL 280]
- ☐ State safety standards for **building construction** are applicable per state Compact
- ☐ Periodic **annual safety inspections** by state certified inspector; report to be submitted to State, City and County; non-compliance to be corrected
- ☐ Federal law requires compliance with State **alcohol** laws with alcohol served only during hours set by law; no sales for off-premises consumption
- ☐ Adoption of **local ordinances**

Local Ordinances to be Adopted Administered and Enforced by Tribe

- City Ordinances
 - Entertainment District [City Draft]
 - Certain health ordinances [noise, no smoking, animals, consumer protection]
- County Ordinances
 - Emergency alarm and 911
 - County Health
 - County Shoreland

Special Considerations

- **Sewer, Water**
 - Authority to pay usual and customary charges for delivery and receipt of **sewer and water services**
 - Authority to pay usual and customary charges associated with **increasing size** of sanitary sewer and water mains needed for the facility
- **Stormwater**
 - Authority to pay usual and customary charges associated stormwater **control and management** in the drainage basis in which casino is located

Special Considerations

- Air and Water Quality
 - Tribe may enact any air quality, water quality or other environmental regulations on the Trust Land that **IS NOT MORE STRINGENT THAN THE LEAST STRINGENT REGULATION APPLICABLE TO THE COUNTY.**
- Airport
 - Development is subject to height limitations and Federal laws and regulations of FAA

Annexation Prohibited

- Expansion of Trust Lands in the County beyond the boundaries shall require the written consent of all of the parties
- See FAQ 19

Monetary Considerations, Contributions and Requirements

- **Net Win**

- the **total amount wagered** on gaming on the Federal Trust Land, **less the amounts paid out as prizes** (including the cost of non-cash prizes), which shall mean any personal property distributed to a Kenosha Facility patron as a result of a specific legitimate wager at the Kenosha Facility.

- **Net Revenue**

- “Net Revenues” shall mean the **gross revenues** of the Kenosha Facility **less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.**

% of Net Win



- Phase I --- Years 1 through 8 or until management and development fees have been paid - whichever occurs first
 - **3% of NET WIN for each calendar year**
- Post Phase I
 - **4% of NET WIN for each calendar year thereafter for so long as gaming occurs at the facility**
 - **See Exhibit “D” in packet for sample calculations**

2003 Taxes



- **Real Estate**
\$543,208

- **Personal Property**
\$22,428

Annual Minimum Payment ***[in any year when net win is less than the minimum payment]***

- **Calendar Year One**
 - \$1 million dollars *[or prorated if trust land is established after Jan. 1]*
- **Calendar Year Two Through Six**
 - \$1 million dollars adjusted by CPI
- **Calendar Year Seven**
 - \$2 million dollars
- **Calendar Year Eight and Thereafter**
 - \$2 million dollars adjusted by CPI

PROPERTY Tax --- Year of Closing

- Property taxes collected by the Tribe from the seller at the time of closing are to be forwarded to City

Reserves and Interest

- Interest on Late Payment = 1.5% per month
- Gaming Authority shall maintain as a reserve account a sum of money equal to the minimum annual payment under the terms of the IGA for the current calendar year

Charitable Contributions Policy

- The Authority and/or the Tribe shall establish a charitable contributions **policy** to govern donations by the Authority and/or the Tribe to charities in Kenosha County. Within ninety (90) days after the Federal Trust Land is established, the Authority and/or the Tribe will create a **committee** to draft and implement such a policy, with **consultation from citizens who reside in Kenosha County** sought by the Authority and/or the Tribe from time to time. In addition, the Tribe and/or the Authority shall make the following charitable donations:

Specific Charitable Contributions

- \$5 million dollars one time payment at the time of financial closing to be used by City and County to:
 - Establish a trust to support public museums and to meet the needs of the homeless in the City with principal to be preserved and interest used for expenses so as to remove costs from tax levy
 - To address cultural and charitable needs in the county of county organizations

Specific Charitable Contributions --- Schools

- When NET WIN payments exceed \$2 million dollars in any calendar year the Tribe is to Pay
 - **\$1.5 million dollars to Unified School District**
 - **\$1.5 million dollars to schools on the Menominee Indian Reservation**

County Payments --- Schools

- When NET WIN payments exceed \$2 million dollars in any calendar year
 - City shall pay \$500,000 to Unified School District
 - County shall pay \$500,000 to high school districts west of I-94 as determined by County

Sales Tax and Tribal Sales Tax

- State Sales Tax
 - Imposition depends upon the identity of buyer and where buyer takes possession
 - retail establishment leased to non-Indian --- sales to non-Indians are subject to State sales tax
 - construction material purchased by Tribe with possession taken on Trust Land is not subject to State sales tax

Sales Tax and Tribal Sales Tax

- Tribal Sales Tax
 - Being negotiated
 - At same rate equivalent to current sales tax levels
 - to allow for certain Tribal taxes to be imposed on sales that would otherwise be exempt under the Federal pre-emption doctrine

Personal Property Tax

- Subject to State Personal Property Tax by Lessee
 - Third party equipment
 - Major lease improvements to the structure by lessee
 - 3rd party built and owned structure
 - 3rd party built structure and owned 50 - 50 between Tribe and 3rd party is taxed as personal property at 50% to the 3rd party

Income Tax



- Subject to State and Federal Income Tax
 - Wages
 - Winnings

22 Year PROJECTIONS

- Net Win \$521,695,590
- Minimum Payment [no CPI adj] 38,000,000
- Property Tax at time of closing ?
- One Time Contribution \$5,000,000
- Schools [approximate] \$55,000,000
- Sales Tax ?
- Personal Property Tax ?

22 Year PROJECTIONS

- No Casino [*not adjusted for inflation*]
 - Real Estate Tax $\$543,208 \times 22 = \$11,950,576$
 - Personal Property $\$22,428 \times 22 = \$ 493,416$
- No Casino + other future development ???

AUDIT REQUIREMENTS

- Annually by a CPA that maintains a gaming-related contractor certificate issued by Wisc. Dept. of Adm.
- Copy of audit to be provided to City and County
- In accordance with the Am. Institute of CPA Casino Auditing Guide
- Failure to comply allows City and County to seek audit at Tribal expense
- Allows for post audit adjustments in payments

Maintenance of Authority's Charter

- Tribe and Authority agree not to amend or change any provision of the Charter of the Authority without the consent of the City and County

Dispute Resolution -- Enforcement of the IGA

- Tribal immunity waived as to enforcement of IGA
- AAA Mediation
- Federal Court
- State Court [incl Kenosha Circuit Court] in the event case cannot be tried in Federal Court
- Limitations - Damages limited to Authority assets only

Liquidated Damages



- Tribal
 - \$1,000 / day for each uncured breach of sections on:
 - responsible gaming
 - minority recruitment
 - preference of local and minority contractors
 - alcohol

Liquidated Damages

- Tribal
 - \$10,000 / day
 - inspections
 - adoption of local ordinances
 - acts impairing the agreement
 - maintenance of Charter
 - air/water quality
 - authorized gaming
 - airport regs
 - additional trust lands

Liquidated Damages

- City / County breach
 - \$10,000 / day
 - failure to support trust application
 - support compact amendments consistent with IGA
 - exclusivity [plus a credit not to exceed net win payments]

Boilerplate

- Prevailing party to pay litigation costs and fees
- Breach does not operate to void or terminate agreement --- IGA subject to specific performance and injunctive relief
- Governing law --- U.S.Federal, State of Wisconsin

Boilerplate

- Interpretation -- to be considered drafted jointly
- No challenges to agreement [sec. 13]
- Severability -- provision are not severable
- Good faith duty imposed
- Amendments must be mutually agreed upon
- Complete agreement is represented

Boilerplate



- Force Majeure
- No 3rd Party Beneficiary
- Binding on successors
- No assignment without prior written consent
- Determination of no NIGC approval of IGA is required.

Due Diligence



- Crowe Chizek Report
- Net Win Calculations
- Sales Tax Calculations
- County / City Impacts and Costs
- Review of Tribe's Constitution and By-laws and Charter of the MKGA
- Environmental / traffic studies
- Site and Management plans

City / County Split

- BEING NEGOTIATED --- NOT DETERMINED AS OF YET

FAQs

- 35 Can casino employees form unions - yes
- 40 Will revenue cover costs of additional services --- yes
- 42 Can Tribe be sued for injuries on Trust lands
 - not less than \$250,000 for one person
 - not less than \$4,000,000 for one personal injury occurrence
 - not less than \$2,000,000 for one property damage occurrence