



**KENOSHA**

February 3, 2015

Honorable Scott Walker  
Governor  
State of Wisconsin  
115 East Capitol  
Madison, Wisconsin 53702

Dear Governor Walker:

We are writing to formally request that you reconsider your decision to disapprove the Kenosha Project. I, Chairwoman Laurie Boivin, met with Assistant Secretary of Indian Affairs Kevin Washburn in person on January 29, 2015. He informed me that if you choose to change your position on approval prior to the February 19, 2015 deadline, he would honor that choice and accept your concurrence. If you have any doubts regarding this matter we encourage you to contact Assistant Secretary Washburn directly.

Based on our review of: Secretary Huebsch's January 20, January 22, and January 29, 2015 memoranda; your January 30, 2015 letter in response to the January 28, 2015 letter from State Legislators; and many of your statements to the press, it appears that you have received inaccurate information regarding the relative risks and rewards of approval of the Kenosha Project. This inaccurate information has led you to a decision based on a misunderstanding of the facts.

You previously stated that "to go forward to with this, we need to have some serious protections to make sure that the taxpayers aren't on the hook for hundreds of millions of dollars or more." These serious protections currently exist in the following ways:

1. The amendment to the Menominee Compact executed by yourself and the Tribe on January 20, 2015 protects the State as follows:
  - a. The Tribe agrees to pay to the State daily 7.5% of the Class III Net Win at the Kenosha facility. Over the course of the 25 year compact this is projected to average approximately \$49 Million annually;
  - b. The Tribe guarantees that if the 7.5% payments listed above along with the payments from Forest County Potawatomi and the Ho-Chunk Nation are less than \$37.5 Million in any year the Tribe will pay the State the difference. This constitutes a minimum guaranteed payment of \$37.5 Million which means even if Potawatomi and Ho-Chunk pay the State nothing, the State's revenue from gaming will not decrease. This obligation begins with the 2014 missed Forest County Potawatomi payments;
  - c. The Tribe guarantees that if Forest County Potawatomi wins a lawsuit against the federal government that results in the re-instatement of the 2014 Forest County

Arbitration Amendment, Menominee shall indemnify the State for any required payments pursuant to that amendment;

- d. The Tribe guarantees that if Forest County Potawatomi wins a lawsuit or arbitration award against the State forcing the State back into last best offer arbitration and that arbitration results in a valid compact amendment requiring the State to make payments to Forest County Potawatomi, Menominee shall indemnify the State for any required payments pursuant to such amendment;
  - e. The Tribe agrees that if the State and Forest County Potawatomi enter into a voluntary valid compact amendment to resolve these issues, the Tribe will enter into a parallel amendment to indemnify the State for its obligations under such amendments; and
  - f. The Tribe agrees that it will cover State legal fees and costs associated with the concurrence and potential future litigation in an amount not to exceed \$2 Million annually.
2. Menominee and Seminole Hard Rock have agreed to post a bond in the amount of \$250 Million, which as we understand it would be the amount due from the State to Potawatomi if Potawatomi would prevail in a lawsuit to fully recuperate all of their past revenue share payments.

We believe Secretary Huebsch's January 29, 2015 memorandum to you does not accurately characterize the provisions stated above and how they protect the State taxpayers. A point-by-point rebuttal of Secretary Huebsch's January 29, 2015 memorandum is attached to this letter for your review.

You have suggested that Governor Doyle is at blame for this decision based on the 2005 Compact amendment he signed with the Forest County Potawatomi. We agree that that 2005 Compact amendment was unwise; however the fact is that when the Bureau of Indian Affairs rejected the most recent 2014 Forest County Potawatomi amendment on January 9, 2015, any problems created by the Doyle Compact disappeared. In fact, Hard Rock and Menominee asked Secretary Huebsch and the State's outside Counsel Lance Boldrey specifically in a meeting on December 9, 2014 in the Secretary's conference room if the "\$100 Million hole" issue goes away if BIA rejects the FCPC amendment. The answer given us was "Yes, it goes away."

Therefore, we believe it is inaccurate for Secretary Huebsch to state in his January 29 memo to you, "Menominee and Hard Rock were aware of the State's concern over the risks outlined in the January 22, 2015 report throughout our negotiations. Yet at no point during the months of negotiations and meetings did the Menominee or Hard Rock offer to obtain a bond." The first time we heard that you believed there were additional risks beyond what BIA's rejection of Potawatomi's amendment and the protections that the proposed Menominee amendment provided was 5:00 PM on Tuesday, January 20th. By end of day Thursday, January 22<sup>nd</sup>, Menominee and Seminole Hard Rock announced a \$250 Million bond to provide further assurances to you and your team.

Furthermore, the State's own attorney contradicts Secretary Huebsch's presumption that the State was ever on the hook for this type of repayment:

MITW-Hard Rock  
Governor Scott Walker  
February 3, 2015

“No Compact provision requires the State to pay any amount or to repay FCPC’s so-called lump-sum payment upon another federally recognized Indian Tribe commencing Class III gaming within the 50-mile “no-fly” zone.”

“Compact Section XXXI.B., which provides for the State to repay the lump-sum payment to FCPC, is triggered only by a loss of exclusivity as a result of new non-tribal gaming. Otherwise, the State has fulfilled every obligation it has under the Compact...”

*Excerpt from Governor Walker’s Outside Counsel Lance Boldrey letter to FCPC, July 22, 2014.*

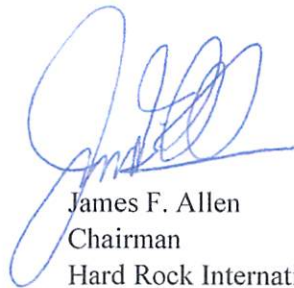
We simply do not believe it is true that your team took 17 months and spent \$1.4 Million of Wisconsin taxpayers’ money to address a few paragraphs in Governor Doyle’s Compact and came up empty. We believe when you examine the facts closer, you will see that you and your team prevailed.

You have said that there are more than a hundred million reasons why you made your decision to reject the Kenosha Project. The fact is that there are more than a billion reasons for you to approve the Kenosha Project. Don’t make a billion dollar mistake without further review of the facts. And please don’t let Wisconsin miss out on 10,600 jobs, \$1.6 Billion in infrastructure investment and a world-class entertainment destination. We think it is your duty to make an informed decision in the best interest of the State of Wisconsin. You still have time to do so.

Sincerely,



Laurie Boivin  
Chairwoman  
Menominee Tribe of Wisconsin



James F. Allen  
Chairman  
Hard Rock International

## **ANALYSIS OF SECRETARY HUEBSCH JANUARY 29, 2015 MEMORANDUM TO GOVERNOR WALKER**

In his January 29, 2014 (should have been dated 2015) memorandum to Governor Walker, Secretary Huebsch attempted to address questions surrounding his analysis of the Kenosha Casino. He asserted his good faith in dealing with the Menominee Tribe, provided his risk assessment associated with approval of the Kenosha Casino, and stated his doubts the Kenosha Casino could come to fruition. His analysis is flawed, contains misleading statements, and is contradicted by his own consultants, and the record of negotiations between the Menominee Tribe and the State.

### **A. Good Faith**

Secretary Huebsch begins by claiming the State worked in good faith in its dealing with Menominee. The record clearly shows that Menominee has worked in good faith with the State and has addressed every concern the State has raised as an issue or obstacle to approval. Even today Menominee and Hard Rock continue to attempt to address any concerns the State has. The record of the State's good faith in dealing with Menominee is more troubling. In particular, the State's actions surrounding the Menominee compact amendment and the so called "risk" to State taxpayers suggest a lack of good faith on the part of the State. These issues are discussed in more detail below.

Secretary Huebsch concludes the first paragraph of his January 29, 2015 memorandum with the statement "Our analysis shows there is nothing the Menominee can do to mitigate the risks we have identified." We strongly disagree and will address the risks in turn.

### **B. Risk to Taxpayers**

Secretary Huebsch makes two counter points in an attempt to dismiss the claim that the Menominee compact would hold the state harmless. Both of which are flawed.

#### **1) Secretary Huebsch's first counterpoint to the claim that the Menominee compact would hold the State harmless, is the fact that the Compact has not yet received BIA approval.**

Secretary Huebsch's counter could not be more disingenuous. The announcement of Governor Walker's denial came within a mere 72 hours of his signing of a historic compact amendment with the Menominee Tribe. The BIA wasn't even given the opportunity to read the compact when the denial was issued. On its face, this timeline shows that the State acted in bad faith. If the State was interested in making a well informed decision on the facts, it would have provided the BIA time to review the amendment. This premature action leads to only two logical conclusions: 1) Secretary Huebsch had made up his mind prior to negotiating the compact with the Menominee; or 2) Secretary Huebsch did not want the BIA to have an opportunity to review and approve the compact, as such approval would have precluded unfounded reasons to deny the project.

The State has a willing party in Menominee and Hard Rock, and Secretary Huebsch has spent over a million dollars of taxpayer money to hire legal counsel well versed in tribal gaming compacts. The Secretary, and his negotiators, led us to believe that the compact negotiated between the parties adequately addressed the State's concerns.

2) Secretary Huebsch's second counterpoint illustrates a misunderstanding of the risk to the State and completely ignores the solution offered by the Menominee and Hard Rock. Secretary Huebsch made the following observations. 1) The Amendment only requires Menominee to compensate the State for any future funds it is required to pay. 2) The amendment does not compensate the State if the State is required to refund past lump sum payments and revenue sharing made by FCP.

- a. Secretary Huebsch is partially correct in his first point. The Compact does require the Menominee to compensate the State for future funds the State would be required to pay to the Forest County Potawatomi. However, the compact amendment also provides that if the State can't collect FCPC missed payments, including the payment missed in 2014, then Menominee will make that payment to the State. Thus, the compact amendment achieves full protection of the State starting in 2014 and going forward.
- b. The Secretary's second point is accurate but misleading. The State never requested such a provision in the compact amendment and the idea that the State would ever be required to pay such a refund to FCPC is contradicted by his own legal counsel's letter to the Forest County Potawatomi Community in 2014 which stated:

*"No compact provision requires the State to pay any amount or to repay FCPC's so called lump-sum payment upon another federally recognized Indian Tribe commencing Class III gaming within the 50-mile "no fly zone".*

*Compact Section XXXI.B., which provides for the State to repay the lump-sum payment to FCPC, is triggered only by a loss of exclusivity as a result of new non-tribal gaming. Otherwise, the State has fulfilled every obligation it has under the compact and is, as you know, currently progressing under the Compact's last best offer arbitration process, which is the State's only obligation with regard to a tribal gaming facility opened within the 50-mile "no fly zone." Notably, the 2005 Compact Amendment stated that FCPC agreed to pay \$43.625 million "in consideration of the good faith negotiation, and execution, of the substitute provisions that are not in dispute." In other words, the Compact's plain language explicitly states the lump sum payment was not in consideration for the "no fly zone," which remained in dispute and unresolved."*

- *R. Lance Boldrey's July 22, 2014 letter to Forest County Potawatomi Attorney Jeff Crawford.*

Menominee was never once informed the State was going to ignore the advice of its Legal Counsel until the Secretary released his January 20, 2015 memorandum. The State's miniscule risk of back payments to the Forest County Potawatomi was never a subject of the Menominee's negotiations with Secretary Huebsch.

Within 48 hours of being notified, Menominee and Hard Rock attempted to address this issue. Due to the compact being already submitted the previous day the best approach to address this new found concern was to offer to put up a \$250 million bond. We were willing to address this because Menominee and Hard Rock agreed with the State's own legal counsel, Lance Boldrey,

that there is no requirement in the FCPC compact which would require any repayment. Simply put, the Forest County Potawatomi have no viable claim that would force the State to pay back any of the Potawatomi's previous payments to the State. This is underscored by the fact that the Potawatomi did not propose such a refund in its arbitration with the State. Secretary Huebsch's suggestion that a \$250 million bond does not provide the State with protection is incomprehensible.

**C. Doubts the Project would come to fruition**

Secretary Huebsch also raises the issue (without any supporting justification) that the mere occurrence of litigation could delay Menominee's ability to open the proposed Kenosha casino. We disagree. This statement demonstrates that Secretary Huebsch misunderstands the following pertinent law and facts:

- 1) If the Kenosha Project opening was delayed or it never opened there would not be any harm to FCPC, and therefore absolutely no reason for FCPC not to pay their revenue share. Again, presumably non-payment for no reason would result in the State taking the necessary steps to ensure payment is made.
- 2) Hard Rock in its development agreement with Menominee has committed to financing the initial purchase of the land and construction of the temporary facility. Hard Rock has provided Secretary Huebsch with a Highly Confident Letter from Bank of America indicating that further financing for construction of the permanent facility can be obtained. Hard Rock has offered to make its Chief Financial Officer, and representatives from Bank of America available to Secretary Huebsch and his consultants to discuss these matters. As Secretary Huebsch has provided no justification for his assertions it is impossible to refute them in detail, however, it is unclear how he believes that he is able to predict the availability of financing for the Kenosha Casino better than Hard Rock International which will be backing their projections with over \$100 million.
- 3) In October of 2013 Hard Rock suggested to the State the concept of a \$50 Million bond to ensure that if the Kenosha Project was approved by the State, the project would be built.
- 4) Nearly every tribally-owned gaming project in the United States has been subject to legal challenges, and that has not deterred tribally-owned gaming facilities from successfully opening in the midst of legal challenges. For example, the Match-E-Be Nash-She-Wish Band of Potawatomi has operated a successful gaming facility in Michigan since 2010, in spite of a pending lawsuit that ultimately reached the United States Supreme Court in 2012.

**D. The State's immediate risk of FCPC withholding payments justifies denying the State 1 billion in future compact payments, 10,600 jobs and a 1.6 billion dollar investment in Wisconsin.**

Secretary Huebsch raised in the last paragraph of his letter that even if 1) Menominee's compact was approved, 2) FCPC was unsuccessful in all litigation, and 3) Menominee was able to open uninterrupted, approving the project would cost the state immediately because FCPC would withhold their payments.

We have four responses,

- 1) The State did a disservice to the taxpayers of Wisconsin by allowing FCPC to withhold their payments in July of 2014. For seven months the state did very little to take enforcement actions

on the FCPC. From Lance Boldrey's July 22, 2014 letter, it's clear the State saw no possible legal justification for FCPC to withhold their payments. In any event, the Menominee Compact amendment ensured that the State would be held harmless from any such non-payment.

- 2) Under Secretary's Huebsch's hypothetical, the only thing standing between 1 billion dollars of new payments to the State, 10,600 jobs, and a 1.6 billion dollar investment in Wisconsin is the temporary risk of FCPC withholding a \$25 million dollar payment to the State. It defies belief that the State would forego this opportunity as a result of FCPC's threat of non-payment.
- 3) As to the Secretary's last point that under the most optimistic economic analysis, the State could not recover this revenue (FCPC missed 2014 missed payment) until 2027. This statement completely ignores the fact that the State could have enforced the FCPC compact and required payment through the process outlined in the compact. There is no logical reason enforcing the compact would have taken 12 years.
- 4) Menominee sent the State draft compact amendment language which would have required Menominee to reimburse the State for the losses attributable to FCPC withholding payments due prior to Kenosha opening (including the 2014 withheld payment). Menominee proposed reimbursing the State for this loss on the June 30 following the first full year of Kenosha operation (estimated at June 30, 2017). The State suggested that these missed payments would not need to be reimbursed so quickly. Therefore Menominee proposed that these payments be spread over a 10 year period and the State agreed. For Secretary Huebsch to now point to this provision of the Compact amendment (i.e. no repayment until 2027) as a reason to reject the project does not lead to a conclusion that the State was acting in good faith.