

Issue Paper

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TRIBAL GAMING ISSUES IN MICHIGAN

by

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Senate Fiscal Agency



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INTRODUCTION

Since the first Michigan gaming compacts were established with seven Indian tribes in 1993, the number of Indian tribes operating casinos and the number of casinos have gradually expanded. Currently, the 12 federally recognized Indian tribes in Michigan have gaming compacts with the State. These tribes operate 19 casinos, with a 20th casino scheduled to open in 2009.

The year 2008 was an active one for Indian gaming issues in Michigan. The Club Keno lawsuit was settled, resulting in \$28.1 million in payments from two Indian tribes to the Michigan Strategic Fund (MSF) in fiscal year (FY) 2007-08. Several compact amendments secured ongoing revenue sharing payments to the MSF. Additionally, the U.S. Congress considered (and rejected) legislation related to a Michigan tribal land dispute involving proposed casinos in Port Huron and Monroe County. Most recently, the Gun Lake tribe's land was taken into trust and in April 2009 its compact took effect.

This paper reviews recent changes in tribal gaming, including the settlement of the Club Keno lawsuit and related amendments to compacts, the revenue that the State has received from Indian gaming, and the basics of the laws that established Indian casino gaming in Michigan.

BACKGROUND

The operation of the Indian casinos is governed by a complex structure of Federal regulation under the Indian Gaming Regulatory Act, compacts entered into between the State and the Indian tribes, and court decisions. In 1987, the U.S. Supreme Court ruled in *California v. Cabazon Band of Mission Indians* that a state does not have the authority to regulate or limit gaming on Indian land. In response to this decision, Congress passed the Indian Gaming Regulatory Act (IGRA) of 1988, which gives states a regulatory role in casino gaming operations conducted on tribal land. The Indian Gaming Regulatory Act establishes three separate categories of games: Class I includes traditional tribal games, Class II consists of bingo or card games that are regulated by the tribes, and Class III includes games of chance or casino-type games. It is the Class III games that the legislation specifies may be operated on Indian lands only under the terms of a negotiated compact entered into by the tribes and the state unless a tribe can show that it has negotiated in good faith with a state and is unable to reach agreement on a compact. In this instance, a tribe may petition the U.S. Department of the Interior for approval to operate Class III games.

The Indian Gaming Regulatory Act sets eligibility requirements for these gaming operations. The tribes are required to obtain Federal recognition of the tribe and the land proposed for the gaming operations. The process for negotiating and approving a compact is left up to the states to determine; however, the U.S. Department of the Interior retains final approval of the compacts and any amendments to them.

The compact approval process in Michigan has typically begun with negotiations between the Governor and the Indian tribes on the terms of the compact. The compact then is presented to the Legislature for approval through the adoption of resolutions. The final step is approval by the Secretary of the Interior, who can either approve the compact or let the 45-day review period expire, resulting in tacit acceptance of the compact.

While IGRA prohibits the taxation of Indian gaming, it has been the position of the Federal government that revenue sharing agreements are acceptable if both sides benefit. In Michigan, the State and the tribes historically have agreed to provisions for exclusive rights for the tribes to operate certain types of games in return for specified revenue sharing payments to the State and nearby local governments of a portion of the net win on electronic games of chance. Recent

compact amendments have redefined exclusivity or based revenue sharing on another type of benefit to the tribe, the creation of an economic incentive for the State to pursue policies that contribute to the success of tribal gaming operations.

1993 COMPACTS

The first compacts in Michigan were negotiated in 1993 between the Governor and a group of seven Indian tribes. These compacts were approved by the Governor, followed by passage of a concurrent resolution of the Legislature, and finally submitted for approval by the U.S. Department of the Interior (USDOl). These compacts govern Indian gaming for these tribes for the negotiated length of the compacts, which was set at 20 years. With one exception discussed below, the 1993 compacts will be in effect until 2013 at which time they will need to be renegotiated in order for the tribes to be able to continue to operate Class III games. The 1993 compacts permit Indian casinos to be constructed and operated on any Indian lands, defined in the compact as land within the limits of the reservation, land contiguous to the reservation as of October 17, 1988, and land held in trust by the United States for the benefit of the tribe. The 1993 compacts do not limit the number of casinos that each tribe may operate; as a result, several tribes operate multiple casinos. The seven tribes with the original 1993 compacts now operate a total of 16 casinos in this State. The operating tribe and location of each of these casinos are shown in Table 1.

Table 1

INDIAN TRIBES OPERATING CASINOS PURSUANT TO 1993 COMPACTS		
Tribes with 1993 Compacts	No. of Casinos in Operation	Location of Casinos
Bay Mills Indian Community	2	Brimley
Grand Traverse Band of Ottawa and Chippewa Indians	2	Suttons Bay, Williamsburg
Hannahville Indian Community	1	Harris
Keweenaw Bay Indian Community	2	Baraga, Marquette
Lac Vieux Desert Band of Lake Superior Chippewa Indians	1	Watersmeet
Saginaw Chippewa Tribe of Michigan	3	Two in Mount Pleasant, one in Standish
Sault Ste. Marie Tribe of Chippewa Indians	5	Sault Ste. Marie, St. Ignace, Christmas, Hessel and Manistique

Source: Michigan Gaming Control Board

Revenue sharing from the casinos to State and local government was not part of the 1993 compacts, but was decided separately in a consent judgment that settled litigation surrounding the compacts. The consent judgment included revenue sharing provisions for State and local government. The local government provision required the tribes to pay 2.0% of the net win (the amount wagered less prizes paid) from electronic video gaming and slot machines to the local municipalities. The payment to local governments was not conditioned on exclusivity of gaming rights and has continued to be paid by the 1993 tribes. The State government provision established an 8.0% payment of the net win from electronic video gaming and slot machines payable to the Michigan Strategic Fund. Payments to the MSF were conditioned on the tribes' continuing to have the exclusive right to operate electronic gaming facilities in the State.

The termination of exclusivity first became an issue with the approval in 1998 of additional Indian gaming compacts. Upon the approval of the Detroit casinos through a voter-initiated law (which required no legislative or gubernatorial approval) in 1999, the exclusivity provisions were deemed to have been conclusively terminated, ending the obligation of the tribes with 1993 compacts (with the exception of the Keweenaw Bay Indian Community) to make revenue sharing payments to the MSF.

The Keweenaw Bay Indian Community is the only tribe from the original 1993 compacts that has continued revenue sharing payments since the 1999 termination of exclusivity. Revenue sharing payments from the Keweenaw Bay Indian Community continue due to a consent judgment that settled a lawsuit relating to the proper siting of one of the tribe's casinos. The consent judgment resolved the case of *Keweenaw Bay Indian Community v. United States of America, United States Department of the Interior, United States Department of Justice and the State of Michigan, Intervenor*, and was approved by the court on February 2, 2001. Under the terms of the consent judgment, beginning June 30, 1999, the Keweenaw Bay tribe has paid 8.0% of its net win from both casinos directly to the Michigan Economic Development Corporation (MEDC). The agreement also stated that if at any time the Governor approves a compact with a lesser percentage, then the rate of revenue sharing will no longer be 8.0% but the lower percentage negotiated by the Governor. Under this consent judgment, the Keweenaw Bay Indian Community tribe paid approximately \$2.5 million annually to the MEDC from 1999 through 2008. The agreement made several other changes, including exempting the three Detroit casinos from the exclusivity requirement, limiting the Keweenaw tribe to two casinos, one on the L'Anse Federal Indian Reservation in Baraga County and one in Marquette County, and extending the duration of the original compact by nine years, until November 30, 2022.

Since the signing of the consent agreement, the Keweenaw tribe, the State, and U.S. Department of the Interior have been in negotiations regarding moving the second site to a different location in Marquette County. This move would require USDOJ approval to take the new property into trust. This action is still pending at the Federal level. Assuming the property is taken into trust, the Governor will have an opportunity to concur with or reject that decision. In the meantime, the second casino continues to operate at the current location.

In total, from 1993 to 1999, the seven tribes with 1993 compacts paid approximately \$182.8 million to the MSF. From 2000 to 2008, the Keweenaw Bay Indian Community paid an additional \$20.8 million to the MEDC.

Table 2
PAYMENTS TO THE MICHIGAN STRATEGIC FUND (MSF)
FROM INDIAN TRIBES WITH 1993 COMPACTS
FY 1992-93 TO FY 2007-08
(Millions of Dollars)

Tribes with 1993 Compacts	Period of Payments	Total Paid to MSF
Bay Mills Indian Community	August 20, 1993 to June 30, 1999	\$6.7
Grand Traverse Band of Ottawa and Chippewa Indians	August 20, 1993 to February 17, 1999	18.1
Hannahville Indian Community	August 20, 1993 to June 30, 1999	7.7
Keweenaw Bay Indian Community	August 20, 1993 to September 30, 2008 ^{a)}	30.3
Lac Vieux Desert Band of Lake Superior Chippewa Indians	August 20, 1993 to June 30, 1999	4.2
Saginaw Chippewa Tribe of Michigan	August 20, 1993 to February 17, 1999	95.9
Sault Ste. Marie Tribe of Chippewa Indians	August 20, 1993 to June 30, 1999	40.7
Total Revenue		\$203.6
^{a)} Keweenaw Bay Indian Community compact was amended by a consent judgment approved on February 2, 2001, to resolve a land dispute. The amendments to that compact provided for continued payments to be made directly to the MEDC and extended the period of the compact until November 30, 2022.		

Source: Michigan Gaming Control Board and Michigan Strategic Fund

1998 COMPACTS

A second set of compacts was approved after negotiations were completed in 1998 between then-Governor John Engler and four Indian tribes that had not achieved Federal recognition in time to participate in the 1993 compacts. The compacts were signed by the Governor and approved by a concurrent resolution of the Legislature on December 11, 1998. The compacts were permitted to take effect following publication in the Federal Register by the USDOJ at the conclusion of the review period on February 18, 1999.

The 1998 compacts differ from the 1993 compacts in several respects. First, the 1998 compacts permit some provisions of the compact to be amended by agreement of the Governor and the tribes, with the approval of the USDOJ. However, the compacts prohibit any amendment that would change the areas where casinos can be located. Second, the 1998 compacts limited the tribes to one casino each. Third, the 1998 compacts redefined exclusivity to reflect the existence of the three Detroit casinos and the other tribes operating under the 1993 compacts. The 1998 compacts retained State revenue sharing at 8.0% of the net win from Class III electronic games of chance, payable semi-annually to the MSF. The local revenue sharing percentage remains 2.0% of the net win from these electronic games of chance. The local revenue sharing is paid to a local revenue sharing board which distributes the funds to local governments that incur additional operating costs, i.e., for police and fire protection, due to the operation of the casino.

The compacts also require the tribes to pay the State an amount not to exceed \$50,000 per year (adjusted annually by the consumer price index) to cover the costs of oversight by the Michigan Gaming Control Board.

The tribes with 1998 compacts are shown in [Table 3](#).

Table 3

TRIBES OPERATING CASINOS PURSUANT TO 1998 COMPACTS		
Tribes with 1998 Compacts	No. of Casinos in Operation	Location of Casinos
Little River Band of Ottawa Indians	1	Manistee
Little Traverse Bay Bands of Odawa Indians	1	Petoskey
Nottawaseppi Huron Potawatami	0	Battle Creek (under construction, expected to open in summer 2009)
Pokagon Band of Potawatomi Indians	1	New Buffalo Township

Source: Michigan Gaming Control Board

The original 1998 compacts would have expired in 2018; however, all except the Nottawaseppi compact have been amended as a result of the settlement of the Club Keno litigation (discussed below) to extend their duration until 2028. The Nottawaseppi casino is expected to open in the summer of 2009.

The compact for the Little Traverse Bay Bands of Odawa was amended in 2003 to permit the operation of a second casino at a different site and require that all revenue sharing payments from casinos be payable to the State as directed by the Governor or his or her designee, instead of to the Michigan Strategic Fund. However, these funds continue to be deposited with the MSF. The amendment made a number of other changes that affected the second site (which has not been developed to date). The revenue sharing provisions were altered for the second site to increase payments to the State. While the original compact provided for 8.0% of the net win on electronic games of chance, the amendment increased that to 10.0% on the first \$50.0 million, and 12.0% of the net win in excess of \$50.0 million. A change in the definition of exclusivity added the expansion

of lottery games beyond those allowable under State law at the execution date of the amendment, or any change in State law that would allow the operation of games of chance or a commercial casino in the following counties: Antrim, Charlevoix, Cheboygan, Crawford, Emmet, Kalkaska, Montmorency, Oscoda, Otsego, and Presque Isle. The gambling age for Class III games was increased to 21 years or older for the second site, up from the 18-year requirement that remains in effect at the Petoskey site. This change is consistent with the requirements placed on private casinos in Michigan, pursuant to Public Act 69 of 1997. Finally, the amended compact was extended for 25 years from the date of the amendments to 2028. To date, no second site has been opened by this tribe. The most recent amendment to this compact, in 2008, made small changes to these original amendments and is discussed in detail below.

CLUB KENO LAWSUIT

In 2003, two of the four 1998 compact tribes, the Little River Band of Ottawa Indians and the Little Traverse Bay Bands of Odawa Indians, were operating casinos when the State Lottery started Club Keno, a game with frequent drawings that is played at participating locations such as restaurants and bars. In 2004, these Indian tribes ceased making their revenue sharing payments, arguing that the new Club Keno game violated the exclusivity provision of their compacts. The State filed a lawsuit in Federal court (*State of Michigan and the Michigan Economic Development Corporation v. the Little River Band of Ottawa Indians and the Little Traverse Bay Band of Odawa Indians*) to obtain the revenue that the tribes were retaining. In April 2007, the State received a favorable court ruling, which the tribes then appealed. The court ordered that the funds in contention be placed in a court-supervised registry account while the appeal was pending. In January 2008, the tribes and the State entered into a settlement agreement that concluded the lawsuit.

The terms of the settlement agreement provided for the distribution of the escrowed funds, the amount of revenue sharing to the State, and the duration of the compacts. With regard to the funds in the court registry account, the agreement provided for them to be divided equally between the tribes and the State. Pursuant to the settlement, \$28.1 million was distributed to the Michigan Strategic Fund on April 4, 2008.

The resolution of other issues in the settlement was reflected in amendments to the compacts, which were approved by the Secretary of the Interior. The amendments included changes that reduced the payment to the State to as low as 6.0%, permitted reduced revenue sharing in periods of declining gaming revenue, redefined exclusivity based on a regional market area, and limited penalties for an infringement of exclusivity. These amendments are described in more detail in [Appendix A](#).

A third tribe with a 1998 compact, the Pokagon Band of Potawatami Indians, opened its New Buffalo casino in August 2007; however, the tribe withheld revenue sharing payments to the State and local governments citing Club Keno and other issues. The tribe did not participate in the Club Keno lawsuit, but after a period of negotiation, entered into compact amendments with the State (approved by the USDOJ) that address the issues raised by the lawsuit and include agreements to make certain payments to the State to cover the period from the time the casino opened to September 30, 2008. The negotiations resulted in an agreement that required the tribe to make a payment of \$18,554,800 to the MSF in FY 2007-08. This payment covered the revenue sharing obligation of the tribe from August 2007 through the time of the agreement. Subsequent payments will be based on the revised revenue sharing formula.

The settlement payments are shown by tribe in [Table 4](#).

Table 4

FY 2007-08		
ONE-TIME SETTLEMENT PAYMENTS TO THE MICHIGAN STRATEGIC FUND		
(Millions of Dollars)		
Date of Payment	Tribe	Amount
April 2008	Little River Band of Ottawa Indians	\$17.9
April 2008	Little Traverse Bay Band of Odawa Indians	10.2
Total		\$28.1

Source: Michigan Strategic Fund

The Pokagon compact amendments redefined the basis for revenue sharing payments, replacing the benefit of exclusivity with language that revenue sharing payments to the State are to "...provide the State with an economic incentive intended to encourage the State to pursue economic policies and activities that promote and contribute to the success of the Tribe's Class III gaming business...".

At the primary casino, revenue sharing payments will be made at a 6.0% rate which can be reduced in periods of declining tribal gaming revenue. The amendments also permit the tribe to operate up to three casinos (where the two additional casinos are limited to locally approved locations in Dowagiac and Hartford and a maximum of 1,000 electronic games of chance at each satellite location), and set a higher revenue sharing rate of 8.0% at satellite casinos. More detail on the amendments to Pokagon compact is shown in Appendix B.

The fourth tribe with a 1998 compact is the Nottawaseppi Huron Potawatami. This tribe has a casino in Battle Creek under construction, which it expects to open in August 2009. Its compact has not been amended to date; however, the tribe and the State may consider adjustments in the compact similar to those in the Club Keno settlement.

The revenue sharing and settlement payments made by the tribes with 1998 compacts are summarized in Table 5. Since 1999, the tribes with 1998 compacts have made revenue sharing and settlement payments to the State that total \$98.9 million through FY 2007-08.

Table 5

PAYMENTS TO THE MICHIGAN STRATEGIC FUND (MSF)					
FROM INDIAN TRIBES WITH 1998 COMPACTS					
FY 1998-99 TO FY 2007-08					
(Millions of Dollars)					
Tribes with 1998 Compacts	Period of Payments	Revenue Sharing	Settlement Payments	Total	
Little River Band of Ottawa Indians	July 21, 1999 to Sept. 30, 2008	\$33.2	\$17.9	\$51.1	
Little Traverse Bay Bands of Odawa Indians	Oct. 1, 1999 to Sept. 30, 2008	19.0	10.2	29.2	
Pokagon Band of Potawatomi Indians	Aug. 2, 2007 to Sept. 30, 2008	18.6	0.0	18.6	
Total		\$70.8	\$28.1	\$98.9	

Source: Michigan Gaming Control Board and Michigan Strategic Fund

MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (The Gun Lake Tribe)

The Gun Lake tribe has received Federal recognition and is planning to develop a casino in Wayland Township located in Allegan County. The U.S. Supreme Court declined to hear an appeal from opponents of the casino who challenged the process by which the land was taken into trust, removing a substantial barrier to development of this casino and the USDOJ has taken the tribe's land into trust. The last step in the Federal approval process is an administrative determination by the U.S. Secretary of the Interior that the land has reservation status and is legally eligible for gaming. This determination is pending.

The Gun Lake compact took effect in April 2009 after a lengthy approval process. In 2002, the Michigan House of Representatives and the Senate passed resolutions endorsing a compact with the tribe (HR 606 of 2002 and SR 279 of 2002); however, the compact was not approved by the Governor. In 2004, in SR 308, the Senate withdrew its approval. In 2007, Governor Granholm approved a revised compact, which was brought before the Legislature. The Michigan House of Representatives in August 2007 approved the compact in two separate resolutions. The first, House Concurrent Resolution 39, was passed, but a procedural motion prevented the concurrent resolution from being transmitted to the Michigan Senate, which therefore did not act on the concurrent resolution. House Concurrent Resolution 39 thus expired without final approval. The second resolution, HR 158, was passed by the House. On February 11, 2009, the Senate adopted SR 11, which approved the compact. Finally, on February 19, 2009, the House confirmed its prior approvals by adoption of HR 28. On April 22, 2009, the Federal Register published notification that the tribal compact would go into effect.

The compact would require the tribe to pay the MSF from 8.0% to 12.0% of the net win from electronic games of chance, with the percentage determined by the amount of the annual net win. A net win of up to \$150.0 million would require an 8.0% payment, a net win between \$150.0 million and \$300.0 million would trigger a 10.0% payment, and the 12.0% rate would apply to a net win greater than \$300.0 million. The proposed compact also would limit the exclusivity requirement to the region of the casino, as opposed to the statewide exclusivity that was part of the 1993 and 1998 compacts.

CHARLOTTE BEACH LAND CLAIM

Another proposal to expand the number of Indian casinos in Michigan involves a possible resolution to long-standing tribal claims on land in Chippewa County located in the Upper Peninsula, referred to as the Charlotte Beach area. A land swap has been proposed between the Sault Ste. Marie Chippewa Indians, the Bay Mills Indians, and the State of Michigan. In exchange for clear title on the land located at the Charlotte Beach area for the current residents, the tribes would receive parcels of land in the Lower Peninsula that would become the site of two more casinos, one in Port Huron and another in one of three locations, Flint, Romulus, or the County of Monroe.

The land settlement issue dates back to the 19th century and is centered on the 1855 Treaty of Detroit entered into by the Ottawa and Chippewa Indians (ancestral tribes to the current Bay Mills and Sault Ste. Marie Chippewa tribes) and the U.S. government. In this treaty it was agreed that the Charlotte Beach property would be held in trust for the benefit of the tribes. Before Congress ratified the treaty, however, the U.S. government issued land patents (awarding title to the land to individuals) to a non-Indian individual. In 1857, this individual deeded the property to the Governor of Michigan to be held in trust for ancestral tribes. This action subjected the land to taxation which went unpaid by the tribal members. The land was later sold for unpaid property taxes to third parties. This land is currently owned by about 100 non-Indians.

The Bay Mills tribe filed suit in 1996 against the State of Michigan seeking monetary damages for the loss of the land. Both the Court of Claims and the Michigan Court of Appeals ruled against the tribe in these matters. The tribe also filed a separate suit in Federal court, in *Bay Mills Indian Community v. Western United Life Assurance Company*, against the current landowners. The suit against the landowners was dismissed on procedural grounds as it did not include the Sault Ste. Marie Chippewa tribe, which also was found to have a potential claim to the land. Both suits were based only on the Bay Mills tribe's claims to the land. Any potential claims from the Sault Ste. Marie tribe have never been litigated. The land claims, history of litigation, and potential for additional litigation from the Sault Ste. Marie tribe against the landowners have impaired the titles of the current owners of these properties. Due to the sovereign immunity of the tribes, the landowners are unable to file suit against the tribes to clear their titles.

A separate attempt was made to resolve the land claims through negotiated settlements. These settlements require Congressional approval under the established process, which is the only way to extinguish Indian land claims. Despite the fact that the State courts ruled in favor of the State of Michigan in the first lawsuit, Governor John Engler entered into settlement agreements with both tribes regarding these land claims. The reason given by the administration was that in the absence of a clear resolution of all claims to these disputed properties, the title to the land continued to be clouded for the landowners, who therefore were unable to obtain title insurance or mortgages. As a result, assessments on these properties declined. In 2002, Settlements of Land Claims were signed by members of both tribes and Governor Engler, but did not receive Congressional approval.

These settlements were amended in November 2007 by Governor Granholm to provide for revenue sharing between the State and the tribes. The settlement agreements set up distinct revenue sharing calculations for each tribe based on the location of the casino. For the Sault Ste. Marie Chippewa tribe, one calculation would be applied to the new casino in the Lower Peninsula. (The settlement agreement provides for the location of a casino in one of three designated areas: within Monroe County, within the City of Romulus, or within the City of Flint.) Another calculation would be applied to the original casinos located in the Upper Peninsula, which were approved under the 1993 compacts (one in Baraga County and one in Marquette County). The settlement agreement would restore revenue sharing from the 1993 tribal compacts, which were voided under the exclusivity provisions in 1999 following the opening of the Detroit casinos. The agreement would require the tribe to make an annual payment from the casino that would be located in Lower Michigan, of 2.0% of the net win to the Michigan Strategic Fund, from 8.0% to 12.0% to the State General Fund based on a sliding scale, and the larger of either \$50,000 or 0.05% of the net win to the Michigan Gaming Control Board. For the casinos that are located in the Upper Peninsula, the agreements would require the tribes to make annual payments based on the combined net win of all licensed Class III facilities of 2.0% to the Michigan Strategic Fund and 4.0% to the State General Fund. Both revenue sharing schedules would allow for reductions in the annual payment should average net win amounts be reduced.

The Bay Mills settlement agreement would require payments from the licensed facilities in the Upper Peninsula of 2.0% of the combined net win to the Michigan Strategic Fund and 4.0% of the combined net win to the State General Fund, and also would allow for reduction if the average net win amounts were reduced. For the facility located in Port Huron, the required payment would be 3.0% of the net win to the Michigan Strategic Fund, which could be reduced by up to 75.0% if the tribe demonstrated that it had contributed or invested an amount greater than the amount of the reduction in noncasino economic activity in Port Huron. The tribe also would be required to make a payment to the State General Fund for the Port Huron site of between 6.0% and 8.0% based on a sliding scale subject to reduction if the average net win were reduced over a specified number of years. This agreement also includes the greater of \$50,000 or 0.05% of net win payment to the Gaming Control Board.

Both settlements were before the last Congress for approval. The agreements, included in H.R. 2176 and H.R. 4115, were voted out of the Committee on Natural Resources in March 2008. On June 25, 2008, H.R. 2176 failed passage in the U.S. House of Representatives.

A few options remain for these tribes to achieve their goal of locating a casino in the Lower Peninsula. First, the land swap issue could be resolved when the original compacts are renegotiated in 2013, which would also require legislative approval of a concurrent resolution ratifying the new compact agreements. Second, the tribes could continue to press for Federal legislation ratifying the settlement agreements in exchange for the release of tribal claims to the land. Finally, the Sault Ste. Marie tribe could file suit in Federal court regarding these land claims, with the risk being that the outcome could confirm the Michigan Court of Appeals ruling.

TRIBAL GAMING PAYMENTS TO THE MICHIGAN STRATEGIC FUND

Revenue sharing payments from the Indian tribes have made a substantial contribution to the revenue of the Michigan Strategic Fund. As shown in Table 6, these payments have varied. In the 1990s when the 1993 compact tribes contributed, annual revenue was quite large. From FY 1999-2000 to FY 2006-07, revenue was diminished as the 1993 tribes ceased payments due to the opening of the Detroit casinos and some 1998 compact tribes ceased payments due to Club Keno. With the recent settlement agreements regarding Club Keno, revenue to the MSF is expected to be significantly larger and more stable. The MSF has estimated the ongoing tribal gaming revenue at approximately \$30.0 million per year.

Table 6

HISTORY OF TRIBAL GAMING PAYMENTS TO THE MICHIGAN STRATEGIC FUND (Millions of Dollars)	
Fiscal Year	Payment
FY 1992-93	\$0.4
FY 1993-94	13.8
FY 1994-95	27.4
FY 1995-96	32.8
FY 1996-97	40.2
FY 1997-98	46.8
FY 1998-99	22.7
FY 1999-2000	9.0
FY 2000-01	11.2
FY 2001-02	13.3
FY 2002-03	15.7
FY 2003-04	3.1
FY 2004-05	2.1
FY 2005-06	2.5
FY 2006-07	2.6
FY 2007-08	59.0 ^{a)}
Total	\$302.5^{b)}
^{a)} Consists of \$28.1 million in one-time settlement payments and \$30.9 million in revenue sharing payments.	
^{b)} Includes payments from the Keweenaw Bay Indian Community which under a 2001 consent judgment are paid directly to the MEDC.	

Source: Michigan Gaming Control Board data as of February 22, 2008, (which showed amounts in the year received) and Michigan Strategic Fund.

Under current law, the use of these funds is determined independently by the MSF. Since the signing of the first compacts and related consent judgments, Indian gaming revenue has been deposited directly to the MSF (or the MEDC in the case of the Keweenaw Bay Indian Community) and classified as "off-budget" or "corporate" revenue, therefore not subject to appropriation.

The MSF's authority over this revenue stream was affirmed by a 1996 Michigan Court of Appeals decision in *Tiger Stadium Fan Club v Governor*. In this case, the Court of Appeals ruled that these funds were public funds not subject to appropriation, but are payments to a fund "...that is authorized by statute to accept gifts, grants, loans, and other aids". A footnote to this opinion further states, "[T]he MSF is authorized to accept grants and gifts directly. Thus, the revenues having been designated for the MSF in the settlement agreement, there is no requirement that they be paid or reported to the Legislature." Finally, the Court ruled that the payments are considered "...gratuitous

payments negotiated by the Governor and designated for a specific purpose and that the payment of those revenues to, and their disbursement from, the MSF without an act of the Legislature does not violate the Appropriations Clause." Given this authority, the MSF has allocated available Indian gaming revenue to further its operating plan.

Attempts have been made by legislators (for example, House Bill 6063 from the 2001-2002 legislative session) to amend the MSF Act and require these funds to be appropriated; however, these bills have never been enacted. The FY 2003-04 target agreement between legislative leaders and the Governor directed the use of Indian gaming revenue by including a provision to allocate \$10.0 million in Indian gaming revenue to the Technology Tri-corridor program, a precursor to the current 21st Century Jobs Program. The MSF complied with this agreement.

CONCLUSION

Although Michigan has a total of 19 operating Indian casinos, by the end of 2009, with the expected opening of the Battle Creek site by the Nottawaseppi Huron Potawatami Tribe, there will be 20 casinos open and operating around the State. There is also the potential for more Indian casinos to open in the future. The Gun Lake tribe has a compact in place and needs a final U.S. Department of the Interior determination prior to starting casino operations. Also, Congressional action for the Charlotte Beach properties potentially could authorize more which would bring the total to 23. The existing casinos have provided \$302.5 million in total revenue to the State since the signing of the first consent judgment in 1993. These funds have been paid to the Michigan Strategic Fund or (in the case of the Keweenaw tribe's payments since its compact was amended) to the MEDC and have been used to support the State's economic development activity.

Although the amount of this revenue had waned in recent years with only a single tribe contributing at one point, the Keno court settlements have provided a new opportunity to examine the uses of these funds. With approximately \$30.0 million in revenue expected annually, under the current structure this revenue will be used by the MSF to enhance its economic development activities.

This raises a policy question of whether some of the State General Fund support for economic development should be reduced and diverted to other areas of the State budget during these hard economic times. An argument in support of diversion is that it would relieve some of the pressure on the General Fund when other revenue streams have been reduced or eliminated. On the other hand, General Fund support for economic development might be even more critical in this difficult economy.

The Legislature could consider reducing General Fund/General Purpose appropriations to the MSF at least in part with the expectation that the Indian gaming revenue would be used for the MSF/MEDC budget. The MSF retains some classified State employees, whose salaries and wages are supported by State funds, which must be appropriated.

Another approach would be to consider legislation that would give the Legislature statutory authority to appropriate all revenue to the MSF. Legislation of this type would shift the oversight of Indian gaming revenue from the Governor and the MSF and MEDC boards to the Legislature with approval from the Governor.

As compacts are reconsidered, in 2013 with the expiration of the 1993 compacts, the State and its representatives may consider another approach to distributing any revenue sharing payments from the tribes to the State. The model adopted in the Charlotte Beach settlement would have created a hybrid approach with a limited portion of the revenue targeted toward economic development and the MSF, and other funds deposited into the General Fund.

Appendix A

SETTLEMENT OF THE CLUB KENO LAWSUIT SUMMARY OF 2008 AMENDMENTS TO THE 1998 COMPACTS WITH THE LITTLE RIVER BAND OF OTTAWA INDIANS AND THE LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS	
Reduction in Percentage for Determining Tribal Payments to the State	For the Little River Band of Ottawa Indians, the payment percentage declined from 8.0% of the net win under the 1998 compact to 6.0% under the settlement. For the Little Traverse Bay Bands of Odawa Indians, the percentages in the 1998 compact had been changed by amendments in 2003 that permitted the tribe to open a second casino and increased the percentage payments to the MSF to a range of 8.0% to 12.0% based on the operation of the second casino and the amount of the annual net win. The settlement reduced those payment percentages to a range of 6.0% to 10.0% and increased the net win requirements to trigger application of the higher percentages. All payments to the State continue to be directed to the MSF.
Declining Revenue Adjustments	The tribes' payments are reduced in periods when the net win is lower than the average net win for the preceding three fiscal periods. When this condition occurs, the payment to the State is reduced by twice the percentage determined taking the difference between the average annual net win for a three-year period preceding the payment period and the net win for the year preceding the payment period and dividing that amount by the three-year annual average net win.
Exclusivity Provisions	The amendments to the compact redefined the benefit of exclusivity. The 1998 compacts included a statewide definition of exclusivity. The settlement, following the example of the 2003 amendments to the Little Traverse compact and the Gun Lake compact, limited exclusivity to a regional market area defined by specific counties listed in the amendments.
Penalty for Infringement on Exclusivity	The settlement provided that if there is infringement of the regional exclusivity, the tribes can suspend payments to the MSF from the time the new facility open until the first subsequent fiscal period when the tribes' net win reaches 110.0% of the net win for the fiscal period prior to the suspension of payments. When payments resume, they will resume at a reduced 4.0% rate. This suspension of payments may be invoked by the tribe only one time during the term of the compact. This contrasts with the 1998 compacts which eliminated payments if exclusivity was violated.
Duration of Compact	The amended compact is in effect until October 31, 2028.

Appendix B

SUMMARY OF 2008 AMENDMENTS TO THE 1998 COMPACT WITH THE POKAGON BAND OF POTAWATAMI INDIANS	
Number of Casinos	Increased the number of casinos the tribe is permitted to operate from one to three, limiting the two additional casinos to locations in Dowagiac and Hartford and to a maximum of 1,000 electronic games of chance at each satellite location. Each additional site needs to obtain approval from the local municipality.
Exclusivity Provisions	Replaced the exclusivity provisions with language that the tribal contribution is to "...provide the State with an economic incentive intended to encourage the State to pursue economic policies and activities that promote and contribute to the success of the Tribe's Class III gaming business...". In return, the tribe is required to pay 6.0% of the net win at the New Buffalo site to the MSF.
Declining Revenue Adjustment	Subjected the payment percentage to adjustment in a period of declining tribal revenue, with the adjustment based on a multiyear average of the net win. The satellite sites will pay 8.0% of the net win to the MSF, and this percentage will similarly be adjusted for declining revenue.
Local Revenue Sharing	Increased the size of the local revenue sharing board from three to five members, of which one member will be selected by the tribe.
Duration of the Compact	Extended the duration of the compact by 10 years to October 31, 2028.