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tribal gaming in wisconsin

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Introduction

Prior to 1965, Article IV, Section 24 of the Wisconsin Constitution stipulated, "the legislature shall never authorize any lottery." This was interpreted to exclude all forms of gambling in Wisconsin. Between 1965 and 1987, however, four constitutional amendments authorized certain types of gaming, including the state-operated lottery. [For information on non-tribal gaming, see the Legislative Fiscal Bureau's informational paper, "State Lottery and Charitable Gaming."]

As a result of separate federal court rulings and legal changes in the 1980's and 1990's, Native American tribes were authorized to negotiate compacts allowing for a gambling activities on reservations and federal trust lands. Eleven Native American tribes and bands operate casino facilities in Wisconsin, as authorized under state-tribal gaming compacts signed in 1991 and 1992.

A fifth constitutional amendment (1993) clarified that all forms of gambling are prohibited except bingo, raffles, pari-mutuel on-track betting, and the state-run lottery. The amendment limited gambling in the state to those forms permitted in 1993. However, a 2006 Wisconsin Supreme Court decision (*Dairyland Greyhound Park, Inc., v. Doyle*) determined that the constitutional amendment does not affect tribal compacts, including amendments that expand the scope of gaming.

This paper discusses tribal gaming in Wisconsin, including: (a) background information relating to tribal gaming; (b) the current extent of gaming; (c) state administration of gaming; (d) state revenues from gaming; (e) the features of the state-tribal gaming compacts; and (f) the impact of court decisions on gaming.

Background

The operation of gaming facilities on Indian lands in Wisconsin resulted from the enactment of the federal Indian Gaming Regulatory Act.

Indian Gaming Regulatory Act (IGRA)

Enacted in 1988, IGRA provides that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands." The Act is consistent with a federal policy goal to promote tribal economic development, self-sufficiency, and strong tribal government. The Act is also responsive to the interest of many tribes to use gambling as a means to economic development.

To provide standards and regulations for tribal gaming, IGRA defines: (a) on what lands gaming may occur; (b) requirements for compacts between tribes and states; and (c) three classes of gaming subject to different jurisdictions and levels of regulation. In addition, the Act prescribes procedures for the negotiation of state-tribal compacts, requires states to negotiate in good faith, and requires a meditation process to be utilized if negotiations are not successful.

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 tribes and are not subject to federal or state regulation.

Class II Gaming. Class II games include bingo and, 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 authorized by the laws of a state (or not expressly prohibited by the laws of a state) and played at any location. 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. State-tribal gaming compacts are required for Class III gaming only and tribes have the exclusive right to operate Class III games in Wisconsin.

Class III games are defined as all forms of gaming that are not classified as Class I or Class II games. These include banking card games, electronic games of chance, including slot machines, and, generally, high-stakes, casino-style games. Class III gaming is within the jurisdiction of tribes, but is subject to federal provisions under IGRA and state provisions under state-tribal compacts.

Under federal law (IGRA), Class III gaming may be conducted on Indian lands if the activities are: (a) authorized by an ordinance or resolution adopted by the tribe and approved by the Chair of the National Indian Gaming Commission; (b) located in a state that permits such gaming; and (c) 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, 1988, and held in trust by the Secretary of the U.S. Department of the Interior (DOI) 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, 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 DOI determines that a gaming facility 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.

The Governor is authorized, under s. 14.035 of the statutes, to negotiate gaming compacts on behalf of the state. Gaming compacts with the 11 tribes and bands in Wisconsin were initially signed in 1991 and 1992.

The compacts govern Class III gaming and include provisions relating to: (a) the operational standards of gaming; (b) the application of criminal and civil laws to the licensing and regulation of gaming; (c) the allocation of criminal and civil jurisdiction between the state and the tribe; (d) the assessment of amounts necessary to defray costs of regulation; and (e) remedies for disputes.

Current Extent of Tribal Gaming in Wisconsin

Currently, 11 tribes operate 24 Class III gaming facilities in the state, as authorized under the compacts. Table 1 lists the name and location of current gaming facilities and the number of electronic gaming devices and gaming tables at each.

Tribes are required to submit annual independent financial audits of casino operations to the Department of Administration (DOA) and to the Legislative Audit Bureau (LAB). These audits are confidential, and the revenue data for individual tribal operations may not be publicly disclosed.

Table 2 shows aggregated statewide annual net revenue (revenue remaining after winnings are paid out) for all tribal casinos since 1992. Summarizing data by year is complicated because fiscal year periods used by tribes are not uniform and may not coincide with the state's fiscal year.

Table 1: Class III Indian Gaming Casinos, October 2020

Tribe or Band	Casino Name	Casino Location	County	Gaming Devices	Tables
Bad River*	Bad River Casino	Odanah	Ashland	403	6
Ho-Chunk Nation	Ho-Chunk Gaming – Wisconsin Dells	Baraboo	Sauk	1,317	32
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	807	0
Ho-Chunk Nation	Ho-Chunk Gaming – Tomah	Tomah	Monroe	98	0
Lac Courte Oreilles*	Sevenwinds Casino	Hayward	Sawyer	527	9
Lac Courte Oreilles*	Grindstone Creek Casino	Hayward	Sawyer	86	0
Lac du Flambeau*	Lake of the Torches Resort Casino	Lac du Flambeau	Vilas	841	7
Menominee Indian Tribe	Menominee Casino Resort	Keshena	Menominee	721	12
Menominee Indian Tribe	The Thunderbird Mini-Casino	Keshena	Menominee	27	0
Oneida Nation	Oneida Main Casino	Green Bay	Brown	955	26
Oneida Nation	IMAC Casino/Bingo	Green Bay	Brown	407	0
Oneida Nation	Oneida Mason Street Casino	Green Bay	Brown	752	0
Oneida Nation	Oneida Casino Travel Center	Oneida	Outagamie	90	0
Oneida Nation	Oneida One-Stop Packerland	Green Bay	Brown	110	0
Stockbridge-Munsee Community	North Star Mohican Casino Resort	Bowler	Shawano	1,170	14
Forest County Potawatomi Comm.	Potawatomi Bingo Casino	Milwaukee	Milwaukee	2,537	97
Forest County Potawatomi Comm.	Potawatomi Carter Casino & Hotel	Carter	Forest	476	7
Red Cliff*	Legendary Waters Resort & Casino	Bayfield	Bayfield	246	2
Sokaogon Chippewa Comm.	Mole Lake Casino	Crandon	Forest	334	4
St. Croix Chippewa Indians	St. Croix Casino – Turtle Lake	Turtle Lake	Barron	1,088	18
St. Croix Chippewa Indians	St. Croix Casino – Danbury	Danbury	Burnett	470	10
St. Croix Chippewa Indians	St. Croix Casino – Hertel	Hertel	Burnett	235	0
Totals				14,985	264

* Band of Lake Superior Chippewa Indians

It should be noted that aggregate data is not necessarily representative of revenue performance for individual tribes, as revenues for each tribe must remain confidential under the compacts.

Table 2: Tribal Class III Net Gaming Revenue - 1992-2019 (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
2016	1,226.0	2.7
2017	1,242.9	1.4
2018	1,266.5	1.9
2019	1,301.8	2.8
Total	$27,100.3	

Several notable amendments to the compacts led to increased net revenues. Under 1998 amendments, some physical expansion of casino gambling was permitted (for example, the 2000 Potawatomi Casino expansion in Milwaukee). Further, new games were implemented following 2003 amendments. The decline in revenue from 2008 to 2010 reflects the national economic downturn.

The tribes make certain payments to the state based on 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 agencies since the first compacts were signed. As of 1997, the Office of Indian Gaming within DOA's Division of Gaming coordinates the regulatory activities under the compacts relating to tribal gaming.

A total of 16.4 full-time equivalent (FTE) positions are authorized for the Office of Indian Gaming. Employees are subject to background investigations and criminal record restrictions.

The Office's funding in 2020-21 totals $1,986,900 in program revenue (PR) derived from: (a) payments from tribes for costs associated with state regulation and state-provided services; (b) fees from tribal gaming vendors and vendor applicants for costs associated with certification and background investigations; and (c) additional revenue from tribes pursuant to the compacts. Tribal payments to the state are described in greater detail in the section on state revenues.

In addition to DOA's regulatory role, the Department of Justice (DOJ) is authorized to monitor gaming to ensure compliance with the compacts; investigate the activities of tribal officers, employees, contractors or participants that may affect tribal gaming; and prosecute violations of applicable state law or compact provisions. These responsibilities are assigned to the Special Operations Bureau 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 2020-21 funding totaling $192,000 PR from Indian gaming receipts.

State Revenues from Tribal Gaming

Overview. Tribal payments to the state are estimated in each biennial budget process. State funding from tribal payments is appropriated to a variety of state programs, including gaming regulation in DOA and law enforcement in DOJ. Under current law, allocations to state agency programs are the first draw on the tribal gaming revenue. Net revenues in excess of amounts appropriated to specific programs are credited to the general fund.

In general, tribes submit three types of gaming-related payments to the state. First, several tribes were required under compact amendments to make lump sum payments. Second, tribes are required to jointly provide $350,000 annually as reimbursement for the cost of regulating Class III gaming. Each tribe's share of this amount is calculated annually based on its share of the statewide amount wagered on Class III gaming during the previous fiscal year. Each tribe must also reimburse the state for the cost of requested services. Third, tribes pay a percentage of annual net win to the state. It should be noted that confidentiality provisions in each compact prohibit the disclosure of individual net win-based payments by tribe.

Table 3 shows tribal gaming-related revenue received by the state since 1999-00. Figures in the table reflect lump-sum payments specific to each tribe, annual payments of $350,000 for the cost of regulation, payments based on a percentage of net win, vendor certification revenue, miscellaneous revenue, and accounting adjustments. Data from tribes paying a percentage of net revenues is aggregated to comply with the compacts' confidentiality provisions. Recent revenue declines reflect the delayed timing of payments in 2018-19 and the closure of facilities during the Coronavirus pandemic in 2019-20.

Exclusive Rights to Class III Games. Each compact includes an amendment to relieve the tribe of its net win-based payment obligation in the event that the state permits the operation of electronic games of chance or other Class III games by any person other than a federally-recognized tribe or by the state lottery. In this event, certain compacts would also require the state to refund the tribe for prior payments. Some compacts also provide that the state must negotiate a reduction in tribal payments if a subsequent gaming agreement with another tribe causes a substantial reduction in the tribe's gaming revenues.

These provisions reflect the view that net win-based tribal payments are not a form of tax payment or a payment made in lieu of 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 amendments) have allowed tribal payments to a state in exchange for exclusive tribal rights to Class III gaming.

With limited exceptions, the compacts provide that payments to the state may be proportionally reduced in the event of a natural or man-made disaster that affects gaming operations. 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.

Intended Use of State Revenues. Nine of the 11 agreements include an ancillary memorandum of understanding (MOU) relating to government-to-government matters, including the intended use of the additional state payments.

In general, the MOUs indicate that the Governor must undertake his or her best efforts to assure that monies paid to the state are expended for: (a) economic development initiatives to benefit tribes and/or American Indians within Wisconsin; (b) economic development initiatives in regions

Table 3: Tribal Gaming-Related Revenue to the State (1999-00 through 2019-20)

Lump-Sum Payments Tribe or Band	Actual 1999-00 to 2012-13	Actual 2013-14	Actual 2014-15 [1]	Actual 2015-16	Actual 2016-17	Actual 2017-18	Actual 2018-19	Actual 2019-20 [2]	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	1,750,100	0	0	0	0	0	0	0	1,750,100
Lac du Flambeau [3]	6,444,700	50,000	50,000	50,000	50,000	50,000	50,000	0	6,744,700
Menominee	3,176,300	0	0	0	0	0	0	0	3,176,300
Oneida	59,451,400	0	0	0	0	0	0	0	59,451,400
Potawatomi [4]	109,925,000	0	0	0	0	0	0	0	109,925,000
Red Cliff	0	0	0	0	0	0	0	0	0
Sokaogon	850,900	0	0	0	0	0	0	0	850,900
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	$321,182,400	$50,000	$50,000	$50,000	$50,000	$50,000	$50,000	$0	$321,482,400
Regulatory Payments	$4,900,000	$350,000	$350,000	$350,000	$350,000	$350,000	$350,000	$350,000	$7,350,000
Net Win-Based Payments and Other Revenue [5]	$409,925,800	$24,566,500	$76,290,600	$51,956,600	$52,681,500	$53,189,000	$20,083,900	$34,595,400	$723,289,300
Total State Revenue	$736,008,200	$24,966,500	$76,690,600	$52,356,600	$53,081,500	$53,589,000	$20,483,900	$34,945,400	$1,052,121,700

1 Includes payment previously withheld in 2013-14 by the Potawatomi.
2 Includes approximately $34 million in delayed net win-based payments associated with tribal gaming that occurred in 2018-19.
3 Includes payment under Lac du Flambeau's 2009 amendments, which ended in 2019.
4 Includes payment under Potawatomi's 2010 amendments.
5 Includes vendor certification revenue, other miscellaneous revenue, and accounting adjustments.

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.

Several agreements differ in the intended use of state tribal gaming revenues. For example, the Red Cliff, Bad River, and St. Croix agreements specify that funds may be used to support law enforcement on reservations and the Potawatomi MOU limits spending to Milwaukee and Forest Counties. The Ho-Chunk and Lac du Flambeau amendments are silent on how the state utilizes additional gaming revenue.

Most of the MOUs also provide for regular meetings between the state and tribes to discuss implementation of the agreements, including an accounting of how funds are expended.

Delayed Tribal Payments. Any delays in tribal payments to the state make it difficult to estimate general fund revenue in those years. 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 fiscal effect has generally been a shortfall in tribal gaming revenues credited to the general fund.

For example, in 2014, the Potawatomi notified DOA of its decision to withhold payment in anticipation of a possible approval of the proposed Kenosha facility operated by the Menominee. The confidentiality provisions of the compacts prohibit the disclosure of individual net win-based payments. However, the withholding contributed to a deficit in the tribal gaming receipts appropriation. No tribal gaming revenue was deposited to the general fund in 2013-14. Potawatomi's withheld payment was made in 2015.

In 2017, the Stockbridge-Munsee Band of Mohicans notified DOA of its decision to withhold payments, claiming that the state violated their compact by allowing the Ho-Chunk to expand the Wittenberg casino. As of October, 2020, the Stockbridge-Munsee have withheld three payments to the state.

Allocation of Tribal Gaming Revenue to State Agency Programs. Net win-based tribal payments are allocated in each biennial budget to various state agencies. Under the respective biennial budget acts, appropriations of tribal gaming revenue to state agencies, excluding regulatory and enforcement costs of DOA and DOJ, averaged $25.2 million annually since 1999-00, and total $27.6 million in 2020-21. The agencies and programs receiving this funding have remained relatively stable through this period.

The costs of regulation and enforcement for DOA and DOJ are partially offset by the regulatory payments ($350,000 annually) under the original compact provisions. The remainder of these costs are funded with the net win-based payments and other miscellaneous revenue. Appropriations to DOA for regulation have averaged about $1.8 million annually since 1999-00 and total $2.0 million annually in the 2019-21 biennium. Appropriations to DOJ for tribal gaming law enforcement have averaged just under $0.2 million annually since 1999-00. The Department was provided $192,000 PR annually in the 2019-21 biennium for tribal gaming law enforcement.

Actual 2019-20 expenditures (excluding encumbrances) and 2020-21 budgeted allocations to state agencies under 2019 Act 9, including DOA regulation and DOJ enforcement activities, are summarized in Table 4.

In reviewing Table 4, it should be noted that financial support for expenditures may include: (a) expenditure authorization carried forward from the prior year; (b) revenue from previous years; and (c) appropriation supplements. In addition, appropriations may retain unexpended revenue or expenditure authority for the following year.

Table 4: 2019-21 Tribal Gaming Revenue Expenditures and Allocations

	Agency	2019-20 Actual	2020-21 Appropriated	Purpose
1	Administration	$0	$0	Youth treatment wellness center. *
2	Administration	563,200	563,200	County management assistance grant program.
3	Administration	247,500	247,500	UW-Green Bay and Oneida Tribe programs assistance grants.
4	Administration	90,200	79,500	Tribal governmental services and technical assistance.
5	Children and Families	1,291,100	1,867,500	Tribal family services grants
6	Children and Families	717,500	717,500	Indian child high-cost out-of-home care placements.
7	Corrections	50,000	50,000	American Indian tribal community reintegration program.
8	Health Services	953,000	961,700	Medical assistance matching funds for tribal outreach positions and federally qualified health centers (FQHC).
9	Health Services	467,200	712,800	Health services: tribal medical relief block grants.
10	Health Services	445,500	445,500	Indian substance abuse prevention education.
11	Health Services	440,000	445,500	Elderly nutrition; home-delivered and congregate meals.
12	Health Services	0	250,000	Reimbursements for high-cost mental health placements by tribal courts.
13	Health Services	239,000	242,000	Indian aids for social and mental hygiene services.
14	Health Services	91,400	106,900	American Indian health projects.
15	Health Services	20,800	22,500	American Indian diabetes and control.
16	Higher Education Aids Board	631,600	779,700	Indian student assistance grant program for American Indian undergraduate or graduate students.
17	Higher Education Aids Board	455,700	481,800	Wisconsin Grant Program for tribal college students
18	Higher Education Aids Board	405,000	405,000	Tribal College Payments
19	Historical Society	246,300	246,300	Northern Great Lakes Center operations funding.
20	Historical Society	162,900	201,100	Collection preservation storage facility.
21	Justice	695,000	695,000	Tribal law enforcement grant program.
22	Justice	631,200	631,200	County-tribal law enforcement programs: local assistance.
23	Justice	490,000	490,000	County law enforcement grant program.
24	Justice	122,400	115,400	County-tribal law enforcement programs: state operations.
25	Kickapoo Valley Reserve Board	75,600	69,400	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	165,900	165,900	Management of state fishery resources in off-reservation areas where tribes have treaty-based rights to fish.
28	Natural Resources	125,700	125,700	Management of an elk reintroduction program.
29	Natural Resources	0	84,500	Payment to the Lac du Flambeau Band relating to certain fishing and sports licenses.
30	Natural Resources	80,700	80,700	Reintroduction of whooping cranes.

Agency		2019-20 Actual	2020-21 Appropriated	Purpose
31	Natural Resources	1,232,200	1,232,200	State snowmobile enforcement program, safety training and fatality reporting.
32	Public Instruction	181,100	222,800	Tribal language revitalization grants.
33	Tourism	6,074,500	8,967,100	General tourism marketing, including grants to nonprofit tourism promotion organizations and specific earmarks.
34	Tourism	160,000	160,000	Grants to local organizations and governments to operate regional tourist information centers.
35	Tourism	24,900	24,900	State aid for the arts.
36	Transportation	435,600	435,600	Elderly transportation grants.
37	University of Wisconsin System	417,500	417,500	Ashland full-scale aquaculture demonstration facility operational costs.
38	University of Wisconsin System	254,600	256,200	Ashland full-scale aquaculture demonstration facility debt service payments.
39	University of Wisconsin-Madison	488,700	488,700	Physician and health care provider loan assistance.
40	Veterans Affairs	96,700	101,300	American Indian services veterans benefits coordinator position.
41	Veterans Affairs	61,200	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	Wisconsin Technical College System Board	525,600	594,000	Grants for work-based learning programs.
43	Workforce Development	317,300	314,900	Vocational rehabilitation services for Native American individuals and American Indian tribes or bands.
	Subtotal (Non-Regulatory Items)	$23,174,300	$27,560,200	
44	Administration	$1,783,100	$1,986,900	General program operations for Indian gaming regulation under the compacts.
45	Justice	195,700	192,000	Investigative services for Indian gaming law enforcement.
	Subtotal (Regulation/ Enforcement)	$1,978,800	$2,178,900	
	Total	$25,153,100	$29,739,100	

* In 2019-20, $640,000 was encumbered for the youth treatment wellness center but no funds were expended.

As previously discussed, net revenue in excess of amounts appropriated to agencies is deposited into the general fund. Table 5 shows actual tribal gaming general fund revenue for 2019-20 and estimated revenues for 2020-21. Tribal payments to the state totaled $34.5 million in 2019-20, of which $5.3 million was transferred to the general fund. Net revenues in 2019-20 were lower than amounts estimated under 2019 Act 9 due to casino closures during the Coronavirus pandemic.

Table 5: Tribal Gaming General Fund Revenue

	2019-20 (Actual)	2020-21 (Act 9)
Estimated Tribal Payments	$34,478,600	$53,610,800
Regulatory Payments	350,000	350,000
Vendor Certification Revenue	116,800	140,600
Subtotal	$34,945,400	$54,101,400
Unobligated Funds Reversions	$339,800	$600,000
Total Revenue	$35,285,200	$54,701,400
Program Allocations	$29,955,600	$29,739,100
Program Reserves	16,900	83,300
Total Program Funding	$29,972,500	$29,822,400
Tribal Gaming General Fund Revenue	$5,312,700	$24,879,000

Features of Wisconsin's State-Tribal Gaming Compacts

The Governor is authorized to negotiate Indian gaming compacts on behalf of the state under s. 14.035 of the statutes. State-tribal gaming compacts were signed with 11 tribes and bands in Wisconsin in 1991 and 1992. Between 1998 and 2010, the compacts were amended to extend the terms, expand payments to the state, and resolve conflicts between the state and tribes.

While the 11 state-tribal gaming compacts contain many identical provisions, they also include a number of differences. The following discussion summarizes major compact components.

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 neither the state nor the tribal governments waived their sovereign immunity under state or federal law. Under amendments to the compacts in 2003, tribal governments and the state generally agreed to a limited waiver of sovereign immunity in disputes about compact provisions.

The sovereign immunity waiver provision of the Potawatomi compact was challenged in the case *Panzer v. Doyle.* The Wisconsin Supreme Court concluded, with respect to the 2003 Potawatomi amendments only, that the Governor lacks the authority to waive the state's sovereign immunity in compact negotiations. Therefore, provisions of the compact that waive the state's sovereign immunity are invalid. Subsequently, the state and the Potawatomi entered into additional amendments that, in part, amended the state's waiver of sovereign immunity.

Compacts with other tribes include provisions waiving the state's sovereign immunity similar to those held unconstitutional in *Panzer v. Doyle;* to date, they have not been amended or challenged.

Term and Renewal. The duration and renewal process differs by tribe. 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 2003/2004.

Under the 2003 amendments, the duration provisions were 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. The 2003 amendments resulted in most compacts having an unlimited duration.

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, then the term would default to expiration dates in 2101 or 2102 (a term of 99 years).

The current compacts include 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.

The perpetual duration provision of the 2003 Potawatomi amendments was challenged as part of the *Panzer v. Doyle* litigation. The Wisconsin Supreme Court concluded that with respect to the Potawatomi amendments, the Governor was without authority to agree to the "perpetual" duration provision. As a result, the Potawatomi and the state renegotiated the compact's duration provisions in 2005 and agreed to a term of 25 years (2030), thereafter extended automatically unless either party serves a notice of nonrenewal.

In the event written notice of nonrenewal is given, the tribe must cease all Class III gaming upon the expiration of the compact. Pursuant to the procedures of IGRA, the tribe may also request that the state enter into negotiations for an amended, renewed, or successor compact. 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. If neither party serves a notice of nonrenewal, the compact would automatically renew.

Several other tribes have subsequently renegotiated compact term and renewal provisions. The current provisions of each compact are as follows: (a) the Bad River, Lac Courte Oreilles, Menominee, Red Cliff, and Sokaogon compacts have unlimited durations; (b) the Oneida, St. Croix, and Stockbridge-Munsee compacts will remain in effect in perpetuity, although each specifies that, if the unlimited duration provision is found to be invalid or unlawful by a court of competent jurisdiction, the term would default to expiration dates in 2101 or 2102; (c) the Potawatomi compact is extended until 2030, and thereafter extended automatically unless either party serves a notice of nonrenewal; (d) the Lac du Flambeau compact is extended until 2034, and thereafter extended automatically unless either party serves a notice of nonrenewal; and (e) the Ho-Chunk compact is extended until 2033, but will renew automatically in 2023 with an expiration date of 2058 unless either party serves a notice of nonrenewal or a material breach of the compact is unresolved.

Types of Games Authorized. The compacts define the scope of allowable Class III games. Under the original compacts, these 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 a location with bingo. Tribes were not authorized to operate other types of Class III gaming unless the compacts were amended.

Under subsequent compact amendments, authorized games were expanded to include electric keno, pari-mutuel wagering on live simulcast races, roulette, craps, poker, and non-house banked card games. In addition, for some tribes, amendments allow for lottery games, variations of blackjack, and other dice games.

Gaming Procedures and Requirements. The compacts detail operational requirements for Class III games to ensure security and adequate regulatory oversight, including that: (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 disputes; and (e) alcoholic beverages may be served on the premises of gaming facilities only during the hours prescribed under state law. In general, the minimum age to play is 21 years, except for the Lac Courte Oreilles and Sokaogon compacts, under which the minimum is 18 years.

Most compacts specify that rules for Class III games must be promulgated as minimum internal control standards to ensure accurate payout ratios, fairness of play, and the adequate accounting of revenue in compliance with generally accepted accounting principles. Separate requirements are

specified for operating electronic games of chance, blackjack, and pull-tab ticket games.

Under IGRA, Class III games may not be conducted outside qualified tribal lands. Further, the compacts specify that Class III gaming may not be conducted through the use of common carriers such as telecommunications or postal services for the purpose of facilitating gambling by a person who is not physically present on tribal lands.

State Data Collection. With some variations, MOUs associated with the compact amendments require the tribes to provide the state with electronic and physical access to certain slot machine accounting data. The data must be treated as confidential by the state and may not be disclosed without the permission of the tribes.

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, online monitoring of any tribe’s online accounting system. The tribes also agree on a timeline to submit daily revenue information to DOA once-per-month.

Employee Restrictions. Under the compacts, the tribes agree that no person may be employed in the operation or conduct of gaming 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 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.

Gaming-Related Contracts. The compacts define agreements under which a tribe procures goods unique to the operation of gaming as "gaming-related contracts." These contracts include: (a) management, consultation, or security service contracts; (b) prize payout agreements; (c) procurement of materials, supplies, and equipment; and (d) certain financing agreements related to gaming facilities.

Under the original compacts, any contract exceeding $10,000 requires that the contractor be certified by DOA. Some compacts were amended to only require state certification by DOA if the annual value of the contract exceeds $25,000. Management contracts for the operation of Class III gaming are subject to additional requirements.

Eligibility for certification is subject to criminal history background checks and other restrictions. To provide certification, DOA must conduct background investigations of those proposing to be tribal gaming contractors. Further, DOJ is authorized to submit applicants' fingerprint cards to the Federal Bureau of Investigation. Applicants must pay for the costs of the investigation.

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 (LAB).

A security audit to review and evaluate the effectiveness, adequacy and enforcement of the systems, policies and procedures relating to the security 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 comments or suggestions to improve 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 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.

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. 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 compacts, including the Menominee agreement, provide for state jurisdiction of gambling law enforcement.

Under the compacts, the state has jurisdiction to prosecute criminal violations of its gambling laws that occur on tribal lands. The consent of the state Attorney General is required before prosecution may commence. The state may not initiate any prosecution against an individual authorized by the tribe, on behalf of the tribe, to engage in gaming activities. Some compacts specify that the tribe has jurisdiction to prosecute violations of its tribal gaming code against 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 to resolve the dispute. This procedure did not limit 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 through mechanisms such as negotiations, non-binding mediation, binding arbitration, or court action.

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 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, most of the agreements also provide that, prior to engaging in dispute resolution procedures, the tribe or state may petition for provisional or ancillary remedies to a dispute, including preliminary or permanent injunctive relief.

Severability. All tribes have a severability provision in their compacts. Generally, the severability provision states the each provision of the compact will stand separate and independent of every other provision. If a court 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.

Proposed Kenosha Site. The Menominee compact amendments of 2000 made extensive changes to the tribe's gaming compact, establishing provisions to govern Class III gaming at a proposed site in Kenosha. Many of the 2000 amendment provisions relating to the Kenosha facility were eliminated under the 2010 amendments.

The application for the Kenosha proposal was denied by the Department of the Interior in 2009. In 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 2013, the DOI approved the proposal. However, the tribe could not proceed with plans for the Kenosha facility unless it received a concurrence by the Governor. In January, 2015, the Governor rejected the proposal.

Proposed Beloit Site. In 2012, the Ho-Chunk Nation submitted an application to the DOI to build a Class III gaming facility in the City of Beloit. In April, 2020, the DOI approved the proposal. However, the tribe cannot proceed with plans for the Beloit facility until it receives a concurrence by the Governor. As of November, 2020, the proposed facility is pending the approval of the Governor.

Wisconsin Supreme Court Decisions

Subsequent to the 2003 compact amendments there were two important state Supreme Court decisions relating to tribal gaming: *Panzer v. Doyle*, 2004 WI 52, and *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107.

***Panzer v. Doyle*.** This case challenged the Governor's authority to agree to provisions in the 2003 Potawatomi compact amendments. The provisions that were challenged relate to: (a) newly authorized games; (b) unlimited duration of the compact; and (c) waiver of the state's sovereign immunity. 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 a result, the Potawatomi compact's duration provisions were renegotiated. The major features of the Wisconsin Supreme Court's 2004 ruling are described below.

Scope of Authorized Games. The 2003 Potawatomi amendments expanded the scope of authorized games. Under federal law (IGRA), tribal gaming activities are permitted only if allowed under state law and a state-tribal compact. The Court held that the Governor could not authorize these additional games because they violated the Wisconsin Constitution and state statutes. This restriction was later reversed in the *Dairyland* decision, discussed below.

Duration of the Compact. Under the 2003 Potawatomi amendments, the compact would have remained 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. While the Governor is delegated the authority to negotiate gaming compacts with the tribes, the Court held that the Governor's authority is subject to "certain implicit limits." The Court concluded that the Governor had not been delegated authority to agree to an unlimited duration provision.

Waiver of the State's Sovereign Immunity. Several provisions in the 2003 Potawatomi amendments related to suits to enforce the compact. Generally, both the tribe and state waived sovereign immunity with respect to any claim to enforce the compacts. The Supreme Court ruled that the Governor did not have the authority to waive the state's sovereign immunity, noting that only the Legislature may waive sovereign immunity on the state's behalf. If the Legislature wishes to authorize a designated agent to waive sovereign immunity, the Legislature must do so expressly.

Compacts with other tribes include provisions relating to the waiver of sovereign immunity; to date, these other compacts have not been amended or challenged.

Dairyland Greyhound Park, Inc. v. Doyle. This case challenged the continuation of casino gambling in Wisconsin. In 2001, the Dairyland racetrack sued to bar the authorization of casino gambling, based on the 1993 state constitutional amendment to Article IV, Section 24 that clarified all forms of gambling in Wisconsin are prohibited except bingo, raffles, pari-mutuel on-track betting and the state-run lottery. The plaintiff argued that the 1993 constitutional amendment precluded the Governor from extending or renewing Indian gaming compacts to allow casino gambling, except for the limited forms of gambling authorized in the Wisconsin Constitution.

In 2006, the Wisconsin Supreme Court ruled that the compacts and amendments to the compacts, including amendments to expand the scope of gaming, are protected under the Wisconsin and U. S. Constitutions. As a result, the 1993 state constitutional amendment that limited legal gambling does not apply to games authorized by state-tribal compacts. The ruling withdrew any language to the contrary in the *Panzer* decision.

A key finding in the ruling is that compact

renewals constitute the continuation of the original compacts. The Court maintained that the 1993 constitutional amendment did not apply to these original compacts, which were entered into prior to 1993. The Court did note that the 1993 constitutional amendment could apply to successor compacts or other new compacts.

Federal Court Decisions

Designation of Electronic Poker. In 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 2015, the U.S. 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.

Wittenberg Casino Dispute. In 2016, the Ho-Chunk announced plans to expand their Wittenberg casino, built in Shawano County in 2008. The Stockbridge-Munsee Band of Mohicans, whose reservation and casino are also in Shawano County, filed a lawsuit against the State of Wisconsin and the Ho-Chunk Nation. The Stockbridge-Munsee claimed that the expansion violated both tribes' compacts and federal law (IGRA). In 2017, a U.S. District Judge dismissed the lawsuit against the Ho-Chunk, ruling that the Stockbridge-Munsee's claims were barred by Wisconsin's six-year statute of limitations, which expired for the Wittenberg casino in 2014. In 2018, a U.S. District Judge also dismissed the lawsuit against the state, stating that this case also exceeded the six-year statute of limitations.

Sports Gambling. In 2018, the U.S. Supreme Court overturned the Professional and Amateur Sports Protection Act, a 1992 law that prohibited state authorization of sports gambling. The Supreme Court ruled that the law violated the 10th Amendment's anti-commandeering principle by overextending federal control over state legislatures. The Court's decision (in *Murphy v. National Collegiate Athletic Association*) allows each state to act on its own with regard to the regulation and legalization of sports betting.

Sports gambling is prohibited by the Wisconsin Constitution and is not allowed under any of the current state-tribal compacts. Amending the Wisconsin Constitution to allow sports gambling operated by non-tribal-owned facilities could be viewed as violating the exclusivity clause of the compacts that restricts Class III gaming to tribal-owned facilities. This could result in the termination of tribal payments to the state and, in the case of certain tribes' compacts, could require the state to repay tribes for prior payments. Alternatively, each compact could be renegotiated to allow the corresponding tribe to operate sports gambling at Class III facilities. However, to date, the compacts have not been renegotiated to allow sports gambling.