



WISCONSIN LEGISLATIVE COUNCIL

*Terry C. Anderson, Director
Laura D. Rose, Deputy Director*

TO: SPEAKER JOHN GARD AND SENATOR MARY E. PANZER

FROM: Ronald Sklansky and Joyce L. Kiel, Senior Staff Attorneys

RE: Possible Grounds for a Legal Challenge Relating to the Potawatomi Gaming Compact Amendments

DATE: March 25, 2003

This memorandum responds to your request to Terry C. Anderson, Legislative Council Director, for information about possible grounds for a legal challenge relating to the Governor's authority to have entered into the agreement on February 19, 2003 with the Forest County Potawatomi Community of Wisconsin (the tribe) amending the gaming compact between the tribe and the state (the compact). You have asked if a lawsuit could be based on any of four questions you presented, and you have requested information about the legal arguments that may be made with respect to each issue.

EXECUTIVE SUMMARY

Each of the four questions you presented could be the grounds for a lawsuit. This section states your questions and briefly summarizes the arguments that a plaintiff might raise with respect to each question. Later sections provide a more extended discussion of each question. Because no appellate-level court in Wisconsin has specifically addressed these questions with respect to the compact, it is impossible to predict with certainty the outcome of any lawsuit.

1. *Does the compact impermissibly expand the scope of gaming?*

The compact clearly authorizes the tribe to conduct games that are now prohibited by the state. Under federal law, these games could not be part of a *new* compact. It may be argued that a compact entered into *before* the games were prohibited cannot be amended at a later date to include the games.

2. *May a compact make an appropriation of funds received by the state from the tribe?*

A compact may not make an appropriation of funds received by the state from the tribe. Only the Legislature, through passage of a bill, may make an appropriation.

3. *Does the compact's waiver of the state's sovereign immunity violate Article IV, Section 27 of the Wisconsin Constitution?*

The state and state officials acting in their official capacity have sovereign immunity. Article IV, Section 27 of the Wisconsin Constitution, provides that the Legislature determines in what manner and in what courts suits may be brought against the state. The Legislature has established a process for making claims for monetary damages against the state. If the compact is interpreted as applying that process, there arguably is no violation of the constitution if a suit against the state is limited to seeking monetary damages.

For legal actions against the state or state officials that seek to interpret or enforce the compact but do not seek monetary damages (or if the compact is interpreted as not applying the statutory process to claims for monetary damages), it could be argued that the Legislature did not authorize the Governor to waive the state's sovereign immunity. It also could be argued that, even if s. 14.035, Stats. (authorizing the Governor to enter into compacts), is interpreted as providing such authorization, it is an unconstitutional delegation of legislative authority because the Legislature did not articulate standards or a purpose for such a waiver or establish procedural safeguards to ensure that the Governor acted within the scope of an articulated standard or purpose.

4. *Does the compact violate the separation of powers doctrine?*

The policy and contractual issues involved in negotiating gaming compacts probably would be construed by a court as shared powers of the legislative and executive branches of government. The question to be resolved is whether the action of the Governor in agreeing to a compact that might not be terminated unduly burdens or substantially interferes with the Legislature's constitutional authority. An answer to this question would be speculative; it can be resolved only through litigation.

DETAILED EXPLANATION

A. DOES THE COMPACT IMPERMISSIBLY EXPAND THE SCOPE OF GAMING?

1. The Federal Indian Gaming Regulatory Act

IGRA provides, in part:

Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. [See 25 U.S.C.A. s. 2701 (5).]

IGRA divides Indian gaming activity into three "classes," each of which is regulated in differing manners. Under IGRA, Class III gaming appears to include: (a) casino games (e.g., roulette, craps, and banking card games, such as blackjack, baccarat, and chemin de fer); (b) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind; (c) pari-mutuel betting, including

simulcasting; and (d) various forms of lotteries. These gaming activities are lawful on Indian lands if such activities are, among other things, located within a state that permits such gaming for any purpose by any person, organization, or entity. [See 25 U.S.C.A. ss. 2703 (8) and 2710 (d) (1).]

2. Determination of Gaming Activity That a State Permits

The enactment of IGRA resulted in confusion over what gaming activities the state was required to negotiate with the Indian tribes. In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F. Supp. 480 (D.C.W.D. Wis. 1991), the court stated that:

The parties dispute whether the state is required to include casino games, video games, and slot machines in its negotiations with the tribes. I conclude that it is required to negotiate these activities because they are permitted under Wisconsin law within the meaning of 25 U.S.C. s. 2710 (d) (1) (B). [*Id.*, 770 F. Supp., at 482.]

The court reviewed the general prohibition against lotteries in Wis. Const. art. IV, s. 24, judicial and attorney general opinions interpreting that provision, and the history of amendments to the constitution. It held that the merchandising, bingo, raffle, state-operated lottery, and pari-mutuel amendments to the constitution evidenced a policy towards gaming that was regulatory rather than prohibitory in nature; the fact that Wisconsin continued to prohibit commercial gambling and unlicensed gaming activities did not make its policy prohibitory. Thus, the opinion concluded by stating that:

...the state is required to negotiate with plaintiffs over the inclusion in a tribal-state compact of *any activity that includes the elements of prize, chance and consideration and that is not prohibited expressly by the Wisconsin Constitution or state law*. [*Id.*, 770 F. Supp., at 488; emphasis added.]

It was not clear from the *Lac du Flambeau* decision whether: (a) a state with a civil-regulatory approach to *some* Class III gaming must negotiate with a tribe regarding *all* Class III gaming; or (b) the federal courts would approach these issues on an activity-by-activity basis.

Following the decision in *Lac du Flambeau*, the court in *Ysleta Del Sur Pueblo v. State of Texas*, 852 F. Supp. 587 (D.C.W.D. Tex. 1993), held that Texas was required to negotiate over all casino gaming because of its broad “carnival exception” to its public policy against commercial gambling. In the course of its decision, the court implicitly noted that an activity-by-activity review was not really an issue in *Lac du Flambeau*:

...In *Lac du Flambeau*, the State of Wisconsin could engage in any game of chance, prize and consideration under its lottery laws.... The court concluded that since Wisconsin was a civil-regulatory jurisdiction, and under the lottery law, the state was permitted to play any game of prize, chance and consideration, then it must negotiate a Tribal-State compact governing the conduct of any type of class III gaming requested by the tribe which involved prize, chance and consideration.... [*Id.*, 852 F. Supp., at 594; emphasis added.]

In other words, Wisconsin was ordered to negotiate with the tribes over all forms of Class III gaming because the term “lottery,” as it existed in Wisconsin’s Constitution at that time and, as interpreted by the Attorney General, allowed the state-operated lottery to run all games involving consideration, chance, and prize. This is not inconsistent with the conclusion in *Lac du Flambeau* that the state was required to negotiate with the tribes over any activity including the elements of prize, chance, and consideration that was not prohibited expressly by the Wisconsin Constitution or state law. If any activity were so expressly prohibited, the *Lac du Flambeau* decision appears to indicate that the state would not be required to negotiate with the tribes over that activity.

It appears that federal courts since *Lac du Flambeau* clearly have adopted an activity-by-activity review, rather than requiring a state to negotiate over all forms of Class III gaming if only some Class III gaming is allowed in a state. [See *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F. 3d 273 (8th Cir. 1993); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F. 3d 1250 (9th Cir. 1995); *Coeur d’Alene Tribe v. State of Idaho*, 842 F. Supp. 1268 (D.C. Idaho 1994), aff’d 51 F. 3d 876 (9th Cir. 1995); *U.S. v. Sante Ynez Band*, 33 F. Supp. 2d 862 (D.C. C.D. Cal. 1998); and *American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D.C. Ariz. 2001), vacated on other grounds, 305 F. 3d 1015 (2002).]

3. Amendments to the Wisconsin Statutes and the Wisconsin Constitution

Following the decision in *Lac du Flambeau*, 1991 Wisconsin Act 321 was enacted. The law created s. 565.01 (6m), Stats., to set forth specifically those forms of gambling that may be conducted by the state-operated lottery. In general, the statute defines the state-operated lottery in terms of those activities conducted by the state-operated lottery since its inception, including instant win tickets and prizes determined by computer selection or chance drawings. The statute also generally provides that the state-operated lottery does not include any other form of gambling. Section 565.01 (6m) (b), Stats., provides that the state-operated lottery does not include specified games or games simulating those games, including:

- a. Any banking card game, including blackjack, baccarat, or chemin de fer.
- b. Poker.
- c. Roulette.
- d. Craps or any other game that involves utilizing dice.
- e. Keno.
- f. Bingo 21, bingo jack, bingolet, or bingo craps.
- g. Any game of chance that is played on a slot machine or any mechanical, electromechanical, or electronic device that is generally available to be played at a gambling casino.
- h. In general, any game or device that is commonly known as a video game of chance or a video gaming machine or that is commonly known as or considered to be a video gambling machine.

- i. Any other game that is commonly considered to be a form of gambling.

The enactment of 1991 Wisconsin Act 321 immediately was followed by the adoption of an amendment to art. IV, s. 24, Wis. Const. The amendment to the Constitution affected that document in the same way that 1991 Wisconsin Act 321 amended the statutes. In other words, the state-operated lottery is limited to conducting those types of games promoted since the inception of the lottery, but generally is prohibited from operating all other forms of gambling, including the casino-type gaming previously described in s. 565.01 (6m) (b), Stats. Adding emphasis to the antigambling intent of the amendment, art. IV, s. 24 (1), Wis. Const., also was amended to read: “Except as provided in this section, the legislature may not authorize gambling in any form.” Thus, along with the specific amendment to the state-operated lottery, this additional change in the Constitution clarified that the Legislature is prohibited from authorizing any form of gambling in the state, except as otherwise provided in art. IV, s. 24.

4. The Potawatomi Compact

In 1992, after the *Lac du Flambeau* decision but prior to the statutory and constitutional amendments described above, the state entered into a compact with the Forest County Potawatomi Community of Wisconsin providing, in part, that the tribe was authorized to operate only the following Class III games:

- a. Electronic games of chance with video facsimile displays.
- b. Electronic games of chance with mechanical displays.
- c. Blackjack.
- d. Pull-tabs or break-open tickets when not played at the same location where bingo is being played.

The recent amendments to the compact authorize the tribe also to operate casino table games offered by a competitive facility, including roulette or craps; poker or other nonhouse banked games; or games played at blackjack-style tables. A competitive facility is defined to mean a facility offering Class III-type gaming outside of the state, but within 75 miles of the state border.

5. Discussion

IGRA provides that Class III gaming activities are lawful on Indian lands only if the activities are, among other things, located in a state that permits that gaming for any purpose by any person, organization, or entity. The federal law does *not* provide that Class III gaming activities are lawful on Indian lands if those games are permitted in neighboring states or countries. If Wisconsin does not permit the games described in the compact amendments, federal law does not provide that they may be played on Indian lands in Wisconsin simply because the games are permitted outside of the borders of the state. Out-of-state activities are irrelevant when determining what is permitted in Wisconsin under IGRA.

With respect to a negotiation process preceding the creation of a *new* compact, it appears that the state would not be required to negotiate over poker, roulette, or craps. These games, in the terms of IGRA, are not permitted in Wisconsin for any purpose by any person, organization, or entity, as evidenced by the following constitutional and statutory provisions:

- a. Wisconsin Constitution, Article IV, Section 24 (1). (Except as provided in this section, the Legislature may not authorize gambling in any form.)
- b. Wisconsin Constitution, Article IV, Section 24 (6) (c). (Notwithstanding the authorization of a state lottery, the following games, or games simulating any of the following games, may not be conducted by this state as a lottery: poker, roulette, or craps.) [See also s. 565.01 (6m) (b), Stats.]
- c. Chapter 945, Stats., which, in general, prohibits all forms of casino gaming.

The final question is whether a compact originally created in 1992 and renewed in 1998 and 2003 may authorize a tribe to operate games that may have been lawfully permitted in 1992, but are now clearly prohibited by state law. Assuming that a compact can be lawfully renewed following prohibitions placed on casino gaming in the 1991 and 1993 Legislative Sessions, it can be argued that the *scope* of gaming originally authorized may not be expanded because of the intervening constitutional and statutory amendments.

The issue of the impact of the 1993 constitutional amendments currently is being litigated in *Dairyland Greyhound Park, Inc. v. Doyle*, Case No. 01-CV-2906. The trial court in this case concluded, on February 11, 2003, that the 1993 constitutional amendments do not restrict the Governor from renewing the existing compacts. The decision has been appealed to the Wisconsin Court of Appeals. A final opinion in the case may assist in determining whether a renewed compact may expand the scope of authorized gaming in the original compact now that state law does not permit the operation of casino gaming.

B. MAY A COMPACT MAKE AN APPROPRIATION OF FUNDS RECEIVED BY THE STATE FROM THE TRIBE?

1. Compact Provisions

The compact provides in part that the following payments will be made:

\$34.125 million on June 30, 2004 and \$43.625 million on June 20, 2005, to State of Wisconsin for the benefit of the University of Wisconsin, in lieu of and to supplant funds that would otherwise have been provided to the University of Wisconsin from the general fund of the State of Wisconsin. [See Section XXXI. G. 1. b. of the compact.]

The compact also provides that:

The State and the Tribe agree to cooperate and to consult in the preparation of the budget of the State of Wisconsin to the extent it

proposes the appropriation of the funds made available to the State of Wisconsin under this Section XXXI. of the compact. The State and the Tribe shall cooperate as is appropriate for governments that share their revenue to fund programs or activities to achieve goals of mutual interest. [See Section XXXI. H. of the compact.]

Finally, the compact provides that the tribe will be relieved of its obligation to pay specified amounts, including the amounts relating to the University of Wisconsin, and the state will be required to refund to the tribe the amounts relating to the University of Wisconsin, if any of the following occur:

- a. A change in state law permits the operation of electronic games of chance, or other Class III games that are not permitted by state law on January 1, 2003, by any person or entity other than a tribe.
- b. The Wisconsin Legislature approves, on first consideration, an amendment to the Wisconsin Constitution that authorizes any entity, other than a tribe, to engage in gaming, except as authorized by the 1993 amendment to the Wisconsin Constitution. (However, if, after first consideration, an amendment is not ratified, the tribe must repay to the state the amount that was refunded to the tribe.)
- c. The state enters into or authorizes an agreement permitting Class III gaming within 50 miles of the Potawatomi Bingo and Casino on the Menominee Valley land. [See Section XXXI. B. of the compact.]

2. Discussion

Wisconsin Constitution Article VIII, Section 2, in part provides that no money shall be paid out of the treasury except in pursuance of an appropriation by law. The Wisconsin Supreme Court has had no difficulty concluding that an appropriation of money from the treasury only may be made by an enactment of the Legislature. [See *State ex rel. Board of Regents of Normal Schools v. Zimmerman*, 183 Wis. 132, 197 N.W. 823 (1924); *B.F. Sturtevant Company v. Industrial Commission of Wisconsin*, 186 Wis. 10, 202 N.W. 324 (1925); and *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 72 N.W.2d 577 (1955).]

If the provisions of the compact are construed to be appropriations, a court almost certainly would find them void and would sever them from the compact under Section XXXV. The same analysis would apply to a compact with any other tribe. A legislative enactment is required to appropriate funds from the treasury; s. 14.035, Stats., authorizing the Governor to enter into any compact that has been negotiated, is not specific enough for this purpose.

C. DOES THE COMPACT'S WAIVER OF THE STATE'S SOVEREIGN IMMUNITY VIOLATE ARTICLE IV, SECTION 27 OF THE WISCONSIN CONSTITUTION?

Wisconsin Constitution Article IV, Section 27 provides that: "The legislature shall direct by law in what manner and in what courts suits may be brought against the state." The compact contains various provisions waiving the state's sovereign immunity and consenting to suit or entry of judgment in court. These provisions and pertinent statutory provisions are set forth below before discussing your

question. This part also discusses the effect of the severability provisions in the compact should a court find that these compact provisions are invalid or unenforceable.

I. Compact Provisions

The pertinent provisions of the compact relating to suits against the state or state officials include:

- a. Section XXII. A. 9., which provides that if there is an arbitration award, the award may be entered in any court having jurisdiction. (However, the compact provides for binding arbitration only if both the state and tribe agree to it.)
- b. Section XXII. D., which provides that, unless the state and tribe agree otherwise, a dispute regarding compliance with or the proper interpretation of the compact requirements under Sections IV. (authorized Class III gaming), XXII. (dispute resolution), XXIII. (sovereign immunity), XXXI. (payment to the state), and XXIV. (reimbursement of state costs), must be resolved by a court of competent jurisdiction. It further provides that “For this purpose, in an action brought by the Tribe against the State, one court of competent jurisdiction is the State of Wisconsin Circuit Court.” Section XXII. D. also provides that: “Nothing in this Section XXII. D. is intended to prevent either party from seeking relief in some other court of competent jurisdiction.”
- c. Section XXII. E. 1., which provides, in pertinent part, that the tribe may seek in a court of competent jurisdiction prior to the selection of arbitrators under Section XXII. A. 2. and A. 3. and pending the outcome of an arbitration proceeding under Section XXII. A., provisional or ancillary remedies, including preliminary injunctive relief or permanent injunctive relief to enforce an arbitration award issued pursuant to XXII. A.
- d. Section XXIII., which provides that:

XXIII. SOVEREIGN IMMUNITY; COMPACT ENFORCEMENT.

A. This Compact does not alter any waiver of either State or Tribal immunity which may have been effectuated by Congress in passing the Act. This Compact in no way limits the application of 25 U.S.C. sec. 2710 (d) (7) (A) [1991] which the parties believe provides an enforcement mechanism for violation of this compact.

B. In addition to other enforcement mechanisms, both the State and the Tribe agree that suit to enforce any provision of this Compact may be brought in federal court by either the State or the Tribe against any official or employee of either the State or the Tribe. Relief in said suit shall be limited to prospective declaratory or injunctive relief. An allegation that an official or employee violated this Compact shall be deemed an allegation that said official or employee is acting in excess of his/her authority for purposes of jurisdiction only. The State and the Tribe will bear their own

costs of litigation for any action to enforce this Compact, including but not limited to, attorneys' fees.

C. The Tribe and the State expressly waive any and all sovereign immunity with respect to any claim brought by the State or the Tribe to enforce any provision of this Compact. This waiver includes suits to collect money due to the State pursuant to the terms of the Compact; to obtain an order to specifically enforce the terms of any provision of the Compact; or to obtain a declaratory judgment and/or enjoin any act or conduct in violation of the Compact. This waiver also includes a suit to enforce the obligations in Section XXV. and a suit by the Tribe to restrain actions by State officials that are in excess of their authority under the Compact. Nothing contained herein shall be construed to waive the immunity of the Tribe except for suits arising under the terms of this Compact. This waiver does not extend to other claims brought to enforce other obligations that do not arise under the Compact or to claims brought by parties other than the State and the Tribe.

D. These enforcement provisions are an essential part of this Compact, and if they are found unenforceable against the Tribe or the State, or should the courts otherwise determine they lack jurisdiction to enforce the Compact, the parties will immediately resume negotiations to create a new enforcement mechanism.

2. Statutory Provisions

Section 14.035, Stats., provides that the Governor may, on behalf of the state, enter into any compact that has been negotiated under IGRA. This statute and IGRA are silent with respect to who in the state is responsible for conducting the negotiations. In the absence of a provision requiring legislative involvement, it appears that negotiation is the responsibility of the executive branch, as represented by the Governor, in whom executive power is vested under Wis. Const. art. V, s. 1. Section 14.035, Stats., does not explicitly provide for lawsuits against the state or authorize waiver of the state's sovereign immunity; whether it impliedly does so is discussed below.

Under the authority of Wis. Const. art. IV, s. 27, the Legislature has enacted ch. 775, Stats., to allow certain actions against the state if the prerequisites in that chapter and, if applicable, any prerequisites in s. 16.007, Stats. (relating to the Claims Board), are met. As discussed below, s. 775.01, Stats., may apply with respect to a suit for money damages under the compact. In addition to this general statute, the Legislature also has enacted various statutes authorizing actions against the state in specific circumstances.¹ None of these specific statutes appears to authorize suits against the state or state officials to enforce a gaming compact.

¹ Examples include the Fair Employment Act [subch. II, ch. 111, Stats.] and the Family and Medical Leave Act [s. 103.10, Stats.]. In addition, ch. 227, Stats., provides for judicial review of administrative agency decisions (not including the Governor) under certain circumstances.

3. Discussion

It is possible that a court would hold that these compact provisions are a violation of art. IV, s. 27 with respect to certain types of suits relating to the compact based on the argument that the Legislature has not clearly authorized the waivers of sovereign immunity contained in the compact. However, a court may hold that these compact provisions are not a violation because there has been an implied authorization to waive sovereign immunity or may hold that they are not a violation to the extent that they authorize a lawsuit seeking monetary damages because the Legislature has established how such suits are to be brought.

With respect to assertions of sovereign immunity, the courts have considered suits seeking monetary damages, suits seeking specific performance of a contract provision, and suits seeking prospective injunctive relief or a declaratory judgment.² As discussed below, the application of art. IV, s. 27 may depend on which type of relief is sought in a suit.

a. Suit for Monetary Damages

It appears that art. IV, s. 27 would not be violated if the compact is interpreted as requiring that the tribe comply with the statutory prerequisites in ss. 16.007 and 775.01, Stats., relating to making a claim against the state before filing a suit against the state for monetary damages.³ Because the compact does not explicitly refer to these statutory prerequisites, there is ambiguity as to whether the Governor and tribe intended that these statutory prerequisites apply. If they are held to apply, then there is no violation of art. IV, s. 27 because the claim would proceed in accordance with the manner specified by the Legislature.

However, if they are not applied, then it appears likely that a court would proceed to determine whether the Legislature has waived the state's sovereign immunity under some statute other than ch. 775. Because no other specific waiver statute appears to be relevant, it may be argued that s. 14.035, Stats., carries an implicit authority to the Governor to create an effective enforcement mechanism in any gaming compact negotiated. This argument likely would be based on the premise that, because it is generally understood that every party to a contract is desirous of having an enforceable contract and because a compact is essentially a contract, the Legislature implicitly understood that it was authorizing the Governor to enter into a compact that permitted claims against the state and, thus, might include a negotiated waiver of the state's sovereign immunity.

However, implied authority to waive sovereign immunity generally has not been upheld by the courts. [See, e.g., *German v. Wisconsin Department of Transportation*, 612 N.W.2d 50, 235 Wis. 2d 576, 2000 WI 62 (2000) (holding that the Legislature had waived sovereign immunity and permitted state patrol officers to bring a wage claim against the state under ch. 109, Stats., but indicating that it is axiomatic that the state cannot be sued without the express consent of the Legislature).]

² This memorandum does not discuss sovereign immunity for tort actions because it appears that they would not be pertinent to the issue at hand.

³ Such a suit could occur, for example, if the state became obligated to refund to the tribe the amount paid to the state for the benefit of the University of Wisconsin because the state no longer provided exclusivity as provided in Section XXXI. B. of the compact.

Even if a court held that s. 14.035, Stats., is an implied delegation to the Governor of the legislative function of determining how and in what court a suit could be brought against the state, the court likely would go on to determine if such a delegation of a legislative function is constitutional. In general, delegation of legislative authority will be upheld if the purpose of the delegating statute is ascertainable and there are procedural safeguards to ensure that the agency to which legislative power is delegated acts within that legislative purpose. [*Westring v. James*, 238 N.W.2d 695, 71 Wis. 2d 462 (1976), citing *Watchmaking Examining Board v. Husar*, 182 N.W.2d 257, 49 Wis. 2d 526 (1971).]

There does not appear to be a clear standard established by the Legislature as to the circumstances under which the Governor may waive sovereign immunity and consent to suit under the compact, other than suits for monetary damages following the statutory claims procedure. Moreover, even if a court held that the Legislature had established a standard or purpose, it is not clear that a court would hold that the requisite procedural safeguards exist to ensure that the Governor acts within the scope of the articulated legislative purpose. Neither the statutes nor compact provide an opportunity for active or passive review by another entity (such as the Legislature or a legislative body) of the terms of the compact regarding waiver of sovereign immunity before this provision goes into effect,⁴ and there appears to be no effective judicial safeguard because the issue of whether the court has jurisdiction over the state is the point in controversy. Thus, it is possible that a court would hold that, even if s. 14.035, Stats., were interpreted as authorizing the Governor to enter into a compact that contained a waiver of the state's sovereign immunity, s. 14.035, Stats., would be an unconstitutional delegation of legislative authority regarding consent to suit.

b. Suit for Specific Performance of a Compact Provision

In a suit for specific performance of a contract provision, the court may order a party to exactly perform a specific thing agreed to in a contract.⁵ The compact includes several provisions with respect to which the tribe could conceivably bring a suit against the state for specific performance, including Section XXXI. H. of the compact (which provides that the state and tribe will cooperate and consult in preparing the state budget to the extent the budget proposes the appropriation of gaming revenues paid to the state) and other sections which indicate that the state will negotiate in good faith under certain circumstances.

While the options of negotiation, mediation, and arbitration are available if both parties agree to engage in any of them, Section XXIII. C. of the compact provides that the state expressly waives any and all sovereign immunity and consents to suit against it.

In contrast to ch. 775, Stats., which provides for suits against the state for monetary damages under certain circumstances, there does not appear to be a general statute that waives the state's sovereign immunity in a suit against the state requesting specific performance of a contract provision. The courts generally have dismissed such suits. For example, when the state was sued by an entity that submitted an offer to purchase state land and the offer was apparently accepted but later rejected by the

⁴ While the compact must be submitted to the U.S. Secretary of Interior for review and approval or disapproval, the parameters of the Secretary's grounds for disapproval are set forth in IGRA and do not provide for consideration of the authority of the state officials entering into the compact.

⁵ Courts sometimes order specific performance when money damages would be an inadequate compensation for the breach of an agreement.

Department of Transportation, the court dismissed the case on the ground of state sovereign immunity because the Legislature had not expressly agreed that the state could be sued for specific performance of a contract for a sale of real estate, and the court would not imply such consent. [*Erickson Oil Products v. Wisconsin*, 516 N.W.2d 755, 184 Wis. 2d 36 (Ct. App. 1994), rev. den.⁶ Similarly, there is no explicit consent of the Legislature to suit against the state for specific performance of a provision in the compact.

The analysis as to whether s. 14.035, Stats., impliedly, rather than expressly, authorizes such a suit is discussed in item a. on page 10 of this memorandum.

c. Suit for Injunctive Relief or Declaratory Judgment

A request for injunctive relief is a suit to require a party to do or refrain from doing a particular thing. A declaratory judgment seeks a determination of some point of law or the rights or status of litigants but does not award relief. A suit for injunctive relief or declaratory judgment involving the state typically is brought against the state or a state official, such as the Governor, acting in his or her official capacity.

It seems likely that an action by the tribe against the state or Governor acting in his official capacity for injunctive relief or a declaratory judgment to establish rights under the compact would be subjected to the same analysis as above regarding whether the Legislature had authorized such a suit.

One court decision relates to an agreement to enter an arbitration decision in court, which is similar to the provision in Section XXII. A. 9. of the compact providing for entry of an arbitration award in court. When a University of Wisconsin official entered into an agreement with the Teaching Assistants Association providing for judicial enforcement of an arbitration award, the Wisconsin Court of Appeals held that this agreement was void because no statute conferred power on the university official to waive the defense of state sovereign immunity. [*State ex rel. Teaching Assistants Association v. University of Wisconsin-Madison*, 292 N.W.2d 657, 96 Wis. 2d 492 (Ct. App. 1980), rev. den., citing *Lister v. Board of Regents*, 240 N.W.2d 610, 72 Wis. 2d 282 (1976).] Again, in the absence of an explicit statute, implied authorization may be argued under s. 14.035, Stats., as discussed in item a. on page 10 of this memorandum.

In the *Teaching Assistants Association* case, the court distinguished between a suit against a state official for declaratory judgment to determine the validity and construction of a contract versus a suit against a state official for declaratory judgment to determine the constitutionality or proper construction and application of a statute. The court indicated that it was unaware of any Wisconsin case authorizing the use of the declaratory judgment statute in an action against state officials to determine the validity and construction of a contract, which would include the compact.

⁶ The Wisconsin Court of Appeals made an exception to its explicit consent holdings in a case involving a condemnation action in which a statute authorized an action in court against the state but did not specifically provide for an action to determine an appraisal's reasonable cost. The court looked at the condemnation statute and held that a suit relating to determining the appraisal's reasonable cost was authorized in order to carry out the overall scheme of the condemnation statute to compensate the owner and avoid absurd results. [*Miesen v. Wisconsin Department of Transportation*, 594 N.W.2d 821, 226 Wis. 2d 298 (Ct. App. 1999), rev. den., 618 N.W.2d 748, 237 Wis. 2d 258.] However, even in this case, the court repeated the consistent holdings of the court that consent to a suit against the state must be clearly and expressly stated by the Legislature.

In contrast to an action against the state to determine the validity or construction of the contract, the court cited the *Lister* court's exception which permits a declaratory judgment action against state officials to resolve a controversy as to the constitutionality or proper construction and application of a statute. [*Teaching Assistants Association*, 292 N.W.2d at 666, n. 26.] The premise for this exception is that a public official or agency is acting outside the bounds of their constitutional or statutory authority and, thus, sovereign immunity does not apply to prohibit the suit. Because of this exception, it is likely that an action for declaratory judgment against the Governor in his official capacity alleging that entering into the compact was a violation of the Wisconsin Constitution would not be dismissed on the ground that the Legislature had not consented to such a suit.

In summary, it is possible that a court would hold that, at least with respect to a suit other than for monetary damages, the Governor did not have explicit authority to agree to the provisions in the compact allowing suit against the state because the Legislature had not directed that such a suit may be brought under art. IV, s. 27. Whether there was sufficiently implied authorization by the Legislature may be debated, but, in general, courts have required explicit legislative authorization. Moreover, questions may be raised about an unconstitutional delegation of legislative authority absent legislative standards and procedural safeguards.

d. Severability Provisions

Because of the severability provisions in the compact, a court's holding that the compact provisions discussed above waiving sovereign immunity violated art. IV, s. 27, may not result in invalidation of the entire compact.

Section XXIII. D. of the compact (relating to sovereign immunity and compact enforcement) specifies that if the enforcement provisions in Section XXIII. are found to be unenforceable against the tribe or the state or should the courts otherwise determine that they lack jurisdiction to enforce the amended compact, the parties will immediately resume negotiations to create a new enforcement mechanism. In addition, Section XXXV. of the compact provides that each compact provision is separate and independent and that if a court of competent jurisdiction finds any provision to be invalid or unenforceable, the parties' intent is that the remaining provisions remain in full force and effect.

Even if a court held that the compact provisions relating to the state's waiver of sovereign immunity and consent to suit or judgment violated the Wisconsin Constitution or that the court did not have jurisdiction over the state, it appears that such a holding would invalidate these provisions of the compact but would not invalidate the remainder of the compact.

D. DOES THE COMPACT VIOLATE THE SEPARATION OF POWERS DOCTRINE?

1. Separation of Powers

The Wisconsin Supreme Court has held that the state's three branches of government (legislative, judicial, and executive) exercise both core powers and shared powers. When exercising shared powers, one branch of government may not unduly burden or substantially interfere with another branch. Further, an attempt by one branch to exercise the core power of another branch is impermissible, unless the branch having the core authority accedes to the intrusion as a matter of

courtesy. In *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis. 2d 1, 531 N.W.2d 32 (1995), the court made the following comments:

The doctrine of separation of powers, while not explicitly set forth in the Wisconsin constitution, is implicit in the division of governmental powers among the judicial, legislative and executive branches. “The Wisconsin constitution creates three separate coordinate branches of government, no branch subordinate to the other, no branch to arrogate to itself control over the other except as is provided by the constitution and no branch to exercise the power committed by the constitution to another.”

Each branch has a core zone of exclusive authority into which the other branches may not intrude....

The separation of powers doctrine was never intended to be strict and absolute. Rather, the doctrine envisions a system of separate branches sharing many powers while jealously guarding certain others, a system of “separateness but interdependence, autonomy but reciprocity.” ...The undue burden or substantial interference must be proven beyond a reasonable doubt.... [See *Id.*, 531 N.W.2d at 36, 40; footnotes and citations omitted.]

In another case involving an alleged intrusion of the legislative branch into judicial functions, the Wisconsin Supreme Court stated:

...To determine whether legislation unconstitutionally intrudes upon judicial power and therefore violates the separate of powers doctrine, this court developed a three-part test. We must first determine whether the subject matter of the statute is within the powers constitutionally granted to the legislature. The second inquiry is whether the subject matter of the statute falls within powers constitutionally granted to the judiciary. If the subject matter of the statute is within the judiciary’s constitutional powers but not within powers constitutionally granted to either the legislature or executive branch, the subject matter is within the judiciary’s core zone of exclusive power. Any exercise of power by the legislature or executive branch within such an area is an unconstitutional violation of the separation of powers doctrine. The judiciary may recognize such an exercise of power but only as a matter of comity and courtesy, not as an acknowledgement of power.

If the subject matter of the statute is within the powers constitutionally granted to the judiciary and the legislature, the statute is within an area of shared powers. Such a statute is constitutional if it does not unduly burden or substantially interfere with another branch. [See *State v. Horn*, 226 Wis. 2d 637, 594 N.W.2d 772, 776-7 (1999); citations omitted.]

The separation of powers doctrine applies equally to the relationship between the Legislature and the executive branch. For example, in *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W.2d 780 (1973), the Wisconsin Supreme Court reviewed statutes creating the Wisconsin Housing Finance Authority. The enabling legislation required the Governor and the Secretary of Administration to include in the Biennial Budget an amount certified by the chairman of the Housing Authority. The court stated that the Legislature cannot interfere with, or exercise any powers properly belonging to, the executive branch. The court noted that while the Legislature had a legitimate interest in reviewing the activities of the authority, it could not do so in a manner that interfered with, or encroached upon, the exercise of the Governor's constitutional power to make discretionary budget recommendations. The statutory provisions were declared unconstitutional and void.

2. Discussion

The Governor is authorized (under s. 14.035, Stats.), on behalf of the state, to enter into a gaming compact negotiated under the provisions of the Indian Gaming Regulatory Act (IGRA). Under this grant of authority, the Governor has agreed to an amendment to the compact providing that the compact will continue in effect until terminated by mutual agreement of the parties or by a duly adopted ordinance or resolution of the tribe revoking the authority of the tribe to conduct Class III gaming under IGRA. You question whether the perpetual nature of the compact violates the separation of powers doctrine.

The power to regulate gambling clearly is held by the Legislature. Wisconsin Constitution Article IV, Section 1, vests the legislative power in a Senate and Assembly. The Legislature has exercised this authority to enact ch. 949, Stats., which prohibits most forms of gambling.

The ability of the Governor to enter into a compact appears to be a typical power exercised by the executive branch in Wisconsin. For example, s. 14.11, Stats., authorizes the Governor to enter into a contract for the employment of special counsel. Similarly, subch. IV of ch. 16, Stats., is replete with statutory provisions recognizing the power of the executive branch to enter into contracts for the purchase of various goods and services. With respect to matters of public policy, the Wisconsin Supreme Court has noted that the Governor, at least in the exercise of the partial veto power, has a quasi-legislative power that is coextensive with that of the Legislature. [See *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988).]

The powers to set gaming policy and to enter into a compact under IGRA appear to be powers that are shared by the legislative and executive branches. If so, the next question is whether authority of the Governor to agree to a perpetual compact unduly burdens or substantially interferes with the Legislature's authority. On this point, the Legislature can argue that the action of the executive branch attempts to forever remove the subject of tribal gaming from the Legislature and that such action unduly burdens and substantially interferes with the Legislature's continuing authority and responsibility regarding gaming policy. The executive branch can argue that, in fact, the compact recognizes the continued authority of the Legislature in this area by the creation of Section XXX. D. 2. of the compact. This provision states that within 30 days preceding each 25th annual anniversary of July 1, 2004, the state, by the Governor as directed by an enactment of a session law by the Legislature, may propose amendments to any provision of the compact. The tribe and the state then must enter into good faith negotiations regarding the proposed amendments. Disputes over the obligation to negotiate in good faith may be resolved by binding arbitration. The Legislature, in response, can claim that this

acknowledgement of its authority is not meaningful. For example, binding arbitration will only determine whether a party has negotiated in good faith and not whether a substantive amendment to the compact must be made. Further, binding arbitration will proceed only if both parties agree to the process. Consequently, if the tribe or state does not agree to binding arbitration, or to any other method of dispute resolution, the compact provides that a dispute over the limited topic of good faith negotiation will not be resolved. [See Section XXII. A. of the compact.]

A resolution of the separation of powers claim can be achieved only through litigation. (Wisconsin separation of power case law generally reviews legislative branch encroachment upon the functions of the judicial and executive branches of government. A somewhat different, but related method, of analyzing whether the executive is invalidly exercising legislative authority is to ask whether the Governor, under s. 14.035, Stats., is exercising authority improperly delegated by the Legislature. See part C. 3. a., page 10, of this memorandum for a discussion of the standards by which an unconstitutional delegation of legislative authority is determined and whether s. 14.035, Stats., meets these standards.)

We hope that this information is helpful to you. If you have additional questions or need for clarification, please contact us.

RS:JLK:ksm:rv:tlu;jal;ksm